

REMINGTON & BALLINGER'S

ANNOTATED

CODES AND STATUTES

OF ~~WASHINGTON~~ *(State). Laws, statutes etc.*

(Cite REM. & BAL. CODE)

SHOWING ALL
STATUTES IN FORCE, INCLUDING THE EXTRAORDINARY SESSION LAWS OF
1909.

BY

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PREFACE.

This work revises "Ballinger's Annotated Codes and Statutes of the State of Washington," published in 1897. The added laws embrace acts passed at six regular biennial sessions of the legislature, 1899 to 1909, inclusive, and the extraordinary sessions of the years 1901 and 1909, as well as a few earlier enactments that have been discovered to be in force. The new annotations cover the decisions reported in Washington Reports, volumes 16 to 52, inclusive.

The Codes of Procedure (Civil, Probate, Justice, and Criminal) in the first volume follow the order of arrangement of the earlier work; except that the chapters relating to wills, and descent and distribution, have been taken from the General Statutes and inserted in the Probate Code, and the schedule of taxable fees of officers and witnesses has been inserted in the chapter on Costs. No other material changes have been made in this volume, except that the preliminary matter, constitutions, and constitutional index have been placed in front to avoid confusion with the index and tables.

Modern methods, and the vast increase in general legislation, require an alphabetical arrangement for the general statutes embraced in the second volume. It has been impossible to achieve an entirely satisfactory plan. Any alphabetical classification is more or less arbitrary, and should be familiarized by users of the book. Accordingly, the heads used are as few and as general as possible. Cross-reference heads are employed to point the way, but this feature has not been extended to take the place of an index. Each general title is preceded by a complete table of contents, and subdivided when necessary. One who bears these simple points in mind will avoid the principal difficulties encountered in the use of a new classification.

Judge Ballinger's invaluable historical references at the end of each section are preserved and the same system adopted for the subsequent enactments, except that the Ballinger Code numbers appear in parentheses immediately after the current code section numbers, an asterisk indicating a later enactment or amendment. His cross-references have also been adapted, amplified, and the system extended to the new enactments.

But few liberties have been taken with Judge Ballinger's annotations to the first fifteen volumes of Washington Reports, but the necessity for more condensation, in the work on the subsequent thirty-seven volumes, has been recognized, and is obvious from these covers. Much has necessarily been sacrificed to brevity, and it has been exceedingly difficult—I will say impossible—to decide where to draw the line to one's entire satisfaction. All citations of current laws, from the earliest times to date, have been briefly noted, at the expense of great labor; this being the first attempt that has been made to reduce to the same terms the ever-varying citations of early acts, re-enactments, and compilations.

It has been deemed advisable to print in the form of an appendix, with a separate index immediately following, all the old criminal laws governing prosecutions for crimes committed prior to June 9, 1909. For

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convenience in reference, the consecutive numbering of sections has been carried through this appendix. The tables of sectional cross-references to earlier compilations and session laws hardly need explanation. The tables for the session laws include only the acts passed since the publication of Ballinger's Code.

Mr. E. G. Kreider's work on the indexes speaks for itself. My thanks are due to him for other valuable assistance, and also to Mr. W. L. Sachse, and Mr. Robert M. Davis, of the Tacoma Bar, Mr. George R. Biddle of the Seattle Bar, and others.

I cannot take leave of this work without acknowledging my renewed appreciation of Judge Ballinger's original compilation of the laws of the Territory and State. It has been my happy purpose to see that none of its value should be lost, and it is with pleasure and confidence that I place it all anew before an appreciative and indulgent profession and the less discriminating general public.

ARTHUR REMINGTON.

Olympia, Wash., January, 1910.

PREFACE TO BALLINGER'S ANNOTATED CODES AND STATUTES, 1897.

This work embraces the statute law and codes of the state of Washington, as now existing, including all acts of a general nature passed at the fifth biennial session of the legislature, of 1897.

The statute law has been arranged in titles of broad generic significance with the purpose of establishing a logical and systematic order for this branch of the law, while the codes have been substantially continued in the order of arrangement as found in former publications. Commencing with the statute law, the sections are numbered throughout the entire work in one series, leaving several blank sections between each chapter or article for the convenience of future legislation. The matter contained in the Code of Civil Procedure, probate, justice's and criminal codes has not, for the most part, been difficult of logical and harmonious compilation, and it is believed to present a fairly well-codified system for this branch of the law. The statute law has presented many perplexing problems touching conflicting, superseded, obsolete and repealed provisions, and where the validity of a statute or any part thereof is in doubt, it has been deemed best to retain it, without hazarding the possible omission of laws in force, although the result may be ever so obnoxious to a general codification.

Following each section is given a brief historic reference to the legislation affecting the same, from the first territorial session of February 28, 1854, to the last biennial session, of 1897, in chronological order; also a comparative reference to codes of other states possessing like provisions. This reference clause has been prepared with much labor and care, and will, without doubt, meet with grateful favor by the lawyer who desires to trace our laws to their original sources.

An effort has been made to bring all inter-dependent matter together by means of cross-references, immediately preceding the annotations under the section. The value of such reference table is apparent in a compilation of laws which have never been systematically codified.

The territorial, state and federal decisions have been carefully annotated and placed under the sections which they interpret. These notes have been given with the view of stating, concisely, the point or points adjudicated under the statute in each case; and in stating the principles enunciated, the cases themselves have been consulted rather than the syllabi, and while great care has been taken in their preparation, it is not intended that they shall obviate the necessity of reference to the cases themselves for a full understanding of the law as declared, but to operate merely as a guide to the practitioner. Where they have been deemed pertinent, without overencumbering the work, notes of decisions of other courts have been subjoined interpreting like statutory provisions in other states.

The constitution of Washington is exhaustively annotated and indexed and comparative references given to the constitutions of all the other states of the Union. A separate and complete index to the constitution is given in connection therewith.

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The index to the codes and statutes has been prepared with great care, recognizing its importance as a means of easy access to the various provisions of the law, and it is believed that with its comprehensive scope and abundant cross-references that no feature of the law should escape the practitioner.

A table of sectional references from Hill's Annotated Codes and Statutes to the sections of this work is appended.

Seattle, October, 1897.

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DECLARATION OF INDEPENDENCE.

IN CONGRESS, JULY 4, 1776.

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED.

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation, till his assent should be obtained; and, when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature,—a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the state remaining, in the mean time, exposed to all the dangers of invasion from without, and convulsions within.

DECLARATION OF INDEPENDENCE.

He has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners, refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislature.

He has effected to render the military independent of and superior to the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:—

For quartering large bodies of armed troops among us;

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states;

For cutting off our trade with all parts of the world;

For imposing taxes on us without our consent;

For depriving us, in many cases, of the benefits of trial by jury;

For transporting us beyond seas to be tried for pretended offenses;

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies;

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our government;

For suspending our own legislature, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun, with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring, on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these oppressions, we have petitioned for redress in the most humble terms. Our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

DECLARATION OF INDEPENDENCE.

Nor have we been wanting in attention to our British brethren. We have warned them, from time to time, of attempts, by their legislature, to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war; in peace, friends.

We, therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by authority of the good people of these colonies, solemnly publish and declare that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

JOHN HANCOCK.

New Hampshire:
JOSIAH BARTLETT,
WILLIAM WHIPPLE,
MATTHEW THORNTON.

Massachusetts Bay:
SAMUEL ADAMS,
JOHN ADAMS,
ROBERT TREAT PAINE,
ELBRIDGE GERRY.

Rhode Island, etc.:
STEPHEN HOPKINS,
WILLIAM ELLERY.

Connecticut:
ROGER SHERMAN,
SAMUEL HUNTINGTON,
WILLIAM WILLIAMS,
OLIVER WOLCOTT.

New York:
WILLIAM FLOYD,
PHILIP LIVINGSTON,
FRANCIS LEWIS,
LEWIS MORRIS.

New Jersey:
RICHARD STOCKTON,
JOHN WITHERSPOON,
FRANCIS HOPKINSON,
JOHN HART,
ABRAHAM CLARK.

Pennsylvania:
ROBERT MORRIS,
BENJAMIN RUSH,
BENJAMIN FRANKLIN,
JOHN MORTON,
GEORGE CLYMER.

JAMES SMITH,
GEORGE TAYLOR,
JAMES WILSON,
GEORGE ROSS.

Delaware:
CAESAR RODNEY,
GEORGE READ,
THOMAS M'KEAN.

Maryland:
SAMUEL CHASE,
WILLIAM PACA,
THOMAS STONE,
CHARLES CARROLL, of Carrollton.

Virginia:
GEORGE WYTHE,
RICHARD HENRY LEE,
THOMAS JEFFERSON,
BENJAMIN HARRISON,
THOMAS NELSON, Jr.,
FRANCIS LIGHTFOOT LEE,
CARTER BRAXTON.

North Carolina:
WILLIAM HOOPER,
JOSEPH HEWES,
JOHN PENN.

South Carolina:
EDWARD RUTLEDGE,
THOMAS HEYWARD, Jr.,
THOMAS LYNCH, Jr.,
ARTHUR MIDDLETON.

Georgia:
BUTTON GWINNETT,
LYMAN HALL,
GEORGE WALTON.

CONSTITUTION OF THE UNITED STATES.

PREAMBLE.

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I.

§ 1. LEGISLATIVE POWER—CONGRESS.—All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

§ 2. HOUSE OF REPRESENTATIVES.—The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand; but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The house of representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

§ 3. SENATE.—The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be

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chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointment until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The vice president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

The senate shall choose their other officers, and also a president pro tempore, in the absence of the vice president, or when he shall exercise the office of president of the United States.

The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

§ 4. ELECTIONS OF SENATORS AND REPRESENTATIVES.—The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

SESSIONS OF CONGRESS.—The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

§ 5. POWERS OF HOUSES OF CONGRESS—QUORUM.—Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

§ 6. COMPENSATION OF MEMBERS—PRIVILEGES—DISABILITIES.—The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases except treason, felony, and breach of

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the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

§ 7. MANNER OF PASSING BILLS—ORDERS, RESOLUTIONS, ETC.—All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States. If he approve he shall sign it, but if not he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment), shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

§ 8. POWERS OF CONGRESS.—The congress shall have power,—

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations and among the several states and with the Indian tribes;

To establish an uniform rule of naturalization; and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

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To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

§ 9. LIMITATIONS OF POWERS OF CONGRESS.—The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by laws; and a regular statement and account of the receipts and expenditure of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

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§ 10. LIMITATION OF POWERS OF STATES.—No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

§ 1. EXECUTIVE POWER—PRESIDENT AND VICE PRESIDENT. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice president, chosen for the same term, be elected as follows:—

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the vote shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose by ballot one of them for president; and if no person have a majority, then from the five highest on the list, the said house shall in like manner choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice president.]

The congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

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No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

The president shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

§ 2. POWERS AND DUTIES OF PRESIDENT.—The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate shall appoint, ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

§ 3. MESSAGES—CONVENING AND ADJOURNING CONGRESS, ETC.—He shall from time to time give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

§ 4. IMPEACHMENT OF OFFICERS.—The president, vice president, and all civil officers of the United States, shall be removed from office on

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impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

§ 1. JUDICIAL DEPARTMENT.—The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

§ 2. JUDICIAL POWER.—The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

§ 3. TREASON—EVIDENCE—PUNISHMENT.—Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

ARTICLE IV.

§ 1. RECORDS AND PROCEEDINGS OF STATES—EFFECT—AUTHENTICATION.—Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

§ 2. PRIVILEGES OF CITIZENS.—The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

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No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

§ 3. NEW STATES.—New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

§ 4. REPUBLICAN FORM OF GOVERNMENT—GUARANTEE OF. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

AMENDMENTS.—The congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, That no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first articles; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

DEBTS—SUPREME LAW—NO RELIGIOUS TEST.—All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

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ARTICLE VII.

RATIFICATION.—The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in convention by the unanimous consent of the states present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

GEO. WASHINGTON,
President and Deputy from Virginia.

New Hampshire:
JOHN LANGDON,
NICHOLAS GILMAN.

Massachusetts:
NATHANIEL GORHAM,
RUFUS KING.

Connecticut:
WM. SAML. JOHNSON,
ROGER SHERMAN.

New York:
ALEXANDER HAMILTON.

New Jersey:
WIL. LIVINSTON,
WM. PATERSON,
DAVID BREARLEY,
JONA. DAYTON.

Pennsylvania:
B. FRANKLIN,
ROBT. MORRIS,
THOS. FITZSIMONS,
JAMES WILSON,
THOMAS MIFFLIN,
GEO. CLYMER,
JARED INGERSOLL,
GOUV. MORRIS.

Delaware:
GEO. READ,
JOHN DICKINSON,
JACO. BROOM,
GUNNING BEDFORD, Jr.,
RICHARD BASSETT.

Maryland:
JAMES McHENRY,
DANL. CARROLL,
DAN. of ST. THOS. JENIFER.

Virginia:
JOHN BLAIR,
JAMES MADISON, Jr.

North Carolina:
WM. BLOUNT,
HU. WILLIAMSON,
RICHD. DOBBS SPAIGHT.

South Carolina:
J. RUTLEDGE,
CHARLES PINCKNEY,
CHARLES COTESWORTH PINCKNEY,
PIERCE BUTLER.

Georgia:
WILLIAM FEW,
ABR. BALDWIN.

Attest: WILLIAM JACKSON, Secretary.

ARTICLES.

IN ADDITION TO AND AMENDATORY OF THE CONSTITUTION OF THE UNITED STATES,

Proposed by Congress and Ratified by the Legislatures of the Several States,
Pursuant to the Fifth Article of the Original Constitution.

ARTICLE I.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

FREEDOM OF RELIGION, SPEECH, ETC.—Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

RIGHT TO BEAR ARMS.—A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

QUARTERING OF SOLDIERS.—No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

UNREASONABLE SEARCHES PROHIBITED.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

RIGHTS OF PERSONS CHARGED WITH CRIME.—No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

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ARTICLE VI.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

MODE OF TRIAL.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

ARTICLE VII.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

JURY TRIAL—RIGHT OF GUARANTEED.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

ARTICLE VIII.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

EXCESSIVE BAIL, FINES AND PUNISHMENTS.—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

POWERS RESERVED NOT DISPARAGED.—The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

POWERS NOT DELEGATED.—The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ARTICLE XI.

[Proposed by Congress March 5, 1794; ratified January 8, 1798.]

LIMITATION OF JUDICIAL POWER.—The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII.

[Proposed by Congress December 12, 1803; ratified September 5, 1804.]

ELECTION OF PRESIDENT AND VICE PRESIDENT.—The electors shall meet in their respective states, and vote by ballot for president and vice president, one of whom at least shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice president, and

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they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice president shall be the vice president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice president of the United States.

ARTICLE XIII.

[Proposed by Congress February 1, 1865; declared ratified December 18, 1865.]

§ 1. **SLAVERY PROHIBITED.**—Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

[Proposed by Congress June 16, 1866; declared ratified July 28, 1868.]

§ 1. **CITIZENSHIP—EQUALITY OF RIGHTS.**—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. **APPORTIONMENT.**—Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive

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and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. **DISABILITIES FROM HOLDING OFFICE.**—No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who having previously taken an oath as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two thirds of each house remove such disability.

§ 4. **VALIDITY OF PUBLIC DEBT — INVALIDITY OF REBEL DEBT.**—The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection, or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

[Proposed by Congress February 27, 1869; declared ratified March 30, 1870.]

§ 1. **RIGHT OF SUFFRAGE.**—The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.

§ 2. The congress shall have power to enforce this article by appropriate legislation.

TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN.

IN REGARD TO LIMITS WESTWARD OF THE ROCKY MOUNTAINS.

[Concluded June 15, 1846; proclaimed by the President August 5, 1846.]

PREAMBLE.

Whereas, a treaty between the United States of America and her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, was concluded and signed by their plenipotentiaries at Washington, on the fifteenth day of June last, which treaty is word for word as follows:—

The United States of America and Her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, deeming it to be desirable for the future welfare of both countries that the state of doubt and uncertainty which has hitherto prevailed respecting the sovereignty and government of the territory on the northwest coast of America, lying westward of the Rocky or Stony Mountains, should be finally terminated by an amicable compromise of the right mutually asserted by the two parties, over the said territory, have respectively named plenipotentiaries to treat and agree concerning the terms of such settlement; that is to say: The President of the United States of America has, on his part, furnished with full powers James Buchanan, Secretary of State of the United States, and her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, has, on her part, appointed the right honorable Richard Pakenham, a member of her Majesty's most honorable Privy Council, and her Majesty's envoy extraordinary and minister plenipotentiary to the United States; who, after having communicated unto each other their respective full powers, found in good and due form, have agreed upon and concluded the following articles:—

ARTICLE I.

From the point on the forty-ninth parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the territory of the United States, and those of her Britannic Majesty shall be continued westward along the said forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of the said channel, and of Fuca Straits to the Pacific Ocean: Provided, however, That the navigation of the whole of said channel and straits, south of the forty-ninth parallel of north latitude, remain free and open to both parties.

ARTICLE II.

From the point at which the forty-ninth parallel of north latitude shall be found to intersect the great northern branch of the Columbia River, the

TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN.

navigation of the said branch shall be free and open to the Hudson's Bay Company, and to all British subjects trading with the same, to the point where the said branch meets the main stream of the Columbia, and thence down the said main stream to the ocean, with free access into and through the said river or rivers, it being understood that all the usual portages along the line thus described shall, in like manner, be free and open. In navigating the said river or rivers, British subjects, with their goods and produce, shall be treated on the same footing as citizens of the United States; it being, however, always understood that nothing in this article shall be construed as preventing, or intended to prevent, the government of the United States from making any regulations respecting the navigation of the said river or rivers, not inconsistent with the present treaty.

ARTICLE III.

In the future appropriation of the territory south of the forty-ninth parallel of north latitude, as provided in the first article of this treaty, the possessory rights of the Hudson's Bay Company, and of all British subjects who may be already in the occupation of land or other property lawfully acquired within the said territory, shall be respected.

"POSSESSORY RIGHTS" OF BRITISH SUBJECTS.—The stipulation of the United States as to the possessory rights of British subjects in the occupation of land in Oregon did not constitute a grant to such British subjects, nor confer upon them any interest in the soil: *Cowenia et*

al. v. Hannah et al., 3 Or. 465; *Town v. De Haven et al.*, 5 Saw. 146.

Such stipulation was merely a promise by the United States to Great Britain, for a violation of which the only remedy would be a claim upon the United States for compensation: *Id.*

ARTICLE IV.

The farms, lands, and other property of every description belonging to the Puget Sound Agricultural Company on the north side of the Columbia River shall be confirmed to the said company. In case, however, the situation of those farms and lands should be considered by the United States to be of public and political importance, and the United States government should signify a desire to obtain possession of the whole, or of any part thereof, the property so required shall be transferred to the said government, at a proper valuation, to be agreed upon between the parties.

ARTICLE V.

The present treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by her Britannic Majesty; and the ratifications shall be exchanged at London, at the expiration of six months from the date hereof, or sooner if possible.

In witness whereof, the respective plenipotentiaries have signed the same, and have affixed thereto the seals of their arms.

Done at Washington, the fifteenth day of June, in the year of our Lord one thousand eight hundred and forty-six.

JAMES BUCHANAN. [L. S.]

RICHARD PAKENHAM. [L. S.]

And whereas, the said treaty has been duly ratified on both parts, and the respective ratifications of the same were exchanged at London on the seventeenth ultimo, by Louis McLane envoy extraordinary and minister plenipotentiary of the United States, and Viscount Palmerston, her Britannic

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Majesty's principal secretary of state for foreign affairs, on the part of their respective governments,—

Now, therefore, be it known, that I, James K. Polk, President of the United States of America, have caused the said treaty to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this fifth day of August, in the year of our Lord one thousand eight hundred and forty-six, and of the [L. S.] independence of the United States the seventy-first.

JAMES K. POLK.

By the President:

JAMES BUCHANAN, Secretary of State.

ENABLING ACT.

AN ACT TO PROVIDE FOR THE DIVISION OF DAKOTA INTO TWO STATES AND TO ENABLE THE PEOPLE OF NORTH DAKOTA, SOUTH DAKOTA, MONTANA, AND WASHINGTON TO FORM CONSTITUTIONS AND STATE GOVERNMENTS, AND TO BE ADMITTED INTO THE UNION ON AN EQUAL FOOTING WITH THE ORIGINAL STATES, AND TO MAKE DONATIONS OF PUBLIC LANDS TO SUCH STATES.

[Approved February 22, 1889.]

§ 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the territories of Dakota, Montana, and Washington, as at present described, may become the states of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

§ 2. The area comprising the territory of Dakota shall, for the purposes of this act, be divided on the line of the seventh standard parallel produced due west to the western boundary of said territory; and the delegates elected as hereinafter provided to the constitutional convention in districts north of said parallel shall assemble in convention, at the time prescribed in this act, at the city of Bismarck; and the delegates elected in districts south of said parallel shall at the same time assemble in convention at the city of Sioux Falls.

§ 3. That all persons who are qualified by the laws of said territories to vote for representatives to the legislative assemblies thereof are hereby authorized to vote for and choose delegates to form conventions in said proposed states; and the qualifications for delegates to such conventions shall be such as by the laws of said territories, respectively, persons are required to possess to be eligible to the legislative assemblies thereof; and the aforesaid delegates to form said conventions shall be apportioned within the limits of the proposed states, in such districts as may be established as herein provided, in proportion to the population of each of such counties and districts, as near as may be, to be ascertained at the time of making said apportionments by the persons hereinafter authorized to make the same, from the best information obtainable, in each of which districts three delegates shall be elected, but no elector shall vote for more than two persons for delegates to such conventions; that said apportionments shall be made by the governor, the chief justice, and the secretary of said territories; and the governors of said territories shall, by proclamation, order an election of the delegates aforesaid in each of said proposed states, to be held on the Tuesday after the second Monday in May, eighteen hundred and eighty-nine, which proclamation shall be issued on the fifteenth day of April, eighteen hundred and eighty-nine; and such election shall be conducted, the returns made, the result ascertained, and the certificates to persons elected to such convention issued in the same manner as is prescribed by the laws of said territories regulating elections therein for delegates to Congress; and the number of votes cast for delegates in each precinct shall also be returned. The number of delegates to said conventions respectively shall be seventy-five; and all persons residents in said proposed states, who are qualified voters of said territories as herein provided, shall be entitled

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to vote upon the election of delegates, and under such rules and regulations as said conventions may prescribe, not in conflict with this act, upon the ratification or rejection of the constitutions.

§ 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and after organization shall declare, on behalf of the people of said proposed states, that they adopt the constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and state governments, for said proposed states respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States, and the people of said states:—

First. That the perfect toleration of religious sentiment shall be secured, and that no inhabitant of said states shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the states on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of Congress may prescribe.

Third. That the debts and liabilities of said territories shall be assumed and paid by said states, respectively.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said states, and free from sectarian control.

§ 5. That the convention which shall assemble at Bismarck shall form a constitution and state government for a state to be known as North Dakota, and the convention which shall assemble at Sioux Falls shall form a constitution and state government for a state to be known as South Dakota: Provided, That at the election for delegates to the constitutional convention in

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South Dakota, as hereinbefore provided, each elector may have written or printed on his ballot the words "For the Sioux Falls constitution," or the words "Against the Sioux Falls constitution," and the votes on this question shall be returned and canvassed in the same manner as for the election provided for in section three of this act; and if a majority of all votes cast on this question shall be "For the Sioux Falls constitution," it shall be the duty of the convention which may assemble at Sioux Falls, as herein provided, to resubmit to the people of South Dakota, for ratification or rejection at the election hereinafter provided for in this act, the constitution framed at Sioux Falls and adopted November third, eighteen hundred and eighty-five, and also the articles and propositions separately submitted at that election, including the question of locating the temporary seat of government, with such changes only as relate to the name and boundary of the proposed state, to the reapportionment of the judicial and legislative districts, and such amendments as may be necessary in order to comply with the provisions of this act; and if a majority of the votes cast on the ratification or rejection of the constitution shall be for the constitution irrespective of the articles separately submitted, the state of South Dakota shall be admitted as a state in the Union under said constitution as hereinafter provided; but the archives, records, and books of the territory of Dakota shall remain at Bismarek, the capital of North Dakota, until an agreement in reference thereto is reached by said states. But if at the election for delegates to the constitutional convention in South Dakota a majority of all the votes cast at that election shall be "Against the Sioux Falls constitution," then and in that event it shall be the duty of the convention which will assemble at the city of Sioux Falls on the fourth day of July, eighteen hundred and eighty-nine, to proceed to form a constitution and state government as provided in this act the same as if that question had not been submitted to a vote of the people of South Dakota.

§ 6. It shall be the duty of the constitutional convention of North Dakota and South Dakota to appoint a joint commission, to be composed of not less than three members of each convention, whose duty it shall be to assemble at Bismarek, the present seat of government of said territory, and agree upon an equitable division of all property belonging to the territory of Dakota, the disposition of all public records, and also adjust and agree upon the amount of the debts and liabilities of the territory, which shall be assumed and paid by each of the proposed states of North Dakota and South Dakota; and the agreement reached respecting the territorial debts and liabilities shall be incorporated in the respective constitutions, and each of said states shall obligate itself to pay its proportion of such debts and liabilities the same as if they had been created by such states respectively.

§ 7. If the constitutions formed for both North Dakota and South Dakota shall be rejected by the people at the elections for the ratification or rejection of their respective constitutions, as provided for in this act, the territorial government of Dakota shall continue in existence the same as if this act had not been passed. But if the constitution formed for either North Dakota or South Dakota shall be rejected by the people, that part of the territory so rejecting its proposed constitution shall continue under the territorial government of the present territory of Dakota, but shall, after the state adopting its constitution is admitted into the Union, be called by the name of the territory of North Dakota, or South Dakota, as the case may be: Provided,

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That if either of the proposed states provided for in this act shall reject the constitution which may be submitted for ratification or rejection at the election provided therefor, the governor of the territory in which such proposed constitution was rejected shall issue his proclamation reconvening the delegates elected to the convention which formed such rejected constitution, fixing the time and place at which said delegates shall assemble; and when so assembled they shall proceed to form another constitution, or to amend the rejected constitution, and shall submit such new constitution, or amended constitution, to the people of the proposed state for ratification or rejection, at such time as said convention may determine; and all the provisions of this act, so far as applicable, shall apply to such convention so reassembled, and to the constitution which may be formed, its ratification or rejection, and to the admission of the proposed state.

§ 8. That the constitutional convention which may assemble in South Dakota shall provide by ordinance for resubmitting the Sioux Falls constitution of eighteen hundred and eighty-five, after having amended the same as provided in section five of this act, to the people of South Dakota for ratification or rejection at an election to be held therein on the first Tuesday in October, eighteen hundred and eighty-nine; but if said constitutional convention is authorized and required to form a new constitution for South Dakota, it shall provide for submitting the same in like manner to the people of South Dakota for ratification or rejection at an election to be held in said proposed state on the said first Tuesday in October. And the constitutional conventions which may assemble in North Dakota, Montana, and Washington shall provide in like manner for submitting the constitutions formed by them to the people of said proposed states, respectively, for ratification or rejection, at elections to be held in said proposed states on said first Tuesday in October; at the elections provided in this section, the qualified voters of said proposed states shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution, the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon, and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed states are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed states which have adopted constitutions and formed state governments as herein provided shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original states, from and after the date of said proclamation.

§ 9. That until the next general census, or until otherwise provided by law, said states shall be entitled to one representative in the House of Representatives of the United States, except South Dakota, which shall be entitled to two; and the representatives to the fifty-first Congress, together with the governors and other officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the consti-

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tutions; and until said state officers are elected and qualified under the provisions of each constitution, and the states, respectively, are admitted into the Union, the territorial officers shall continue to discharge the duties of their respective offices in each of said territories.

§ 10. That upon the admission of each of said states into the Union, sections numbered sixteen and thirty-six in every township of said proposed states, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior: Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act, until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

§ 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

§ 12. That upon the admission of each of said states into the Union, in accordance with the provisions of this act, fifty sections of the unappropriated public lands within said states, to be selected and located in legal subdivisions, as provided in section ten of this act, shall be and are hereby granted to said states for the purpose of erecting public buildings at the capital of said states for legislative, executive, and judicial purposes.

§ 13. That five per centum of the proceeds of the sales of public lands lying within said states which shall be sold by the United States subsequent to the admission of said states into the Union, after deducting all the expenses incident to the same, shall be paid to the said states, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within said states respectively.

§ 14. That the lands granted to the territories of Dakota and Montana by the act of February eighteenth, eighteen hundred and eighty-one, entitled "An act to grant lands to Dakota, Montana, Arizona, Idaho, and Wyoming for university purposes," are hereby vested in the states of South Dakota, North Dakota, and Montana, respectively, if such states are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said states, and any portion of said lands that may not have been selected by either of said territories of Dakota or Montana may be selected by the respective states aforesaid; but said act of February eighteenth, eigh-

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teen hundred and eighty-one shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said states severally, and the income thereof be used exclusively for university purposes. And such quantity of the lands authorized by the fourth section of the act of July seventeenth, eighteen hundred and fifty-four, to be reserved for university purposes in the territory of Washington, as, together with the lands confirmed to the vendees of the territory by the act of March fourteenth, eighteen hundred and sixty-four, will make the full quantity of seventy-two entire sections, are hereby granted in the like manner to the state of Washington for the purposes of a university in said state. None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section eleven of this act. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said states respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. The section of land granted by the act of June sixteenth, eighteen hundred and eighty, to the territory of Dakota, for an asylum for the insane, shall, upon the admission of said state of South Dakota into the Union, become the property of said state.

§ 15. That so much of the lands belonging to the United States as have been acquired and set apart for the purpose mentioned in "An Act appropriating money for the erection of a penitentiary in the territory of Dakota," approved March second, eighteen hundred and eighty-one, together with the buildings thereon, be, and the same is, hereby granted, together with any unexpended balances of the moneys appropriated therefor by said act, to said state of South Dakota for the purposes therein designated; and the states of North Dakota and Washington shall respectively have like grants for the same purpose and subject to like terms and conditions, as provided in said act of March second, eighteen hundred and eighty-one, for the territory of Dakota. The penitentiary at Deer Lodge City, Montana, and all lands connected therewith and set apart and reserved therefor, are hereby granted to the state of Montana.

§ 16. That ninety thousand acres of land, to be selected and located as provided in section ten of this act, are hereby granted to each of said states, except to the state of South Dakota, to which one hundred and twenty thousand acres are granted for the use and support of agricultural colleges in said states, as provided in the acts of Congress making donations of lands for such purpose.

§ 17. That in lieu of the grant of land for purposes of internal improvement made to new states by the eighth section of the act of September fourth, eighteen hundred and forty-one, which act is hereby repealed as to the states provided for by this act, and in lieu of any claim or demand by the said states, or either of them, under the act of September twenty-eighth, eighteen hundred and fifty, and section 2479 of the Revised Statutes, making a grant of swamp and overflowed lands to certain states, which grant it is hereby declared is not extended to the states provided for in this act, and in lieu of any grant of saline lands to said states, the following grants of land are hereby made, to wit:—

To the state of South Dakota: For the school of mines, forty thousand acres; for the reform school, forty thousand acres; for the deaf and dumb asylum, forty thousand acres; for the agricultural college, forty thousand

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acres; for the university, forty thousand acres; for state normal schools, eighty thousand acres; for public buildings at the capital of said state, fifty thousand acres; and for such other educational and charitable purposes as the legislature of said state may determine, one hundred and seventy thousand acres; in all, five hundred thousand acres.

To the state of North Dakota: A like quantity of land as is in this section granted to the state of South Dakota, and to be for like purposes and in like proportion, as far as practicable.

To the state of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for state normal schools, one hundred thousand acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a state reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the state, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres.

To the state of Washington: For the establishment and maintenance of a scientific school, one hundred thousand acres; for state normal schools, one hundred thousand acres; for public buildings at the state capital, in addition to the grant hereinbefore made for that purpose, one hundred thousand acres; for state charitable, educational, penal, and reformatory institutions, two hundred thousand acres.

That the states provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide.

§ 18. That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivisions or portion of any smallest subdivision thereof in any township, shall be found by the Department of the Interior to be mineral lands, said states are hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said states in lieu thereof, for the use and the benefit of the common schools of said states.

§ 19. That all lands granted in quantity or as indemnity by this act shall be selected under the direction of the Secretary of the Interior, from the surveyed, unreserved, and unappropriated public lands of the United States within the limits of the respective states entitled thereto. And there shall be deducted from the number of acres of land donated by this act for specific objects to said states the number of acres in each heretofore donated by Congress to said territories for similar objects.

§ 20. That the sum of twenty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the treasury not otherwise appropriated, to each of said territories for defraying the expenses of the said conventions, except to Dakota, for which the sum of forty thousand dollars is so appropriated, twenty thousand dollars each for South Dakota and North Dakota, and for the payment of the members thereof, under the same rules and regulations and at the same rates as are now provided by law for the payment of the territorial legislatures. Any money hereby appropriated not necessary for such purpose shall be covered into the treasury of the United States.

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§ 21. That each of said states, when admitted as aforesaid, shall constitute one judicial district, the names thereof to be the same as the names of the states, respectively; and the circuit and district courts therefor shall be held at the capital of such state for the time being, and each of said districts shall, for judicial purposes until otherwise provided, be attached to the eighth judicial circuit, except Washington and Montana, which shall be attached to the ninth judicial circuit. There shall be appointed for each of said districts one district judge, one United States attorney, and one United States marshal. The judge of each of said districts shall receive a yearly salary of three thousand five hundred dollars, payable in four equal installments, on the first days of January, April, July, and October of each year, and shall reside in the district. There shall be appointed clerks of said courts in each district, who shall keep their offices at the capital of said state. The regular terms of said courts shall be held in each district, at the place aforesaid, on the first Monday in April and the first Monday in November of each year, and only one grand jury and one petit jury shall be summoned in both said circuit and district courts. The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction, and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and clerks of the circuit and district courts of each of said districts, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States; and shall, for the services they may perform, receive the fees and compensation allowed by law to other similar officers and persons performing similar duties in the state of Nebraska.

§ 22. That all cases of appeal or writ of error heretofore prosecuted and now pending in the supreme court of the United States upon any record from the supreme court of either of the territories mentioned in this act, or that may hereafter lawfully be prosecuted upon any record from either of said courts, may be heard and determined by said supreme court of the United States. And the mandate of execution or of further proceedings shall be directed by the supreme court of the United States to the circuit or district court hereby established within the state succeeding the territory from which such record is or may be pending, or to the supreme court of such state, as the nature of the case may require: Provided, That the mandate of execution or of further proceedings shall, in cases arising in the territory of Dakota, be directed by the supreme court of the United States to the circuit or district court of the district of South Dakota, or to the supreme court of the state of South Dakota, or to the circuit or district court of the district of North Dakota, or to the supreme court of the state of North Dakota, or to the supreme court of the territory of North Dakota, as the nature of the case may require. And each of the circuit, district, and state courts herein named shall respectively, be the successor of the supreme court of the territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of either of the territories mentioned in this act, in any case arising within the limits of any of the proposed states prior to admission, the parties

ENABLING ACT.

to such judgment shall have the same right to prosecute appeals and writs of error to the supreme court of the United States as they shall have had by law prior to the admission of said state into the Union.

§ 23. That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of either of the territories mentioned in this act at the time of the admission into the Union of either of the states mentioned in this act, and arising within the limits of any such state, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said territory; and in respect to all other cases, proceedings, and matters pending in the supreme or district courts of any of the territories mentioned in this act at the time of the admission of such territory into the Union, arising within the limits of said proposed state, the courts established by such state shall, respectively, be the successors of said supreme and district territorial courts; and all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such circuit, district, and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission of any of the states mentioned in this act shall be pending in any territorial court in any of the territories mentioned in this act, shall abate by the admission of any such state into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district, or state court, as the case may be: Provided, however, That in all civil actions, causes, and proceedings in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request, such cases shall be proceeded with in the proper state courts.

§ 24. That the constitutional conventions may, by ordinance, provide for the election of officers for full state governments, including members of the legislatures and representatives in the fifty-first Congress; but said state governments shall remain in abeyance until the state shall be admitted into the Union, respectively, as provided in this act. In case the constitution of any of said proposed states shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two Senators of the United States; and the governor and secretary of state of such proposed state shall certify the election of the Senators and Representatives in the manner required by law; and when such state is admitted into the Union, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other states in the Congress of the United States; and the officers of the state governments formed in pursuance of said constitutions, as provided by the constitutional conventions, shall proceed to exercise all the functions of such state officers; and all laws in force made by said territories, at the time of their admission into the Union, shall be in force in said states, except as modified or changed by this act or by the constitutions of the states, respectively.

§ 25. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said territories or by Congress, are hereby repealed.

CONSTITUTION OF THE STATE OF WASHINGTON.

[This constitution was framed by a convention of seventy-five delegates, chosen by the people of the Territory of Washington at an election held May 14, 1889, under § 3 of the Enabling Act. The convention met at Olympia on the fourth day of July, 1889, and adjourned on the twenty-second day of August, 1889. The constitution was ratified by the people at an election held on October 1, 1889, and on November 11, 1889, in accordance with § 8 of the Enabling Act, the President of the United States proclaimed the admission of the State of Washington into the Union.]

PREAMBLE.

We the people of the state of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

ARTICLE I.

BILL OF RIGHTS.

§ 1. POLITICAL POWER.—All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

Ala., I, 3; Ark., II, 1; Cal., I, 2; Conn., I, 2; Fla., II, 2; Ida., I, 2; Ind., I, 1; Ia., I, 2; Kan., B. R., 2; Ky., 4; Me., I, 2; Mo., II, 1; Mont., III, I; N. Dak., I, 2; N. C., I, 2; Nev., 1, 2; N. J., I, 2; Ohio, I, 2; Or., I, 1; Pa., I, 2; S. Dak., VI, 1; S. C., I, 3; Tenn., I, 1; Tex., I, 2; Va., I, 5; Wy., I, 1.
Cited in 30 Wash. 443.

These provisions have no application to

the distribution of the sovereign power: State v. Clark, 30 Wash. 439.

The absence in the constitution of specially delegated power to the legislature to enact laws for the taxation of inheritance is not to be construed as a restriction of the right under these provisions, or under the provisions of Art. I, § 30: State v. Clark, 30 Wash. 439.

§ 2. SUPREME LAW OF THE LAND.—The constitution of the United States is the supreme law of the land.

Cf. Ala., I, 35; Cal., I, 3; La., B. R., 2; Md., D. R., 2; Mo., II, 3; Nev., I, 2; N. C., I, 4; S. C., I, 4; Tex., I, 1; Va., I, 2, 3; W. Va., I, 1.

Cited in 1 Wash. 386.

This provision only relates to those matters wherein the general government assumes to control the individual states, and the requirement of a presentment by a grand jury is not one of them: In re Rafferty, 1 Wash. 382.

A conflict between the federal and state constitutions will not be declared unless it is very obvious: Romine v. State, 7 Wash. 215.

The state cannot prescribe the kind of money in which debts are to be paid: Dennis v. Moses, 18 Wash. 537.

Upon federal constitutional questions the rule of the United States supreme court is to be followed: Herrick v. Niesz, 16 Wash. 74; Broad, In re, 36 Wash. 449; Trowbridge v. Spinning, 23 Wash. 48.

§ 3. PERSONAL RIGHTS.—No person shall be deprived of life, liberty, or property without due process of law.

See notes to Art. I, § 25.

Cf. Ala., I, 7; Ark., II, 8, 21; Cal., I, 13; Colo., II, 25; Conn., I, 9; Fla., D. R., 12; Ga., I, 3; Ill., II, 2; Ia., I, 9; Mich., V, 32; Minn., I, 7; Miss., III, 14; Mo., II, 30; Neb., I, 3; N. Y., Rev., I, 6; N. C., I, 17; Pa., I, 9; Tex., I, 19; W. Va., III, 10; Mont., III, 27; N. Dak., I, 13; S. Dak., VII, 2; Ida., I, 13; Wy., I, 6.

Cited in 5 Wash. 304; 13 Wash. 159; 16 Wash. 415; 17 Wash. 450; 18 Wash. 78; 18 Wash. 595; 19 Wash. 208; 19 Wash. 337; 29 Wash. 604; 35 Wash. 512; 36 Wash. 312; 36 Wash. 453; 41 Wash. 178; 42 Wash. 240; 44 Wash. 352; 44 Wash. 354; 45 Wash. 252; 46 Wash. 302; 39 Wash. 164.

See 1 Remington's Digest, pp. 521-525, §§ 43-59; Id., pp. 538-544, §§ 119-142.

The right of a municipal corporation to impound stock running at large, under charter powers, is a valid exercise of police power, and does not violate this section: *Wilson v. Beyers*, 5 Wash. 303.

The right to execution and supplementary proceedings on a judgment in force prior to the adoption of the Code of 1881 was a valuable and vested right; the right to exercise it could be limited by a new statute, but not summarily taken away: *Murne v. Schwabacher Bros. Co.*, 2 W. T. 130.

Abolition of dower by act of Nov. 9, 1871, was the taking away of an expectancy, and not the destruction of a vested right: *Hirsch v. Hayden*, 2 W. T. 223.

DEPRIVATION OF LIBERTY.—A statute authorizing a justice of the peace to adjudge costs against a complaining witness and order his imprisonment until paid, does not deprive him of his property or liberty without due process of law: *Colby v. Backus*, 19 Wash. 347.

One accused of murder, who submits a plea of insanity to trial by jury and is found not guilty by reason of insanity, may be confined in the county jail until the further order of the court, and is not deprived of his liberty without due process of law, where he does not allege a restoration of sanity: *In re Brown*, 39 Wash. 160.

One accused of murder who submits a plea of insanity to trial by a jury and is found not guilty by reason of insanity, may be committed to prison if found manifestly dangerous, conformably to § 6959, Bal. Code, and is not deprived of liberty without due process of law: *State ex rel. Thompson v. Snell*, 46 Wash. 327.

Sections 2891 and 2892, *infra*, defining the crime of incest without including actual knowledge on the part of the defendant of his relationship to the particeps criminis, does not deprive one of liberty without due process of law: *State v. Glindemann*, 34 Wash. 221.

The statute making it a felony for any male person to accept or live off the earnings of a prostitute is not unconstitutional, because it fails to require that the same be knowingly done: *State v. Zenner*, 35 Wash. 249.

The prohibition of the employment of females in a place where liquors are sold is not a deprivation of property or liberty to contract without due process of law: *State v. Considine*, 16 Wash. 358.

Prohibiting the business of barbering on Sunday does not violate the constitutional prohibitions against the taking of liberty or property without due process of law: *State v. Bergfeldt*, 41 Wash. 234.

A law providing that none but a duly authorized agent of a railroad company shall be permitted to sell railway transportation does not deprive a citizen, who was already established in such business

prior to the enactment of the law, of property without due process of law: *In re O'Neill*, 41 Wash. 174.

A fine against keeping open any playhouse or theater on Sunday is not unconstitutional as an abridgment of the rights of the individual: *State v. Herald*, 47 Wash. 538.

The right of liberty and the pursuit of happiness are not infringed by an act prohibiting the smoking of opium: *Ah Lim v. Territory*, 1 Wash. 156.

The act requiring horseshoers to pass an examination and pay a license fee is unconstitutional, as an arbitrary interference with personal liberty and private property without due process of law: *In re Aubrey*, 36 Wash. 308.

Restricting the right to own, run or manage a dental office is an unwarranted abridgment of the private right of property and of the citizen's liberty to engage in legitimate pursuits for a livelihood: *State v. Brown*, 37 Wash. 97.

The act regulating the business of plumbing and requiring plumbers to secure a license from an examining board infringes the state and federal constitutions by depriving them of the pursuit of happiness and liberty to pursue their chosen calling: *State ex rel. Richey v. Smith*, 42 Wash. 237.

Laws 1901, page 349, regulating the business of barbering and requiring a license therefor, is not unconstitutional as an abridgment of the liberty or natural rights of citizens: *State v. Walker*, 48 Wash. 8.

DEPRIVATION OF PROPERTY.—To compel an attorney to gratuitously defend a pauper accused of crime is not a taking of his property without due process of law: *Presby v. Klickitat County*, 5 Wash. 329.

To give effect to probate proceedings declaring a man to be dead after seven years' absence is not to deprive him of his property without due process of law: *Scott v. McNeal*, 5 Wash. 309, 31 Pac. 873 (overruled in *Id.*, 154 U. S. 34, 14 Sup. Ct. 1108).

Requiring the payment of all taxes by a vendor before his deed of conveyance will be recorded is a violation of the constitutional inhibition that no person shall be deprived of his property without due process of law: *State ex rel. Baldwin v. Moore*, 7 Wash. 173.

Section 1230, *infra*, authorizing the court to strike a pleading and give judgment against a party for failure to answer interrogatories is not unconstitutional as depriving a party of property without due process: *Lawson v. Black Diamond Coal Co.*, 44 Wash. 26.

The right of an attorney to practice is property, and depriving him of it by a punishment for contempt, when no contempt in fact was committed, is a taking without due process of law: *State ex rel. Rohde v. Sachs*, 2 Wash. 373.

An act providing that the wages of labor shall be forthwith paid on cessation of the work is in accordance with a sound public policy and is not void under this section as a deprivation of property without due process of law: *Shortall v. Puget Sound Bridge & Dredge Co.*, 45 Wash. 290.

Section 6339, *infra*, in regard to the right of a person to the first use of spring waters arising on his land, is unconstitutional as to riparian rights to the use of the water for domestic purposes by lower proprietors whose lands were patented prior to the enactment of the statute, as it deprives them of property without due process of law: *Nielson v. Spomer*, 46 Wash. 14.

The statutory allowance of an attorney's fee to the plaintiff upon the foreclosure of a lien is not unconstitutional where it is not imposed as a penalty, but allowed as costs: *Ivall v. Willis*, 17 Wash. 645; *Griffith v. Maxwell*, 20 Wash. 403.

And authorizing an attorney's fee in favor of the plaintiff in an action to foreclose a mechanic's lien is not unconstitutional: *Littell v. Saulsberry*, 40 Wash. 550.

This section is violated by the anti-trading stamp act making it a misdemeanor to sell or exchange property under an inducement, etc.: *Leonard v. Bassindale*, 46 Wash. 301.

An ordinance prescribing the minimum wage to be paid for a day's labor upon public work undertaken by a city is not unconstitutional: *Gies v. Broad*, 41 Wash. 448.

A law intended to apply retrospectively to validate a void tax would be void as a taking of property without due process of law: *Baer v. Choir*, 7 Wash. 631.

Laws of 1893, page 428, requiring a purchaser of sawlogs and shingle bolts during the period within which liens thereon may be filed, to see that the purchase money is applied to the payment of bona fide claims, is not a violation of the constitutional inhibition against taking property without due process of law, or for a private use without compensation: *McCoy v. Cook*, 13 Wash. 158.

The act giving servants, clerks, laborers, etc., the right to claim from the proceeds of execution or attachment, etc., due them for services, etc., is not open to the objection that it deprives one of his property without due process of law: *Gleason v. Tacoma Hotel Co.*, 16 Wash. 412.

The act giving a lien upon lots for clearing, grading or filling streets is not unconstitutional on the ground of depriving the owner of his property without due process of law: *Young v. Borzone*, 26 Wash. 4.

The statute creating a lien on logs for boomage charges against a nonconsenting

owner is constitutional: *East Hoquiam Boom etc. Co. v. Neeson*, 20 Wash. 142.

The act of 1893, authorizing the excavation of public waterways by private contract, and providing for liens upon the filled in tide lands belonging to the state does not deprive the subsequent purchasers from the state of their property without due process of law: *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503.

It is within the police power to place reasonable restrictions upon the disposal by retail dealers of their stocks of goods in bulk, for the protection of the public and prevention of frauds: *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549.

A state statute prohibiting the sale of process butter unless it is plainly marked with the words "Renovated Butter," falls within the police powers of the state, and is not in violation of Art. I, § 8 of the federal constitution: *Hathaway v. McDonald*, 27 Wash. 659.

Section 1368, *infra*, providing that no real estate of a deceased person shall be liable for his debts unless administration be granted within six years, is not unconstitutional as depriving a mortgagee of property without due process of law: *Fuhrman v. Power*, 43 Wash. 533.

TAXATION OF PROPERTY.—The municipal taxation of agricultural lands included within the corporate limits of a city is not unconstitutional on the ground that it is a taking of private property without just compensation: *Ferguson v. Snohomish*, 8 Wash. 668; *Frace v. Tacoma*, 16 Wash. 69.

The requirement of due process of law is complied with in a proceeding to enforce the payment of taxes, where the owner is given an opportunity to appear in court in response to a suit for the enforcement of a tax lien: *Whatcom County v. Fairhaven Land Co.*, 7 Wash. 101.

There is no vested right to have property assessed in a particular way, and the legislature may change the mode of assessment at any time: *Heilig v. Puyallup*, 7 Wash. 29.

Where a property owner has notice and an opportunity to defend before his title is actually divested by the issuance of a tax deed, the issuance of a tax certificate without notice to him will not constitute a taking of property without due process of law: *State ex rel. American Savings Union v. Whittlesey*, 17 Wash. 447.

The statutory proceeding to foreclose a county delinquency tax certificate, being in rem, need not require personal notice in order to constitute due process of law: *Williams v. Pittock*, 35 Wash. 271; *Pennsylvania Co. v. Tacoma*, 36 Wash. 656; *Carson v. Titlow*, 38 Wash. 196; *Plumb v. Dvas*, 38 Wash. 240; *Allen v. Peterson*, 38 Wash. 599.

But in the case of an individual certificate, the statute requiring personal ser-

vice of notice, the judgment is void if notice is not given: *McManus v. Morgan*, 38 Wash. 528.

The tax itself is sufficient notice to owners: *Spokane Falls & N. R. Co. v. Abitz*, 38 Wash. 8.

The fact that a property owner was lulled into security by a promise of city officials to give him notice of the time to be fixed for a hearing does not deprive him of his property without due process of law, where he had no right to rely upon the promise: *Alexander v. Tacoma*, 35 Wash. 366.

FENCE AND STOCK LAWS.—Laws 1883, page 51, in relation to liability of railroad companies for killing stock, is unconstitutional, because it imposes a penalty where no duty to fence exists, and would be taking property without due process of law: *Oregon R. & N. Co. v. Smalley*, 1 Wash. 206.

Laws of 1893, page 418, providing that a railroad company shall be subject to a penalty of double the value of stock killed by collision with its trains, in case of failure to notify the owner within forty-eight hours thereafter, is unconstitutional, on the same grounds: *Jolliffe v. Brown*, 14 Wash. 155.

But the section of the act providing that, in actions for injuries to stock occasioned by collision with moving trains, proof that the railroad track was not fenced so as to turn stock shall be prima facie evidence of negligence merely establishes a rule of evidence, and is constitutional: *Jolliffe v. Brown*, 14 Wash. 155.

TRADE AND BUSINESS.—The statute making it unlawful for any person to open on Sunday any shop, store or building, or place of business whatever, for the purpose of trade or sale of goods, wares and merchandise, does not violate this section: *State v. Nichols*, 28 Wash. 628.

Laws of 1901, page 222, to regulate the purchase, sale, transfer and encumbrance of stocks of goods, wares or merchandise in bulk is a rightful exercise of legislative power, and hence not a violation of this section: *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549.

Laws of 1905, page 238, § 2, arbitrarily fixing the weight of standards for lumber cars at one thousand pounds, and requiring such weight to be deducted from the net weight of the lumber on all carloads received for shipment, is unconstitutional as unreasonable and requiring the carriage of part of the lumber without reward, being a taking of property without due process of law: *State ex rel. Washington Mill Co. v. Great Northern R. Co.*, 43 Wash. 658.

The right to hold and dispose of property ceases with death, and hence acts respecting the devolution of the right or title thereto do not abridge the consti-

tutional rights of the citizen: *State v. Clarke*, 30 Wash. 439.

REMEDIES.—Section 720, *infra*, authorizing an injunction to restrain the malicious erection of any structure intended to spite, injure, or annoy an adjoining proprietor, does not violate this section: *Karasek v. Peier*, 22 Wash. 419.

PROCESS.—In proceedings in rem, constructive service by publication is sufficient to give validity to a judgment purely in rem, and constitutes due process of law: *Wilson v. Beyers*, 5 Wash. 303.

To grant an injunction without notice or any showing of necessity is to deprive a party of his rights, "without due process of law": *In re Groen*, 22 Wash. 53.

Laws 1893, page 237, providing for the location of county roads and award of damages therefor, is unconstitutional as to resident owners of lands appropriated, for the reason that it does not provide for personal service of notice: *In re Smith's Petition*, 9 Wash. 85.

Upon the formation of a diking district under Laws of 1895, page 304, personal service upon every person within the district of notice of the petition to organize the district is not necessary, and failure to give such personal service would not constitute a taking of private property without due process of law: *Hansen v. Hammer*, 15 Wash. 315.

The fact that a section of the irrigation act authorized the testing of the validity of the proceedings without personal notice, and the entry of a judgment thereon, would only affect the validity of such a judgment, and would not render the entire act void as a taking of property without due process: *Kinkade v. Witherop*, 29 Wash. 10.

By laws of 1889, page 261, for the condemnation of rights of way for irrigation purposes, the filing of a complaint, etc., provides ample notice and due process of law: *Weed v. Goodwin*, 36 Wash. 31.

An order in garnishment, that goods claimed by third parties be delivered to the sheriff, would be taking private property without due process of law: *Coombs v. Davis*, 2 W. T. 466; *Weisbach v. Arnold*, 3 W. T. 111.

Section 819, *infra*, entitling the plaintiff in an action of forcible entry and detainer to a writ of restitution before judgment, on filing a bond securing the defendant for costs and damages, does not deprive defendant of property without due process of law: *State ex rel. German Sav. & Loan Soc. v. Prather*, 19 Wash. 336; *Morris v. Healy Lumber Co.*, 33 Wash. 451.

The drainage act does not authorize the taking of private property without due process of law because of the failure to directly provide for contesting the assessment: *State ex rel. Latimer v. Henry*, 28 Wash. 38.

Under § 7731, *infra*, a municipal corporation of the fourth class may prohibit the running at large of domestic animals, and an ordinance providing for the summary sale of impounded animals, under reasonable notice, without a judicial

inquiry, is effective to transfer the title and does not authorize the taking of property without due process of law: *Shook v. Sexton*, 37 Wash. 509. See, also, *Wilson v. Beyers*, 5 Wash. 304.

§ 4. RIGHT OF PETITION AND ASSEMBLAGE.—The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

Cf. Ala., I, 26; Ark., II, 4; Cal., I, 10; Colo., II, 24; Conn., I, 16; Del., I, 16; Fla., D. R., 15; Ga., I, 24; Ill., II, 17; Ind., I, 31; Ia., I, 20; Kan., B. R., 3; Ky., B. R., 1 (6); Me., I, 15; Md., B. R., 13; Mass., Pt. 1st, 19; Mich., XVIII, 10; Miss., III, 4; Mo., II, 29; Neb., I, 19; Nev., I, 10; N. H., I, 32;

N. J., I, 18; N. Y., Rev., I, 9; N. C., I, 25; Ohio, I, 3; Or., I, 26; Pa., I, 20; R. I., I, 21; S. C., I, 6; Tenn., I, 23; Tex., I, 27; Vt., I, 20; W. Va., III, 16; Wis., I, 4; Mont., III, 26; N. Dak., I, 10; S. Dak., VI, 144; Ida., I, 10; Wy., I, 21.

§ 5. FREEDOM OF SPEECH.—Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

Cf. Ala., I, 5; Ark., II, 6; Cal., I, 9; Colo., II, 10; Conn., I, 5; Del., I, 5; Fla., D. R., 13; Ind., I, 9; Ia., I, 7; Ida., I, 9; Kan., B. R., 11; Ky., B. R., 8; La., I, 4; Md., B. R., 40; Mass., I, 16; Me., I, 4; Mich., IV, 42; Minn., I, 3; Miss., III, 13; Neb., I, 5; N. H., I, 22; N. C., I, 20; N. Dak., I, 9; N. J., I, 5; Nev., I, 9; N. Y., Rev., I, 8; Or., I, 8; Ohio, I, 2; Pa., I, 7; R. I., I, 20; S. C., I, 7; S. Dak., VI, 5; Tex.,

I, 8; U. S. Const. Amd., I, 1; W. Va., III, 7; Wis., I, 3; Wy., I, 20; Va., I, 14.

Cited in 19 Wash. 242.

These provisions do not grant immunity from the jurisdiction and process of courts in proceedings for contempt against any person who, during the pendency of the trial of a case, publishes an article reflecting on the court or judges thereof: *State v. Tugwell*, 19 Wash. 238.

§ 6. OATHS—MODE OF ADMINISTERING.—The mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath or affirmation may be administered.

See *State v. Gin Pon*, 16 Wash. 425.

§ 7. INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED.—No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Cf. Ala., I, 6; Ark., II, 15; Cal., I, 19; Colo., II, 7; Conn., I, 8; Del., I, 6; Fla., D. R., 22; Ga., I, 16; Ill., II, 6; Ind., I, 11; Ia., I, 8; Ida., I, 17; Kan., B. R., 15; Ky., B. R., 10; La., B. R., 2; Me., I, 5; Md., B. R., 26; Mass., Pt. I, 14; Mich., VI, 26; Minn., I, 10; Miss., III, 23; Mo., II, 11;

Neb., I, 7; Nev., I, 18; N. H., I, 19; N. J., I, 6; N. C., I, 15; Ohio, I, 14; Or., I, 9; Pa., I, 8; R. I., I, 6; S. C., I, 22; Tenn., I, 7; Tex., I, 9; Vt., I, 11; Va., I, 12; W. Va., III, 6; Wis., I, 11; Wy., I, 4; and see Const. U. S. IVth Amend.

Cited in 36 Wash. 454.

§ 8. IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED.—No law granting irrevocably any privilege, franchise, or immunity shall be passed by the legislature.

Cf. Ala., I, 23; Cal., I, 21; Colo., II, 11; Ill., II, 14; Ind., I, 23; Ia., I, 6; Mo., II, 15; Mont., III, 11; Kan., B. R., 2; Neb., I, 16; N. C., I, 7; N. Dak., I, 20; Ohio, I, 2; Pa.,

I, 17; S. Dak., VI, 12; Tex., I, 17. See § 12, *infra*.

Cited in 21 Wash. 522.

§ 9. RIGHTS OF ACCUSED PERSONS.—No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

See notes to Art. I, § 22.

Cf. Ala., I, 7, 10; Ark., II, 8; Cal., I, 13; Colo., II, 18; Conn., I, 9; Del., I, 7, 8; Fla.,

D. R., 12; Ill., II, 10; Ind., I, 14; Ia., I, 12; Kan., B. R., 10; Ky., B. R., 13; La., I, 6; Me., I, 6, 8; Md., D. R., 22; Mass., Pt. 1st,

12; Mich., VI, 29, 32; Minn., I, 7; Miss., III, 22, 26; Mo., II, 23; Mont., III, 18; Ida., I, 13; Neb., I, 12; Nev., I, 8; N. H., I, 15, 16; N. J., I, 10; N. Y., Rev., I, 6; N. Dak., I, 13; Ohio, I, 10; Or., I, 12; Pa., I, 9, 10; R. I., I, 7, 13; S. C., I, 13, 18; S. Dak., VI, 9; Tenn., I, 9, 10; Tex., I, 10, 14; Vt., I, 10; W. Va., III, 5; Wis., I, 8; Wy., I, 11; U. S. Amend. V.

Cited in 7 Wash. 338; 14 Wash. 666; 18 Wash. 484; 36 Wash. 488; 40 Wash. 219.

See 2 Remington's Digest, pp. 2901, 2902, §§ 84-96. Former jeopardy: See 1 Id., pp. 763-765, §§ 42-53.

A contempt proceeding is not a criminal case, within the meaning of this section: State ex rel. Dye v. Reilly, 40 Wash. 217.

The defendant as a witness in a criminal prosecution is subject to be contradicted, disputed or impeached the same as any other witness, and cross-examination for this purpose is not prohibited by this section: State v. Duncan, 7 Wash. 336.

As to proper cross-examination of accused, see State v. Melvern, 32 Wash. 7.

But a defendant, and a witness in his own behalf in a criminal prosecution, cannot be compelled to testify to matters tending to criminate him: State v. O'Hara, 17 Wash. 525.

As to admissibility of voluntary confession of defendant at preliminary hearing, see State v. Washing, 36 Wash. 485.

When it plainly appears to the court that a question propounded to a witness cannot be answered affirmatively without incriminating him, it is the duty of the court to caution him as to his privilege of not answering: Perkins v. North End Bank, 17 Wash. 100.

The discharge of a defendant before verdict upon a prosecution for larceny is not a bar to subsequent prosecution for obtaining the money under false pretenses, when the first discharge resulted from a variance between the information and proof: State v. Reiff, 14 Wash. 664.

A defendant has been once in jeopardy when he has been arraigned upon an information sufficiently charging the crime, a jury has been sworn and a court of competent jurisdiction has ordered the discharge of the accused at the close of the

case made by the state: State v. Hubbell, 18 Wash. 482.

A plea of former jeopardy cannot be based upon the discharge of the jury for failure to agree: State v. Costello, 29 Wash. 366.

Discharging a jury on a holiday because of its inability to agree would not be a void act, under our statutes, so as to constitute former jeopardy: State v. Lewis, 31 Wash. 515.

The conviction of a defendant charged with murder in the first degree as guilty of murder in the second degree is an acquittal of the higher charge: State v. Murphy, 13 Wash. 229.

A verdict of guilty upon an insufficient information, set aside at the instance of defendant, is a mistrial and does not constitute former jeopardy: State v. Riley, 36 Wash. 441.

The voluntary dismissal of an information for assault and battery is a bar to a conviction for assault and battery, under a subsequent information charging the same facts as constituting the crime of attempting to commit mayhem: State v. Durbin, 32 Wash. 289.

The acquittal of a defendant of one offense is no bar to another offense committed in the same act or transaction, or when the second prosecution is for an offense based upon a different statute: State v. Robinson, 12 Wash. 491; State v. Reiff, 14 Wash. 664; State v. Campbell, 40 Wash. 480.

The reversal of a judgment for errors of law is not an acquittal on the merits: State v. White, 8 Wash. 230; State v. Riley, 36 Wash. 441.

After reversal of a judgment of conviction a new indictment may be filed identical with the former except that the Christian name of the person killed is changed: State v. Freidrich, 4 Wash. 204.

As to offenses to which a plea of former jeopardy is a defense, see State v. Armstrong, 29 Wash. 57; State v. Campbell, 40 Wash. 480.

The only competent evidence of former conviction is the production of a record from a court of competent jurisdiction founded upon an indictment or other proper accusation: State v. Payne, 6 Wash. 563.

§ 10. ADMINISTRATION OF JUSTICE.—Justice in all cases shall be administered openly and without unnecessary delay.

Cf. Ala., I, 14; Conn., I, 12; Del., I, 9; Ind., I, 12; Ida., I, 18; Ky., 14; Kan., B. R., 18; La., 11; Mont., III, 6; Me., I, 19; Miss., III, 24; Mass., Pt. 1st, 11; Minn., I, 8; Mo., II, 10; N. Dak., I, 22; Neb., I, 13; N. H., I, 14; N. C., I, 18; Ohio, I, 16; Or.,

I, 10; Pa., I, 11; R. I., I, 5; S. Dak., VI, 20; S. C., I, 15; Tenn., I, 17; Tex., I, 13; W. Va., III, 17; Wis., I, 9; Wy., I, 8.

Cf. Ark., II, 13. See note to Art. I, § 22.

Cited in 16 Wash. 575.

§ 11. RELIGIOUS FREEDOM.—Absolute freedom of conscience in all matters of religious sentiment, belief, and worship shall be guaranteed to

every individual, and no one shall be molested or disturbed in person or property on account of religion, but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

This section is amended: See 4th Amendment, *infra*.

Cf. Ala., I, 4; Ark., II, 25-6; Cal., I, 4; Colo., II, 4; Fla., D. R., 5, 6; Iowa, I, 3; Ill., II, 3; Ida., I, 4; Kan., B. R., 7; Ky., 5; Me., I, 3; Md., B. R., 36; Mass., Pt. 1st, 2; Mich., IV, 39; Miss., III, 18; Minn., I, 17; Mo., II, 5; Neb., I, 4; N. H., I, 5; N. J., I, 3; N. C., I, 26; N. Y., 1, 3; Nev., I, 4; N. Dak., I, 4; Or., I, 2; Ohio, I, 7; Pa., I, 3; R. I., I, 3; S. Dak., VI, 3; S. C., I, 9; Tenn., I, 3; Tex., I, 6; Vt., I, 3; Va., I, 18; U. S. Amend. 1, § 1; W. Va., III, 15; Wis., I, 18; Wy., I, 18.

The enactment of Sunday laws, being within the police power, does not unduly abridge the rights of the citizen: *State v. Nichols*, 28 Wash. 628.

Laws of 1903, page 68, prohibiting the business of barbering on Sunday, does not violate the federal constitutional prohibitions against abridging the privileges of a citizen even as to those who conscientiously believe in the observance of the seventh day of the week: *State v. Bergfeldt*, 41 Wash. 234.

§ 12. SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED.

No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

Cited in 4 Wash. 426; 15 Wash. 297; 15 Wash. 421; 18 Wash. 78; 18 Wash. 591; 21 Wash. 522; 21 Wash. 554; 23 Wash. 580; 24 Wash. 31; 24 Wash. 56; 28 Wash. 631; 29 Wash. 458; 31 Wash. 192; 31 Wash. 641; 35 Wash. 36; 35 Wash. 343; 35 Wash. 515; 36 Wash. 454; 37 Wash. 429; 37 Wash. 432; 38 Wash. 397; 41 Wash. 238; 42 Wash. 217; 42 Wash. 240; 44 Wash. 352-354; 45 Wash. 477; 47 Wash. 539; 49 Wash. 35; 49 Wash. 462.

See 1 Remington's Digest, pp. 533-537, §§ 99-118.

The licensing of fishing in certain waters and giving exclusive control of the location for one year does not violate the constitutional inhibition against granting exclusive privileges: *Walker v. Stone*, 17 Wash. 578.

The right given to members of the bar to recommend four eligible persons of the county, from whom the court shall select two to act as commissioners for the selection of jurors, imposes merely a duty, and is not the conferring of a privilege or immunity upon any class of citizens such as is prohibited by this section: *State v. Vance*, 29 Wash. 435.

The statute authorizing county superintendents to charge five cents mileage in counties of the first to the tenth classes inclusive, and ten cents mileage in all counties having a higher class number than the tenth, does not violate this sec-

tion: *Henry v. Thurston County*, 31 Wash. 638.

Laws 1901, page 356, regulating new corporations to be thereafter authorized to do business in this state, and making them a class unto themselves, does not violate the provisions of this section: *State v. Fraternal Knights & Ladies*, 35 Wash. 338.

Authorizing county commissioners to appoint road supervisors from among the qualified electors of the state is not unconstitutional as granting special privileges or immunities to any citizen or class of citizens: *State ex rel. Griffith v. Newland*, 37 Wash. 428.

Laws 1899, page 93, § 15, providing that mortgaged premises occupied as a homestead by the mortgagors shall remain in their possession during the period of redemption, is not unconstitutional as granting special privileges to one class of citizens: *North Pacific Loan & Trust Co. v. Bennett*, 49 Wash. 34.

Laws of 1905, page 372, providing that every person who canvasses or sells by sample certain specified articles "after shipment to the state," shall pay in advance a license fee of \$200 per year, violates the state and federal restrictions against discrimination between citizens of this and other states, and is unconstitutional: *Bacon v. Locke*, 42 Wash. 215.

Where a law is uniform in its operation upon persons or property similarly

situated, in so far as it operates at all, its constitutionality is not affected by the number of persons within the scope of its operations: *Redford v. Spokane St. R. Co.*, 15 Wash. 419; *State v. Considine*, 16 Wash. 358; *Fitch v. Applegate*, 24 Wash. 26; *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549.

And such a statute is equal and uniform, although it may act upon very few people: *Lewis County v. Gordon*, 20 Wash. 80.

Laws 1905, page 110, requiring a broker's contract to be in writing, is not unconstitutional as class legislation, or as an unwarranted interference with the right to contract: *Ross v. Kaufman*, 48 Wash. 678.

It should be presumed in favor of the proviso to Laws 1899, page 194, § 4, excepting from the prohibition against salmon fishing during the closed season "any Indian residing in this state," who is allowed to take salmon "at any time for the use of himself and family," that the same was intended to apply only to Indians who have not assumed the duties and obligations of citizenship; hence the act is not unconstitutional under this section as granting special privileges to any citizen or class of citizens, etc.: *State v. Lewis*, 45 Wash. 475.

A poll tax may be restricted to males over twenty-one years of age and under fifty, since the state constitution does not require uniformity therein, but the same may be made by appropriate classification; and the above is not unreasonable or unjust: *Thurston County v. Tenino Stone Quarries*, 44 Wash. 351.

The law requiring jurors to be householders, but making no such requirement as to jurors summoned upon an open venire, is not unconstitutional as discriminating against classes of citizens, or granting privileges which do not equally belong to all citizens: *Redford v. Spokane St. R. Co.*, 15 Wash. 419.

The law conferring upon women the right to vote is void as in conflict with the organic act granting the legislature authority to fix the qualification of voters provided that the right be conferred only upon citizens of the United States, and "citizens" is to be construed as "male citizens": *Bloomer v. Todd*, 3 W. T. 599.

A woman cannot claim unlawful discrimination as to sex by a law forbidding the employment of females in places where intoxicating liquors are sold: *State v. Considine*, 16 Wash. 358.

Laws of 1903, page 230, making it unlawful for male persons to live off the earnings of prostitutes is not in conflict with the fourteenth amendment of the federal constitution because it discriminates between male and female persons, since the privileges and immunities referred to are such only as are lawful, and prostitution may be prohibited or restricted to any class and in any way without

infringing constitutional provisions: *State ex rel. Zenner v. Graham*, 34 Wash. 81.

A game law restricting the killing of deer in certain counties only does not grant special privileges to certain people, and is constitutional: *Hays v. Territory*, 2 W. T. 286.

The act providing for the inspection of grain in certain cities and other places where grain is received in carload lots for milling or export is not obnoxious to the provisions of this section: *Wright v. Lilly, Bogardus & Co.*, 18 Wash. 77.

The migratory stock tax law of 1899, authorizing abatement or deduction from next regular assessment, is unconstitutional: *Nathan v. Spokane County*, 35 Wash. 26.

The refusal of a city to grant a telephone company a franchise for the erection of poles and wires in the streets could not be construed as the granting of special privileges in violation of this section: *State ex rel. Spokane etc. Tel. Co. v. Spokane*, 24 Wash. 53.

An ordinance of a city prohibiting barbers from pursuing their calling on Sunday for compensation is void as an act of special legislation, as it singles out one class of people and imposes restrictions upon them which are not imposed on other citizens alike: *Tacoma v. Krech*, 15 Wash. 296 (overruled in *State v. Nichols*, 28 Wash. 628.)

An ordinance imposing a license tax upon all merchants using trading stamps for the purpose of stimulating the sale of goods is not void as imposing a burden upon a portion only of a class of merchants, as it applies to all who engage in business of that kind: *Fleetwood v. Read*, 21 Wash. 547.

The proviso to § 2916, *infra*, excepting from the operation of the Sunday law hotels, drug-stores, livery-stables and undertakers, does not violate this section: *State v. Nichols*, 28 Wash. 628. Bal. Code, § 7250, prohibiting the keeping open of any theater on Sunday is not unconstitutional as class legislation: *In re Donnellan*, 49 Wash. 460.

The "sales in bulk" act is not in restraint of trade, since it does not prevent the sale of stocks of goods in bulk, but merely restricts the application of the proceeds when stocks are sold in that manner: *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549.

An ordinance prohibiting any person from peddling fruits, vegetables, butter, eggs, etc., within the fire limits of a city, excepting farmers disposing of produce grown by themselves, grants special privileges, in violation of this section: *In re Camp*, 38 Wash. 393.

An act prohibiting the employment of female labor in places where liquor is sold is not unequal and does not abridge the privileges or immunities of citizens, where it applies to all engaged in a like business

and extends to all females employed: *State v. Considine*, 16 Wash. 358.

The act prohibiting the business of railroad ticket brokerage, and requiring railroad companies to duly commission all agents authorized to sell tickets and to redeem unused tickets, does not deny the equal protection of the laws: *In re O'Neill*, 41 Wash. 174.

The statutes forbidding the employment of females in any mechanical or mercantile establishment for more than ten hours during any day is constitutional, although a restriction to some extent upon the right of women to contract their labor: *State v. Buchanan*, 29 Wash. 602.

An ordinance prescribing an eight-hour day, and forbidding the employment for longer hours of any laborer upon municipal construction work, making the same a part of all city contracts for such work, and providing a penalty for any violation thereof by any city contractor, is not unconstitutional as in conflict with the fourteenth amendment or any other federal or state constitutional provision: *In re Broad*, 36 Wash. 449 (overruling *Seattle v. Smyth*, 22 Wash. 327); *Normile v. Thompson*, 37 Wash. 465.

An ordinance prohibiting solicitations by hack drivers in railroad stations, when used by passengers entering or leaving the same, is not an unreasonable restriction upon the right of private contract, especially where the passengers have opportunity on the trains or at an office in the building to fulfill their wants without solicitation: *Seattle v. Hurst*, 50 Wash. 42.

Acts regulating the practice of medicine, and requiring an examination and license do not violate the constitutional inhibition against the granting of special privileges: *Fox v. Territory*, 2 W. T. 297; *State v. Carey*, 4 Wash. 424.

The qualification of residence, or application of different tests for residents and nonresidents, does not infringe any constitutional provision: *Fox v. Territory*, 2 W. T. 297; *State v. Carey*, 4 Wash. 424; *State v. Sharpless*, 31 Wash. 191. An act requiring an applicant for a pilot's license to be a qualified voter does not unlawfully discriminate between citizens of the state: *State v. Ames*, 47 Wash. 328.

The act to regulate barbering (Laws 1901, p. 349) is not void on the ground of being local, class, and special legislation, because of the fact that it divides the communities of the state into classes, for which different regulations are provided: *State v. Sharpless*, 31 Wash. 191.

The fact that a law provides for the issuance of a certificate without examination, upon the payment of one dollar, to all barbers carrying on their occupation in cities of the first, second and third classes at the time the act took effect, while barbers subsequently coming into those cities would be required to stand examination and pay five dollars for a cer-

tificate, would not render the act void as discriminating against one class of citizens in favor of others: *State v. Sharpless*, 31 Wash. 191.

Laws of 1901, page 349, providing for the licensing of barbers, and creating a board to regulate the practice of the trade, gives such board power to revoke a certificate for the causes specified, issued to barbers who were following the occupation at the time the act went into effect, as well as to those who were not: *State v. Chaney*, 36 Wash. 350.

The act regulating the business of plumbing and requiring plumbers to secure a license infringes the state and federal constitutions: *State ex rel. Richey v. Smith*, 42 Wash. 237.

The statute providing a penalty for following the occupation of a barber without first having obtained a license applies to one whose license had been regularly revoked, and who continued to practice without obtaining another license: *State v. Chaney*, 36 Wash. 350.

Laws 1901, page 315, § 1, providing, as qualifications of dentists, that the applicant for a license to practice shall be possessed of a diploma from a dental college in good standing, shall be of good moral character, etc., contains no unreasonable requirements: *In re Thompson*, 36 Wash. 377. The statutory requirement that an applicant for a license to practice dentistry shall present a diploma from a dental college before taking his examination is not so unreasonable and arbitrary as to infringe any constitutional right: *State ex rel. Thompson v. State Board of Dental Examiners*, 48 Wash. 291.

That portion of Laws of 1891, page 314, requiring one to submit to an examination and secure a license from the state dental board, in order to "own, run, or manage" a dental office, as distinguished from the practice of dentistry, is unconstitutional: *State v. Brown*, 37 Wash. 97.

Laws of 1903, page 68, prohibiting the business of barbering on Sunday, does not violate the constitutional prohibitions against class legislation or special privileges even as to those who conscientiously believe in the observance of the seventh day of the week: *State v. Bergfeldt*, 41 Wash. 234.

The statutes providing for liens in favor of laborers working on railroads, canals, etc., on the franchise, earnings, and all the real and personal property of the person or company used in the operation of the business, to the extent of the moneys due for wages, is not unconstitutional as in violation of this section: *Fitch v. Applegate*, 24 Wash. 25.

The provisions of the act of 1893 relating to the excavation of public waterways and creating liens upon the state tide lands cannot be claimed to be invalid or contrary to the provisions of this section: *Seattle & Lake Washington Wa-*

terway Co. v. Seattle Dock Company, 35 Wash. 503.

An act providing for an attorney's fee to plaintiff in case of recovery against a railroad company for the killing of stock is unconstitutional as an attempt to grant special privileges to one class of litigants, where it is in the nature of an added

penalty, and there was no failure to perform a statutory duty: Jolliffe v. Brown, 14 Wash. 155.

Statutory allowance of attorney's fees where allowed as costs and not as a penalty is constitutional: Ival v. Willis, 17 Wash. 645; Griffith v. Maxwell, 20 Wash. 403; Little v. Saulsberry, 40 Wash. 550.

§ 13. HABEAS CORPUS.—The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety requires it.

Ala., I, 18; Ark. II, 11; Cal. I, 5; Colo., II, 21; Fla., D. R., 7; Ill., II, 7; Ind., I, 27; Minn., I, 7; Mo., II, 26; N. Y., Rev., I, 4.

Cf. Conn., I, 14; Del. I, 13; Ga., I, 11; Ia., I, 13; Ida., I, 5; Kan., B. R., 8; Ky., 16; La., 10; Mont., III, 21; Me., I, 10; Mich., IV, 44; Miss., III, 21; N. Dak., I, 5; N. H., Pt. II, 91; N. J., I, 11; N. C., I, 21; Ohio, I, 8; Or., I, 23; Pa., I, 14; R. I., I, 9; S. Dak., VI, 8; S. C., I, 17; Tenn., I, 15; Tex., I, 12; Vt., Amend. XII; Va., V, 14;

W. Va., III, 4; Wis., I, 8; Wy., I, 17; U. S., I, 9 (2).

The statute providing that no inquiry shall be made into the legality of any judgment or process whereby a party is in custody, when such custody is upon a process, issued on a final judgment of a court of competent jurisdiction, precludes the issuance of a writ of habeas corpus in such case, and is not obnoxious to the constitution: In re Lybarger, 2 Wash. 131.

§ 14. EXCESSIVE BAIL, FINES AND PUNISHMENTS.—Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Ala., I, 16, 17; Ark., II, 9; Cal., I, 6; Colo., II, 20; Conn., I, 13; Fla., D. R., 8; Ga., I, 1 (9); Ia., I, 17; Ida., I, 6; Kan., B. R., 9; Ky., 17; La., 9; Mont., III, 20; Me., I, 9; Mich., VI, 31; Minn., I, 5; Mo., II, 25; N. Dak., I, 6; N. J., I, 15; N. Y., Rev., I, 5; Neb., I, 9; Nev., I, 6; Ohio, I, 9; Or., I, 16; Pa., I, 13; R. I., I, 8; S. Dak., VI, 23; S. C., I, 16, 38; Tenn., I, 16; Tex., I, 13; Wy., I, 14; W. Va., III, 5; Del., I, 11; Ind., I, 16; Mass., Pt. 1st, 26; Md., D. R., 25; Miss., III, 28, 29; N. H., Pt. 1st, 33; N. C., I, 14; Va., I, 11; Wis., I, 6; U. S., Amend. VIII.

See 1 Remington's Digest, pp. 854, 855, §§ 460-464.

As to what has been held not to be cruel or unusual punishment, see State v. Berzaman, 10 Wash. 277; State v. Bliss, 27 Wash. 463; State v. Burton, 27 Wash. 528; State v. Newton, 29 Wash. 373; State v. Fenton, 30 Wash. 325; State v. Ryan, 34 Wash. 597; State v. Patchen, 37 Wash. 24.

A defendant acquitted on the ground of insanity may be confined in prison after

a full hearing, while his condition continues: In re Brown, 39 Wash. 160.

Under a statute imposing a fine not exceeding \$500 and defendant to be committed until such fine is paid, a fine of \$500 and costs is valid: Foster v. Territory, 1 Wash. 411.

Under a statute providing for a fine not exceeding \$500, to which may be added imprisonment, a sentence of imprisonment without imposing a fine is not erroneous: State v. Dunlap, 25 Wash. 292.

A forfeiture of a \$750 liquor license in addition to a fine and liability upon a bond is not unconstitutional as excessive penalty for selling intoxicating liquors to a minor: Krueger v. Colville, 49 Wash. 295.

As to right to deduction from term of imprisonment in penitentiary while remaining in jail during pendency of appeal of case, see In re Bojar, 7 Wash. 355.

As to punishment of second or subsequent offenses, see Clifford v. Dryden, 31 Wash. 545; State v. Bush, 41 Wash. 13.

§ 15. CONVICTIONS, EFFECT OF.—No conviction shall work corruption of blood nor forfeiture of estate.

Cf. Ala., I, 20; Ark., II, 17; Colo., II, 9; Conn., IX, 4; Del., I, 15; Ga., I, 2 (3); Ill., II, 11; Ind., I, 30; Kan., B. R., 12; Ky., B. R., 20; Md., D. R., 27; Mo., II, 13;

Neb., I, 15; N. C., IV, 5; Ohio, I, 12; Or., I, 25; Mont., III, 9; Pa., I, 19; S. C., I, 21; Tenn., I, 12; Tex., I, 21; W. Va., III, 18; Wis., I, 12.

§ 16. EMINENT DOMAIN.—Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or

ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.

See *infra*, Art. XII, § 19, eminent domain extended to telegraph and telephone companies.

See *infra*, Art. XII, § 10, right of, not to be abridged.

See notes to code §§ 891, 921, 925, 926, *infra*.

Cf. Ala., I, 24; Ark., II, 22; Cal., I, 14; Colo., II, 15; Fla., XVI, 29; Ill., II, 13; Ia., I, 18; Ida., I, 14; Kan., XII, 4; Miss., III, 17; Mont., III, 14; Me., I, 21; Mich., XVIII, 2, 14; Minn., I, 13; Mo., II, 21; N. Y., Rev., I, 6, 7; N. H., I, 12; Neb., I, 21; N. Dak., I, 14; Ohio, I, 19; Or., I, 18; R. I., I, 16; S. C., I, 23; S. Dak., VI, 13; Tenn., I, 21; Tex., I, 17; W. Va., III, 9; Wis., I, 13; Wy., I, 33.

Cited in 3 Wash. 234, 235; 4 Wash. 451; 5 Wash. 38; 5 Wash. 744; 6 Wash. 8; 6 Wash. 164; 6 Wash. 399; 6 Wash. 402; 7 Wash. 269; 9 Wash. 2; 9 Wash. 87; 9 Wash. 92; 11 Wash. 430; 11 Wash. 635; 13 Wash. 49; 13 Wash. 159; 15 Wash. 319; 19 Wash. 202; 19 Wash. 358; 20 Wash. 88; 23 Wash. 112; 24 Wash. 500; 26 Wash. 286; 27 Wash. 125; 27 Wash. 526; 29 Wash. 5; 29 Wash. 494; 30 Wash. 224; 30 Wash. 254; 31 Wash. 560; 32 Wash. 227; 33 Wash. 391; 33 Wash. 497; 34 Wash. 351;

35 Wash. 76; 36 Wash. 117; 37 Wash. 15; 37 Wash. 17; 38 Wash. 521-523; 38 Wash. 687, 688; 39 Wash. 356; 39 Wash. 661; 41 Wash. 61; 41 Wash. 493; 42 Wash. 498, 499; 42 Wash. 666; 43 Wash. 116; 43 Wash. 230; 43 Wash. 628; 44 Wash. 645; 45 Wash. 303; 47 Wash. 415; 48 Wash. 454; 48 Wash. 618; 50 Wash. 33.

See 1 Remington's Digest, pp. 1026-1059, §§ 1-144.

The provision in this section authorizing the taking of lands for private ways of necessity is not self-executing: *Long v. Billings*, 7 Wash. 267.

This section prevents the taxation of costs in condemnation proceedings against the land owner only in the lower court, and does not exempt him from the costs of his appeal to the supreme court, when, under § 929, *infra*, he fails to recover a greater amount of damages on the appeal: *Kitsap County v. Melker*, 52 Wash. 49.

§ 17. IMPRISONMENT FOR DEBT.—There shall be no imprisonment for debt except in cases of absconding debtors.

Cf. Ala., I, 21; Ark., II, 16; Colo., II, 12; Fla., D. R., 16; Ga., I, 21; Ida., I, 15; Ia., I, 19; Ill., II, 12; Kan., B. R., 16; Ky., B. R., 18; Miss., III, 30; Mont., III, 12; Mich., VI, 33; Mo., II, 16; Neb., I, 20; and see Cal., I, 15; N. J., I, 17; N. C., I, 16; N. Dak., I, 15; Nev., I, 14; Ohio, I, 15; Or., I, 19; S. C., I, 20; S. Dak., VI, 15; Tenn., I, 18; Tex., I, 18; Wis., I, 16; Wy., I, 5.

Cited in 2 Wash. 258; 19 Wash. 349; 21 Wash. 200; 24 Wash. 499.

An absconding debtor is one who leaves or is about to leave the jurisdiction, or who conceals himself within the jurisdiction for the purpose of avoiding the process of the courts: *Burrichter v. Cline*, 3 Wash. 135, 136; see *Cline v. Harmon*, 2 Wash. 155.

Arrest and bail is a provisional remedy only, and not a special proceeding, like an

attachment merely ancillary to the action in which it is invoked: *Cline v. Harmon*, 2 Wash. 155, 158.

Under this section there can be no imprisonment for debt except in the case of absconding debtors: *Burrichter v. Cline*, 3 Wash. 135; *Cline v. Harmon*, 2 Wash. 155.

Statutes for the taxation of cost against the complaining witness and imprisonment for nonpayment are valid, under this section: *Colby v. Backus*, 19 Wash. 347.

A decree for alimony is not a debt within the meaning of this section, and may be enforced by imprisonment for contempt, without infringing the constitution: *In re Cave*, 26 Wash. 213.

In decree of divorce making distribution of property, see *In re Van Alstine*, 21 Wash. 194.

As to legality of commitment in contempt proceedings, see *In re Coulter*, 25 Wash. 526.

"Debt" within the meaning of the constitutional provision that there shall be no

imprisonment for debt refers to contract obligations and not to obligations arising from fraud or in tort: *In re Milecke*, 52 Wash. 312.

§ 18. MILITARY POWER, LIMITATION OF.—The military shall be in strict subordination to the civil power.

Cf. 1 Ark., II, 27; Ala., I, 28; Cal., I, 12; Conn., I, 18; Colo., II, 22; Del., I, 17; Fla., D. R., 21; Ill., II, 15; Ia., I, 14; Ind., I, 33; Ida., I, 12; Ky., B. R., 22; La., B. R., 12; Md., D. R., 30; Minn., I, 14; Mo., II, 27; Mass., Pt. 1st, 17; Me., I, 17; Mich.,

XVIII, 8; Miss., III, 9; Mont., III, 22; Neb., I, 17; Nev., I, 11; N. C., I, 24; N. H., I, 26; N. J., I, 12; N. Dak., I, 12; Pa., I, 22; R. I., I, 18; S. C., I, 28; S. Dak., VI, 16; Tex., I, 24; Vt., I, 16; Va., I, 15; W. Va., III, 12; Wis., I, 20; Wy., I, 25.

§ 19. FREEDOM OF ELECTIONS.—All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Colo., II, 5; cf. Ark., III, 2; Ala., I, 34; Del., I, 3; Ill., II, 18; Ind., II, 1; Ky., B. R., 6; Mass., Pt. 1st, 9; Neb., I, 22; N. H., I, 11; N. C., I, 10; Or., II, 1; Pa., I, 5; S. C., I, 33; S. Dak., VI, 19; Tenn., I, 5; Vt., I, 8; Va., I, 8; Wy., I, 27.

The legislature has power to provide that where there are four candidates for office, a candidate receiving less than forty per cent of the party vote shall not be deemed its nominee, and that in such case, the candidate receiving the highest number of first and second choice votes

shall be the nominee, since there is no interference with the freedom of the elector in casting his first choice ballot: *State ex rel. Zent v. Nichols*, 50 Wash. 508.

That a primary election will tend to destroy political parties which are of general utility or necessity is a political rather than a judicial question which cannot be urged upon the courts against the validity or constitutionality of the law: *State ex rel. Zent v. Nichols*, 50 Wash. 508.

§ 20. BAIL, WHEN AUTHORIZED.—All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great.

Ala., I, 17; Ark., II, 8; Cal., I, 6; Colo., II, 19; Conn., I, 14; Del., I, 12; Fla., D. R., 9; Ill., II, 7; Ind., I, 17; Ida., I, 6; Kan., B. R., 9; Ky., B. R., 16; La., B. R., 9; Mo., II, 24; Me., I, 10; Miss., III, 29; Mont., III, 19; Neb., I, 9; Nev., I, 7; N. Dak., I, 6; Ohio, I, 9; Pa., I, 14; R. I., I, 9; S. C., I, 16; S. Dak., VI, 8; Tex., I, 11; Tenn., I, 15; Wis., I, 8; Wy., I, 14.

Upon appeal from a judgment of contempt committing appellant until a fine was paid, he is entitled to an order fixing the amount of the supersedeas bond:

State ex rel. Denham v. Superior Court, 28 Wash. 590.

The supreme court has no authority to reduce as excessive the amount of an appeal bond fixed by the trial court in a prosecution for manslaughter: *State v. Minkler*, 6 Wash. 623.

As to right to release on bail pending habeas corpus proceedings in extradition cases, see *Foye, In re*, 21 Wash. 250.

An infant committed to the reform school has a right to be admitted to bail pending an appeal to the supreme court: *Packenhams v. Reed*, 37 Wash. 258.

§ 21. TRIAL BY JURY.—The right of trial by jury shall remain inviolate,¹ but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record,² and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.³

1. Cf. Ala., I, 12; Ark., II, 7; Cal., I, 7; Colo., II, 23; Conn., I, 21; Del., I, 4; Fla., D. R., 3; Ia., I, 9; Ida., I, 7; Ill., II, 5; Ind., I, 20; Kans., B. R., 5; Ky., B. R., 7; Me., I, 20; Md., XV, 6; Mass., Pt. I, 15; Mich., VI, 27; Minn., I, 4; Miss., III, 31; Mo., II, 28; N. Dak., II, 7; Neb., I, 6;

Nev., I, 3; N. H., Pt. I, 20; N. C., I, 19; N. Y. (Rev.), I, 2; N. J., I, 7; Ohio, I, 5; Or., I, 17; Pa., I, 6; R. I., I, 15; S. C., I, 11; S. Dak., VI, 6; Tenn., I, 6; Tex., I, 15; Vt., II, 31; Va., I, 13; Wy., I, 9; W. Va., III, 13; Wis., I, 5.

2. Three-fourths rule—Cal., I, 7; and see Minn., I, 4; Nev., I, 3; Tex., V, 13.

3. Waiver in civil actions—Ark., II, 7; Colo., II, 23; Ida., I, 7; Mont., III, 23; Mich., VI, 27; Minn., I, 4; Nev., I, 3; N. Y., I, 2; Vt., II, 31; Wis., I, 5.

Cited in 13 Wash. 663; 15 Wash. 421; 15 Wash. 447; 16 Wash. 384; 22 Wash. 131; 30 Wash. 325; 33 Wash. 537; 39 Wash. 164; 39 Wash. 203.

See 2 Remington's Digest, pp. 1645-1650, §§ 1-26.

This section was held in the particular case not to be violated by the trial court in taking from the consideration of the jury the question of the bona fides of the sale: *Furth v. Snell*, 13 Wash. 660; *Creagh v. Equitable Life Assur. Soc.*, 19 Wash. 108.

Section 2033, Code of 1881, authorizing a jury in insolvency proceedings of not less than six is in conflict with the organic act in so far as it provides for a less number than twelve jurymen: *Thomas v. Hilton*, 3 W. T. 365.

Bal. Code, § 4792, providing that county commissioners shall select as jurors such only as are householders is not in violation of Art. I, § 21, of the constitution, which provides that the right of trial by jury shall remain inviolate: *State v. Holedger*, 15 Wash. 443.

The constitutional provision with reference to the right to trial by jury must be construed with reference to the right as it existed in the territory at common law at the time of the adoption of the constitution: *State ex rel. Mullen v. Doherty*, 16 Wash. 382.

As to nature of cause of action or issue triable by jury, see *Winston v. Crowe*, 28 Wash. 65; *Filley v. Murphy*, 30 Wash. 1.

The constitutional right of trial by jury is not impaired by the summary trial and punishment of a person for the violation of a city ordinance against disorderly conduct, since such constitutional guaranty does not extend to petty and minor offenses: *State ex rel. Belt v. Kennan*, 25 Wash. 621.

The statutes prescribing as a qualification for jurors that they be householders does not violate this section: *State v. Holedger*, 15 Wash. 443.

The provision of this section is not intended to interfere with the right of the

individual to waive such privilege: *State v. Ellis*, 22 Wash. 129.

And will be deemed waived by a youthful offender tried before a justice of the peace, for disturbing a public school, when he did not demand a jury trial: *State v. Packenham*, 40 Wash. 403.

Bal. Code, §§ 6930 and 4978, do not confer the right to try a criminal case by a jury of less than twelve persons: *State v. Ellis*, 22 Wash. 129.

The railway fence law of 1883 is unconstitutional as denying the right of jury trial: *Dacres v. Oregon R. & Nav. Co.*, 1 Wash. 525; *Oregon R. & Nav. Co. v. Dacres*, 1 Wash. 195.

The provision herein that "the right to trial by jury shall remain inviolate" is inapplicable in proceedings to try the right to a public office: *State ex rel. Mullen v. Doherty*, 16 Wash. 382; *State ex rel. Orr v. Fawcett*, 17 Wash. 188.

The jury law of 1903, page 50, providing for a \$12 jury fee in civil cases, is not unconstitutional as imposing any unreasonable conditions upon the right of trial by jury: *State ex rel. Clark v. Neterer*, 33 Wash. 535.

Refusing a jury trial of issues raised in an equitable action is no ground for reversal: *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67. An action for accounting between partners is an equitable action: *Hamar v. Peterson*, 9 Wash. 152. A defendant is not entitled to a jury trial although the action against him is substantially one for damages when the remedy is sought against him in an action seeking equitable relief against other parties: *Murray v. Okanogan Live Stock etc. Co.*, 12 Wash. 259. Proceedings to contest a will are in their nature equitable and trial by jury of issues of fact therein is not a matter of right: *In re Clayson's Estate*, 26 Wash. 253.

A proceeding to recover specific real or personal property must be tried by jury: *In re Alfstad's Estate*, 27 Wash. 175; *Winston v. Crowe*, 28 Wash. 65; *Filley v. Murphy*, 30 Wash. 1. And so of an action to enjoin defendant from enforcing a judgment against plaintiff: *Spokane Co-operative Min. Co. v. Pearson*, 28 Wash. 118. As to when an action is an equitable one, see *Bluett v. Wilce*, 43 Wash. 492.

§ 22. RIGHTS OF ACCUSED PERSONS.—In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel,¹ to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face,² to have compulsory process to compel the attendance of witnesses in his own behalf, have a speedy public trial³ by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final

judgment be compelled to advance money or fees to secure the rights herein guaranteed.

See ante, notes to § 9 of this article.

See infra, §§ 6911, 6916, and notes, speedy trial, etc.

1. Appear and defend in person and by counsel—Ala., I, 7; Ark., II, 10; Cal., I, 13; Colo., II, 16; Conn., I, 9; Del., I, 7; Fla., D. R., 11; Ga., I, 5; Ill., II, 9; Ind., I, 13; Ida., I, 13; Ia., I, 10; Kan., B. R., 10; Ky., B. R., 11; La., B. R., 8; Me., I, 6; Md., D. R., 21; Mass., Pt. 1st, 12; Mich., VI, 28; Minn., I, 6; Miss., III, 26; Mo., II, 22; Mont., III, 16; Neb., I, 11; Nev., I, 8; N. H., I, 15; N. J., I, 8; N. Y. (Rev.), I, 6; N. C., I, 11; N. Dak., I, 13; Ohio, I, 10; Or., I, 11; Pa., I, 9; R. I., I, 10; S. C., I, 13; S. Dak., VI, 7; Tenn., I, 9; Tex., I, 10; Vt., I, 10; W. Va., III, 14; Wis., I, 7; Wy., I, 10; cf. U. S., Amend. VI, 1.

2. To demand nature and cause of accusation, and meet the witness face to face—See references 1, supra, except Cal., Fla., Ida., Nev., N. Y., N. Dak.

3. Compulsory process and speedy public trial—See references, supra, also Cal., I, 13; Colo., II, 16; N. Dak., I, 13; Ida., I, 13; Wy., I, 10.

4. Copy of accusation—Ala., I, 7; Ark., II, 10; Colo., II, 16; Ga., I, 1 (5); Ill., II, 9; Ind., I, 13; Ia., I, 10; Me., I, 6; Md., D. R., 21; Neb., I, 11; Ohio, I, 10; Or., I, 11; Tenn., I, 9; Tex., I, 10; S. Dak., VI, 7; Wy., I, 10.

Cited in 2 Wash. 125; 2 Wash. 371; 3 Wash. 114; 7 Wash. 258; 7 Wash. 337; 8 Wash. 232; 8 Wash. 234; 8 Wash. 464; 9 Wash. 214; 9 Wash. 339; 12 Wash. 297; 13 Wash. 486; 15 Wash. 18; 15 Wash. 421; 16 Wash. 575; 17 Wash. 563; 18 Wash. 48; 19 Wash. 466; 22 Wash. 5; 23 Wash. 578; 29 Wash. 60; 29 Wash. 457; 30 Wash. 142; 35 Wash. 155; 41 Wash. 244; 45 Wash. 254; 49 Wash. 437.

See 1 Remington's Digest, pp. 794, 795, §§ 186-194; Id., pp. 797, 798, §§ 202-208; Id., p. 803, §§ 221-225.

SUBPOENA, ORDER FOR.—The privileges of a defendant cannot be held to include the right to decide upon the materiality of the testimony that he expects from witnesses desired; this is for the court to decide and no subpoena should issue, in such cases, on behalf of a defendant to compel the attendance of witnesses without an order of the court first obtained: *State ex rel. Carraher v. Graves*, 13 Wash. 485, 487.

The provision of the constitution guaranteeing the accused compulsory process to obtain witnesses in his behalf contemplates all the means necessary to a production of the witness on a trial, but a preliminary examination is not a trial within the meaning of this section: *State ex rel. Thurston Co. v. Grimes*, 7 Wash. 445, 450.

NATURE OF ACCUSATION.—The accused has a constitutional right to be ap-

prised of the nature of the cause of action against him, hence under an information charging the accused with an assault with intent to commit murder, a verdict of "assault with a deadly weapon with intent to do bodily harm" is erroneous, as not within the charge as laid: *State v. Ackles*, 8 Wash. 462, 464.

A justice of the peace is not required, under this section, to prepare a copy of the complaint in a criminal action and deliver it to the accused, but the constitutional mandate is sufficiently complied with when the complaint is tendered him for the purpose of making a copy if he chooses: *State v. White*, 8 Wash. 230.

PRESENCE OF ACCUSED.—The granting of a continuance, in a criminal prosecution, without the personal presence of the accused, is not in violation of the constitutional provision giving the accused the right to appear and defend in person and by counsel: *State v. Duncan*, 7 Wash. 336.

IMPARTIAL JURY.—The discretion of the trial court to determine the partiality or impartiality in the jury is subject to review by the appellate court, under the constitutional guaranty to the accused of a trial by an impartial jury: *State v. Rutten*, 13 Wash. 203.

It is a violation of a defendant's constitutional rights to deny his challenge to a juror who has formed an opinion as to defendant's guilt from newspaper accounts, where it would take strong evidence to change such opinion, even though he could lay aside his opinion and try the case wholly upon the evidence: *State v. Murphy*, 9 Wash. 204, 214.

The guaranty that the defendant shall have a "public trial by an impartial jury, etc.," does not prevent the court in its discretion from sending the jury out, during the argument of counsel on instructions asked to be given as the law of the case, during the trial: *State v. Coella*, 3 Wash. 99.

ADVANCEMENT OF FEES.—A person convicted of murder is entitled, on appeal, to a transcript of the record at the expense of the public on showing that he is without means and unable to pay clerks' fees therefor: *State v. Fenimore*, 2 Wash. 370; compare *Stowe v. State*, 2 Wash. 124.

The language of this section, relating to the advancement of fees, has reference to the final judgment of the trial court, and not of the supreme court. The county commissioners cannot be required, for the benefit of a defendant in a criminal cause, to pay for a copy of a stenographer's report of a trial: *Stowe v. State*, 2 Wash. 124. See, also, *State ex rel. Langhorn v. Superior Court*, 32 Wash. 80.

ASSIGNMENT OF COUNSEL.—The constitutional guaranties to the accused in case he is unable by reason of poverty to employ counsel to defend him make it the duty of the court to assign him counsel, even although the law makes no provision for payment of such services: *Presby v. Klickitat County*, 5 Wash. 330. See, also, *State v. Bush*, 41 Wash. 13.

PRESUMPTIONS.—Section 2795, *infra*, providing that the presumption of burglarious intent should follow proof of unlawful entry, does not contravene the constitutional rights of one accused of crime: *State v. Anderson*, 5 Wash. 350.

It is the constitutional right of defendant to demand proof of his guilt before he shall be convicted of a crime: *State v. Anderson*, *supra*, 352.

The words "without specifying any further particulars in regard thereto," authorized by § 2813, *infra*, as to informations in embezzlement, are not in violation of this section: *State v. Krug*, 12 Wash. 288, 297.

No constitutional rights of defendants in criminal prosecutions are violated by the act of March 21, 1895, providing that, in prosecutions for larceny under Penal Code, § 52, where the animal alleged to have been stolen was permitted to run on the range, proof of possession of the animal by the person accused of stealing the same shall be *prima facie* evidence that he acquired possession thereof recently, and shall have the effect of throwing on him the burden of explaining such possession: *State v. Kyle*, 14 Wash. 550.

In a capital case in which twenty witnesses were examined and four days were consumed in the trial, it is an infringement of the constitutional right of the accused to appear and defend, and an abuse of discretion, to limit the time for argument to the jury to an hour and a half on each side: *State v. Mayo*, 42 Wash. 540.

Under this section it is error for the court to refuse to grant a continuance to procure the presence in person of a ma-

terial witness for defendant, when proper application has been made therefor: *State v. Williams*, 18 Wash. 47.

The requirement that the accused shall have the right to meet the witnesses face to face will not exclude evidence of dying declarations: *State v. Baldwin et al.*, 15 Wash. 15. And does not exclude the testimony of a witness, since deceased, on a former trial: *State v. Cushing* 17 Wash. 544. And defendant may waive his right to have the witnesses present, when: See *State v. Lewis*, 31 Wash. 75.

As to discretion of court in allowing separation and exclusion of witnesses, see *State v. Lee Doon*, 7 Wash. 308; *State v. Armstrong*, 37 Wash. 51; *State v. Ilomaki*, 40 Wash. 629; *State v. Dalton*, 43 Wash. 278.

It is error to keep the accused or a witness for him in manacles during the progress of the trial, unless plainly necessary: *State v. Williams*, 18 Wash. 47.

As to appointment and service of interpreter for accused, see *Elick v. Territory*, 1 W. T. 136; *State v. Thompson*, 14 Wash. 285; *State v. Michel*, 20 Wash. 162.

The statute providing that the discharge of an accused person for want of a speedy trial shall not bar a further prosecution does not violate this section: *State ex rel. Repath v. Caldwell*, 9 Wash. 336. Failure to prosecute diligently an appeal from a police court does not entitle an accused person to a dismissal, for want of a speedy trial: *State v. Parmeter*, 49 Wash. 435.

Depositions are not admissible: See *Freidrich v. Territory*, 2 Wash. 358; *State v. Humason*, 5 Wash. 499; *State v. Paggett*, 8 Wash. 579; *State v. Hunter*, 18 Wash. 670.

One charged as an accessory to the crime of rape by procuring its commission cannot be convicted under an information charging him as a principal: *State v. Gifford*, 19 Wash. 464.

Criminal offenses cognizable by a justice of the peace may be prosecuted before any justice in the county: *State ex rel. Calderwood v. Schomber*, 23 Wash. 573.

§ 23. BILL OF ATTAINDER, EX POST FACTO LAW, ETC.—No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

See notes to § 25.

Ala., I, 23; Ark., II, 17; Cal., I, 16; Colo., II, 11; Fla., D. R., 17; Ill., II, 14; Ind., I, 24; Ia., I, 21; Ida., I, 16; Ky., B. R., 19, 20; La., 155; Md., D. R., 17; Mont., II, 11; Me., I, 11; Mich., IV, 43; Minn., I, 11; Miss., III, 16; Mo., II, 15; N. Dak., I, 16; N. H., Pt. 1st, 23; N. J., IV, 7 (3); N. C., I, 32; Neb., I, 16; Nev., I, 15; Or., I, 21; Pa., I, 17-18; R. I., I, 12; S. C., I, 21; S. Dak., VI, 12; Tenn., I, 20; Tex., I, 16; U. S. Const., I, 9 (3); Va., V, 14; Wy., I, 35; W. Va., III, 4; Wis., I, 12.

Cited in 14 Wash. 539; 17 Wash. 613; 19 Wash. 208; 38 Wash. 628.

See 1 Remington's Digest, pp. 525-532, §§ 60-98.

VESTED RIGHTS, ESTATES AND INTERESTS.—The legislature has power to change the law of descent as to community lands, and make the same applicable to lands previously acquired: *Mable v. Whittaker*, 10 Wash. 656.

The title of executors under a nonintervention will is a vested right, which

cannot be impaired by a change in the law after the death of the testator: *State ex rel. Phinney v. Superior Court*, 21 Wash. 186.

The abolition of dower is not the destruction of a vested right, dower being a mere expectancy: *Hamilton v. Hirsch*, 2 W. T. 222.

Laws for the protection of bona fide occupants of land who have, in good faith, made permanent improvements, have no retrospective effect: *Investment Co. v. Hambach*, 37 Wash. 629.

A municipal ordinance requiring fire-escapes upon buildings of a certain description within prescribed limits impairs no vested rights by reason of applying to buildings erected in compliance with a previous ordinance requiring a different kind of fire-escapes: *Seattle v. Hinckley*, 40 Wash. 468.

Laws of 1893, requiring notice of application for a tax deed, has no application to a sale made under Laws of 1891: *Ford v. Durie*, 8 Wash. 87.

But a period of fourteen months before the expiration of the period of redemption would be a reasonable time to enable a purchaser to give notice required by the statute to secure a tax deed: *Herrick v. Niesz*, 16 Wash. 74.

The legislature may shorten the period of redemption from a tax sale, as long as a reasonable time is allowed after the passage of the act for redeeming from the tax: *Allen v. Peterson*, 38 Wash. 599.

There is no vested right, either in municipal corporations of the third or fourth class, or the citizens thereof, to have property assessed in any particular way: *Heilig v. Puyallup City Council*, 7 Wash. 29.

A law authorizing a reassessment for local improvements to cure defects in a former assessment may dispense with the jurisdictional requirements of the former law, so long as no constitutional right is invaded: *Frederick v. Seattle*, 13 Wash. 428; *Tacoma Land Co. v. Tacoma*, 14 Wash. 700.

An officer has no vested right to an office to which he has been elected or appointed: *State ex rel. McReavy v. Burke*, 8 Wash. 412.

A right to a logger's lien is a part of the laborer's contract, and is not affected by the subsequent repeal of the statute: *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467.

REMEDIES.—The right to execution and supplemental proceedings on a judgment being a vested right, it cannot be summarily cut off without the limitation of a reasonable time to avail a party thereof: *Murne v. Schwabacher*, 2 W. T. 130.

There being no vested rights in any particular remedy, the legislature can change the procedure for settling a statement of facts and make it applicable to

pending suits: *Wintermute v. Carner*, 8 Wash. 585.

There is no vested right in mere procedure: *State ex rel. Phinney v. Superior Court*, 21 Wash. 186.

While limitation laws pertain only to the remedy, a reduction of the time will not be given a retroactive effect so as to cut off rights of action that have already accrued, until lapse of the period after the enactment: *Moore v. Brownfield*, 7 Wash. 23; *Baer v. Choir*, 7 Wash. 631; *McAuliff v. Parker*, 10 Wash. 141.

OBLIGATION OF CONTRACTS.—The law in existence at the time of the adoption of a contract becomes a part of it: *State ex rel. Phinney v. Superior Court*, 21 Wash. 186.

The state constitution cannot be said to impair the obligation of the enabling act, which was but a proposition, and in the case of conflict is modified: *Romine v. State*, 7 Wash. 215.

The obligation of a contract to furnish school books for five years, entered into by the state board of education, cannot be impaired either by subsequent legislation or by the action of any board proceeding by authority of such legislation: *Rand, McNally & Co. v. Hartranft*, 29 Wash. 591.

Laws of 1889-90, page 431, granting to abutting owners the preference right to purchase tide lands, was simply a privilege and not a contract creating any obligation on the part of the state: *Allen v. Forest*, 8 Wash. 700. See, also, *State ex rel. Megler v. Forrest*, 13 Wash. 268; *Bartlett v. Forrest*, 12 Wash. 483.

The purchaser of tide lands from the state acquires no contract right through such purchase, as to the manner in which the funds accruing from such sales shall be expended, when: *See Tacoma Land Co. v. Young*, 18 Wash. 495.

Where the franchise granted by a city to a water company to supply water is not exclusive, the city may subsequently erect and operate a water plant in the same territory: *North Springs Water Co. v. Tacoma*, 21 Wash. 517.

An unlimited franchise to a railroad company to lay its tracks in a street creates a perpetual right, which the railroad can be deprived of by the city only by the exercise of the right of eminent domain: *Seattle v. Columbia etc. R. Co.*, 6 Wash. 379.

An ordinance granting a franchise to use city streets is in the nature of a contract, and it is not in the power of the city council to destroy rights and property thus granted by the passage of an ordinance repealing the franchise ordinance: *Commercial Electric Light etc. Co. v. Tacoma*, 17 Wash. 661.

A statute amending the law with reference to redemption from tax sales does not impair the obligation of any contract: *Herrick v. Niesz*, 16 Wash. 74.

The claim of the state against a city for a percentage of the liquor license fees collected by the city, and due under the law to the state, is a well-grounded moral or equitable obligation, although barred by the statute of limitations, and the bar may be removed by the legislature: *State v. Aberdeen*, 34 Wash. 61.

A county warrant is a contract to pay money with interest at the legal rate at the time issued, which cannot be impaired by a subsequent law reducing the rate of interest: *Union Sav. Bank etc. v. Gelbach*, 8 Wash. 497.

A law providing for the diversion of a fund out of which a warrant was to be paid in the order of its issuance is invalid as to any warrants issued prior to its passage, on the ground that it would impair the obligation of a contract: *Eidemiller v. Tacoma*, 14 Wash. 376.

As to validating illegal school warrants by a vote of the school district, see *State ex rel. Dunn v. Dorsey*, 19 Wash. 120.

A law changing the fund from which a contract liability of a city is payable from a general fund to an indebtedness fund, which latter is heavily burdened with outstanding warrants, so greatly lessens the value of the remedy as to impair the obligation of the contract: *Townsend Gas etc. Co. v. Hill*, 24 Wash. 469.

A law seeking to cut off all existing rights to renew or sue upon a judgment is void, as to existing judgments, as impairing the obligation thereof: *Bettman v. Cowley*, 19 Wash. 207; *Palmer v. Laberee*, 23 Wash. 409; *Raught v. Lewis*, 24 Wash. 47; *Denio v. Benham*, 24 Wash. 485; *Fischer v. Kittinger*, 39 Wash. 174.

Also as to a subsequent judgment, when based upon a contract made prior to the enactment of the law, as the obligation of the contract is thereby impaired: *Howard v. Ross*, 38 Wash. 627; *Williams v. Packard*, 39 Wash. 217.

But such a law does not impair the obligation of a contract as applied to existing judgments founded upon tort: *Gaffney v. Jones*, 39 Wash. 587.

Marriage is not a contract in the sense that the obligation thereof is affected by a legislative divorce: *Maynard v. Hill*, 2 W. T. 321.

A law reducing the statutory rate of interest is an impairment of the obligation of the contract: *Union Sav. Bank & Trust Co. v. Gelbach*, 8 Wash. 497; *Burns v. Woolery*, 15 Wash. 134. A law changing the rate of interest does not affect an antecedent judgment in which the rate of interest was specified: *Burns v. Woolery*, 15 Wash. 134.

Acts giving liens to subcontractors and materialmen notwithstanding payment to the principal contractor are valid, and do not impair the obligation of a contract: *Spokane Mfg. etc. Co. v. McChesney*, 1 Wash. 609. An act giving farm laborers priority over all other liens upon crops

which they have assisted in raising is not unconditional as impairing the obligation of a prior mortgage in advance of the labor thereon, where such act was in force at the time of the execution of the mortgage, and must therefore have entered into and formed a part of the contract: *Sitton v. Dubois*, 14 Wash. 624.

An act exempting from liability for debts the proceeds or assets of life insurance policies impairs the obligation of the contract in so far as it applies to antecedent debts and policies: *In re Heilbron's Estate*, 14 Wash. 536.

The act of March 7, 1891, increasing certain penalties imposed upon any tenant who wrongfully continues in possession of premises after a violation on his part of the terms of a lease, is applicable to tenancies entered into before its passage: *Woodward v. Winchill*, 14 Wash. 394.

Where the right to a remedy which is essential to the recovery of a debt is not merely postponed, but virtually destroyed, the obligation of the contract is impaired: *Bettman v. Cowley*, 19 Wash. 207.

And where all remedies are taken away and none substituted: *Palmer v. Laberee*, 23 Wash. 409.

A legislative enactment which so far affects the remedy subsisting when and where a contract is made, as substantially to impair and lessen the value of such contract, impairs the obligation of contracts: *In re Heilbron's Estate*, 14 Wash. 536; *Swinburne v. Mills*, 17 Wash. 611.

There is a distinction between a simple remedy which the legislature may change and one which is a part of the obligation, a change in which cannot be made without lessening the value of the contract: *Swinburne v. Mills*, 17 Wash. 611; *Canadian etc. Trust Co. v. Blake*, 24 Wash. 102.

The time for commencing an action relates to the remedy only, and may be abridged by subsequent legislation where a reasonable time is allowed for commencing actions upon pre-existing causes: *McQuesten v. Morrill*, 12 Wash. 335; *Bettman v. Cowley*, 19 Wash. 207. But the period cannot be extended and the right renewed after the bar is complete: *Packscher v. Fuller*, 6 Wash. 534.

As to invalidity of law making substantial changes in execution sales, see *Swinburne v. Mills*, 17 Wash. 611; *Dennis v. Moses*, 18 Wash. 537.

The statute allowing a purchaser at execution sales upon a money judgment the right to possession during the period of redemption, does not impair the obligation of pre-existing contracts, entered into under a law whereby the debtor was entitled to such possession, and as to subsequent judgments on pre-existing obligations, the act does not change the remedy or affect any right: *Wilson v. Wold*, 21 Wash. 398.

As to invalidity of law making changes in right to possession to property sold under execution during period of redemption, see *Canadian & American Mtg. & Trust Co. v. Blake*, 24 Wash. 102.

RETROSPECTIVE AND EX POST FACTO LAWS.—The prohibition of the state constitution against special legislation incorporating cities and towns is prospective in its operation, and does not affect special charters: *Tacoma Land Co. v. Pierce County*, 1 Wash. 482.

The constitutional prohibition against diminishing the compensation of any public officer during his term does not apply to officers who receive specific fees for specific services: *State ex rel. Thurston County v. Grimes*, 7 Wash. 445.

A statute will not be given a retroactive construction if existing rights are thereby impaired, unless such clearly appears to be the legislative intent: *Heilbron's Estate, In re*, 14 Wash. 536; *Moore v. Brownfield*, 7 Wash. 23; *Packscher v. Fuller*, 6 Wash. 534.

The act of 1869, requiring notice of a wife's title to real estate to be filed and recorded in order to exempt the husband's interest therein from his debts, does not apply to lands acquired before the passage of the act: *Lemon v. Waterman*, 2 W. T. 485.

A statute giving a lien to materialmen or laborers, notwithstanding payment to the main contractor, is constitutional as to future transactions: *Spokane Mfg. etc. Co. v. McChesney*, 1 Wash. 609.

The legislature has power to enact a change in the method of the collection of taxes which were assessed and levied under a former law, as long as an adequate remedy is left: *Spokane County v. Northern Pacific R. Co.*, 5 Wash. 89.

An act expressly limiting its effect to judgments entered subsequent to the taking effect of the law indicates an intent to make the act retroactive as to prior contracts, where the judgment was subsequently entered, and the act is void: *Swinburne v. Mills*, 17 Wash. 611.

Laws 1890, page 91, amending Code 1881, § 389, with respect to the exclusion of evidence of any transaction or statement by a deceased person, so as to embrace transactions with persons "deriving right or title by, through or from any deceased person," applies to transactions or statements prior to the date of the amending enactment, and is constitutional; since it merely declares a rule of evidence and relates only to the remedy, in which there is no vested right: *Kenney Presbyterian Home v. Kenney*, 45 Wash. 106.

A curative statute validating former acknowledgments of conveyances does not violate the constitution or affect vested rights in property: *Skellinger v. Smith*, 1 W. T. 369.

The passage by the legislature of a void law with the intent of legalizing attempted incorporations, or empowering them to reincorporate, cannot be construed as a legislative recognition of such municipal corporations: *Denver v. Spokane Falls*, 7 Wash. 226.

Acts authorizing special elections to validate void municipal indebtedness are not unconstitutional, being merely curative acts, relating only to what had been done before the enactment of the law: *Baker v. Seattle*, 2 Wash. 576; *Hunt v. Fawcett*, 8 Wash. 396.

Laws intended to authorize a municipal corporation to assume and ratify an indebtedness created by the residents of a de facto municipality are within the limits of legislative power: *State ex rel. Traders' Bank v. Winter*, 15 Wash. 407.

The legislature may authorize the payment of indebtedness incurred under an unconstitutional law: *Lewis County v. Gordon*, 20 Wash. 80; *Skagit County v. McLean*, 20 Wash. 92; *State ex rel. Latimer v. Henry*, 28 Wash. 38.

Or it may validate municipal contracts entered into by a de facto municipality: *Pullman v. Hungate*, 8 Wash. 519; *State ex rel. Hemen v. Ballard*, 16 Wash. 418; *Abernethy v. Medical Lake*, 9 Wash. 112.

It is within the power of the legislature to enact a statute authorizing the making of an assessment to cover the cost of work done on a public improvement under a void law: *State ex rel. Latimer v. Henry*, 28 Wash. 38.

A statute prescribing the qualifications of a person practicing medicine is in no sense an ex post facto law, as it does not proceed upon the idea of punishment for past acts: *Fox v. Territory*, 2 W. T. 297.

A law changing the mode of procedure in prosecutions for crime from an indictment to an information, does not contain any of the elements or respond to any of the accepted definitions of an ex post facto law: *Lybarger v. State*, 2 Wash. 552; *State v. Hoyt*, 4 Wash. 818.

The requirement that an insane person shall obtain a certificate from a physician and permit from the warden of the penitentiary before making application for release, is not unconstitutional as an ex post facto law: *State ex rel. Thompson v. Snell*, 49 Wash. 177.

The state cannot urge the unconstitutionality of laws as being ex post facto where a party elects to submit to the additional burdens imposed upon him thereby: *State ex rel. Thompson v. Snell*, 49 Wash. 177.

The law changing the mode of procedure from an indictment to an information does not constitute it an ex post facto law, nor violate any of the guaranties of the federal constitution: *Lybarger v. State*, 2 Wash. 552; *State v. Hoyt*, 4 Wash. 818; compare *McCarty v. State*, 1 Wash. 377; see notes to Art. I, §§ 2, 23.

§ 24. RIGHT TO BEAR ARMS.—The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.

Cf. Ala., I, 27; Ark., II, 5; Colo., II, 13; Mont., III, 13; Or., I, 27; Pa., I, 21; S. C., Conn., I, 17; Fla., D. R., 20; Ind., I, 32; I, 28; S. Dak., VI, 24; Tenn., I, 26; Tex., Ky., B. R., I (7); Mass., Pt. 1st, 17; Mich., I, 23; Vt., I, 15. XVIII, 7; Miss., III, 12; Mo., II, 17; Cited in 46 Wash. 410.

§ 25. PROSECUTION BY INFORMATION.—Offenses heretofore required to be prosecuted by indictment may be prosecuted by information or by indictment, as shall be prescribed by law.

See notes to § 2024, *infra*.

Cf. Ala., I, 9; Cal., I, 8; misdemeanors only by information, Colo., II, 8; Mont., III, 8; Mo., II, 12; N. Dak., I, 8; Pa., I, 10; S. Dak., VI, 10.

Cited in 1 Wash. 380; 2 Wash. 555; 15 Wash. 510; 20 Wash. 247.

See 2 Remington's Digest, p. 1465, §§ 1-4.

A person accused of grand larceny, committed prior to the admission of the state into the Union, is entitled to the guaranty of the United States constitution of presentment by a grand jury, and cannot be prosecuted therefor by information, under the provisions of the state constitution: *McCarty v. State*, 1 Wash. 377; *State v. Holmes*, 9 Wash. 528.

Infamous crimes may be prosecuted in this state by information, as the constitution of the United States does not assume to regulate prosecutions under state laws: *Lybarger v. State*, 2 Wash. 552; *State v. Nordstrom*, 7 Wash. 506; *State v. Baldwin*, 15 Wash. 15; *State v. Humason*, 5 Wash. 499; *State v. Williamson*, 13 Wash. 336.

This section does not require an information or indictment against one charged with assault and battery in a municipal court or that of a justice of the peace, as the offense was within the jurisdiction of a justice of the peace before the adoption of the constitution: *State v. Gleason*, 15 Wash. 509.

§ 26. GRAND JURY.—No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.

Cited in 2 Wash. 555.

§ 27. TREASON, DEFINED, ETC.—Treason against the state shall consist only in levying war against the state, or adhering to its enemies, or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open court.

Cf. Ala., I, 19; Ark., II, 14; Cal., I, 20; Colo., II, 9; Conn., IX, 4; Del., V, 3; Fla., D. R., 23; Ga., I, 2 (2); Ind., I, 28, 29; Ia., I, 16; Kan., B. R., 13; Ky., 229; La., 151; Me., I, 12; Mich., VI, 30; Minn., I, 9; Miss., III, 10; Mo., II, 13; Mont., III, 9; Neb., I, 14; Nev., I, 19; N. J., I, 14; N. C., IV, 5; N. Dak., I, 19; Or., I, 24; S. Dak., VI, 25; Tex., I, 22; U. S. Const., III, 3 (3); W. Va., II, 6; Wis., I, 10; Wy., I, 26.

§ 28. HEREDITARY PRIVILEGES ABOLISHED.—No hereditary emoluments, privileges, or powers shall be granted or conferred in this state.

Ala., I, 30; Ark., II, 19; Conn., I, 20; Kan., B. R., 19; Mass., I, 6; Me., I, 23; N. C., I, 30; Tenn., I, 30; W. Va., III, 19.

§ 29. CONSTITUTION MANDATORY.—The provisions of this constitution are mandatory, unless by express words they are declared to be otherwise.

Cited in 11 Wash. 437; 25 Wash. 265; 46 Wash. 274.

See 1 Remington's Digest, pp. 513-516, §§ 2-24.

The mandatory provisions of the constitution are addressed to the respective departments called upon to perform the same, and one department cannot coerce

another into obedience thereto: State ex rel. Reed v. Jones, 6 Wash. 452. See Nelson v. Troy, 14 Wash. 435.

In construing the provisions of the constitution, no importance can be attached to the debates of the constitutional convention as showing the intention, as there is no record of such debates, and they would not express the intention of the whole convention, or of the people voting upon the adoption of the constitution: State ex rel. School District No. 24 v. Grimes, 7 Wash. 270.

The constitution is to receive a liberal construction: State ex rel. Snell v. Warner, 4 Wash. 773; State ex rel. Chamberlain v. Daniel, 17 Wash. 111.

Single provisions are to be read in connection with other clauses taken as a whole: State ex rel. Chamberlain v. Daniel, 17 Wash. 111.

Upon a conflict, the state constitution must control the enabling act, the latter being but a proposition which was ac-

cepted by the people as modified by the constitution: Romine v. State, 7 Wash. 215.

The courts should not declare a law repugnant to the constitution without a strong conviction, divested of a reasonable doubt: Ah Lim v. Territory, 1 Wash. 156. Nor unless clearly violating some express provision of the constitution: Board of Directors Middle etc. Dist. v. Peterson, 4 Wash. 147; Bellingham Bay Imp. Co. v. New Whatcom, 20 Wash. 53; State ex rel. Murphy v. McBride, 29 Wash. 335. Where doubt exists, the law is sustained: State ex rel. School Dist. No. 24 v. Grimes, 7 Wash. 270. Before the judiciary will declare an act of the legislature invalid on the ground that it is in conflict with the constitution such conflict must be shown to be clear and unquestionable and every intendment must be given force in favor of the constitutionality of the law: Reeves v. Anderson, 13 Wash. 17; Nelson v. Troy, 11 Wash. 435.

§ 30. RIGHTS RESERVED.—The enumeration in this constitution of certain rights shall not be construed to deny others retained by the people.

Ala., I, 39; Ark., II, 29; Cal., I, 23; Colo., II, 28; Fla., D. R., 24; Ida., I, 21; Ia., I, 25; Kan., B. R., 20; La., B. R., 13; Mont., III, 30; Miss., III, 32; Me., I, 24; Md., D. R., 45; Mo., II, 32; Neb., I, 26; Nev.,

I, 20; N. J., I, 19; N. C., I, 37; Ohio, I, 20; Or., I, 33; R. I., I, 23; S. C., I, 41; Va., I, 21; Wy., I, 36.

Cited in 30 Wash. 443.

§ 31. STANDING ARMY.—No standing army shall be kept up by this state in time of peace, and no soldier shall in time of peace be quartered in any house without the consent of its owner, nor in time of war except in the manner prescribed by law.

Ala., I, 29; Ark., II, 27; Cal., I, 12; Colo., II, 22; Conn., I, 19; Del., I, 18; Ill., II, 15; Ind., I, 34; Ia., I, 15; Ky., B. R., 22; Md., D. R., 31; Mo., II, 27; Neb., I, 18; Nev., I, 11; N. J., I, 13; N. C., I, 36; Ohio,

I, 13; Or., I, 28; Pa., I, 23; R. I., I, 19; S. C., I, 29; Tenn., I, 27; Tex., I, 25; U. S. Amend. III; W. Va., III, 12.

Cf. Kan., B. R., 14; Me., I, 18; Mich., XVIII, 9; N. H., Pt. 1st, 27; Pa., I, 23.

§ 32. FUNDAMENTAL PRINCIPLES.—A frequent recurrence to fundamental principles is essential to the security of individual rights, and the perpetuity of free government.

Cited in 18 Wash. 571.

ARTICLE II.

LEGISLATIVE DEPARTMENT.

§ 1. LEGISLATIVE POWERS, WHERE VESTED.—The legislative powers shall be vested in a senate and house of representatives, which shall be called the legislature of the state of Washington.

See Art. IV, § 1, notes.

Cf. Ala., IV, 1; Ark., V, 1; Cal., IV, 1; Colo., V, 1; Conn., III, 1; Del., II, 1; Fla., III, 1; Ga., III, 1; Ill., IV, 1; Ind., IV, 1; Ia., III, 1; Ida., III, 1; Kan., II, 1; Ky., 29; La., 19; Me., IV, 1; Md., III, 1; Mich., IV, 1; Minn., IV, 1; Miss., IV, 1; Mont., V, 1; Mo., IV, 1; N. Dak., II, 25; Neb.,

III, 1; N. H., Pt. II, 2; N. J., IV, 1; N. Y., III, 1; N. C., II, 1; Ohio, II, 1; Or., IV, 1; Pa., II, 1; R. I., IV, 1; S. C., II, 1; S. Dak., III, 1; Tenn., II, 3; Tex., III, 1; Va., V, 1; Wy., III, 1; W. Va., VI, 1; Wis., IV, 1; Nev., IV, 1.

Cited in 13 Wash. 20; 35 Wash. 132.

See 1 Remington's Digest, pp. 517-520, §§ 25-35.

The legislature has power to change the law of descent as to community lands and make the same applicable to lands previously acquired: *Mabie v. Whittaker*, 10 Wash. 656.

The constitution does not restrict the legislature to the special powers delegated to it, but the legislative power extends to a subject unless there is an express or implied restriction thereon in the constitution: *State v. Clark*, 30 Wash. 439.

LEGISLATIVE POWERS AND DELEGATION THEREOF.—The legislative department is not in any sense an inferior department, but the executive, legislative and judicial departments are equal; no one of them is responsible to either of the others for its acts, but is responsible only to the people whom it represents: *State ex rel. Reed v. Jones*, 6 Wash. 452. Legacies and inheritances are natural subjects of legislative control in the absence of constitutional inhibition: *State v. Clark*, 30 Wash. 439.

Authority may be conferred upon the trustees of the reform school to decide when a child committed to the school by the courts shall be returned to the court for discharge or sentence upon his conviction: *Mason, In re*, 3 Wash. 609.

A statute authorizing the creation of a municipal corporation by a judicial court, upon petition of a majority of the inhabitants of the territory to be incorporated, is unconstitutional, as delegating legislative functions to the court: *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98. It is not an unconstitutional delegation of legislative power to provide for the examination and licensing, by a state board of examiners, of physicians or dentists: *In re Thompson*, 36 Wash. 377. The drainage act (Bal. Code, § 3726; Laws 1895, p. 251, § 12), requiring the superior court to find that a proposed ditch is practicable and conducive to the public health and will increase the value of the lands, is not unconstitutional as a delegation of legislative authority; since the court does not originate or devise the system or plan, but simply approves those proposed by the county commissioners: *State ex rel. Matson v. Superior Court*, 42 Wash. 491.

Laws authorizing election precincts to regulate the sale of liquor are unconstitutional as a delegation of legislative authority: *Lessman v. Territory*, 3 W. T. 452; *Thornton v. Territory*, 3 W. T. 482.

Authority to county boards to employ assistants and deputies for the county officers at the expense of their respective counties imposes administrative duties, and is not an unlawful delegation of legis-

lative power: *Nelson v. Troy*, 11 Wash. 435. The same is true of the appointment of road supervisors by the county commissioners: *State ex rel. Griffith v. Newland*, 37 Wash. 428. And the same is true of the statute creating a state capital commission and investing it with power to erect a building and to do whatever is necessary to accomplish the object: *State ex rel. Attorney General v. McGraw*, 13 Wash. 311.

The act granting cities of the first class power to frame their own charters is not an unlawful delegation of legislative power: *Reeves v. Anderson*, 13 Wash. 17.

A law authorizing the adoption of charter amendments requiring the submission of the matter of granting franchises to a vote of the people is not unconstitutional as an unlawful delegation of legislative power to the people: *Hindman v. Boyd*, 42 Wash. 17.

Legislature cannot delegate to cities power to create inferior courts: *In re Clougherty*, 2 Wash. 137. The constitutional authority to frame a freeholders' charter does not authorize a city to exercise the power of eminent domain: *Tacoma v. State*, 4 Wash. 64. Nor to extend municipal boundaries: *State ex rel. Snell v. Warner*, 4 Wash. 773. Nor to require registration at city elections: *Seymour v. Tacoma*, 6 Wash. 138. Nor to provide a tribunal and clothe it with authority to determine an election contest: *State ex rel. Fawcett v. Superior Court*, 14 Wash. 604.

Legislature not having power to pass laws partaking of the character of special legislation, it cannot delegate such power to a city council: *Tacoma v. Kreech*, 15 Wash. 296. The power to vacate streets may be delegated to municipal corporations: *Ponischil v. Hoquiam Sash and Door Co.*, 41 Wash. 303.

An act making it a misdemeanor for anyone except authorized agents of a railroad company to sell railroad tickets, and requiring companies to commission their agents, is not unconstitutional as delegating to the companies the power to say who are guilty of the offense by issuing or withholding the authority: *In re O'Neill*, 41 Wash. 174.

POLICE POWER.—The discretion of the legislature cannot be limited upon a proper subject for its control by the exercise of the police power: *Ah Lim v. Territory*, 1 Wash. 156.

Its authority is supreme to determine what is immoral, unless it is clearly partial, arbitrary and oppressive: *State v. Considine*, 16 Wash. 358.

The police power in its broadest acceptation means the general power of the state to preserve and promote the public welfare: *Karasek v. Peier*, 22 Wash. 419.

§ 2. HOUSE OF REPRESENTATIVES AND SENATE.—The house of representatives shall be composed of not less than sixty-three nor more than

ninety-nine members. The number of senators shall not be more than one-half nor less than one-third of the number of members of the house of representatives. The first legislature shall be composed of seventy members of the house of representatives and thirty-five senators.

§ 3. THE CENSUS.—The legislature shall provide by law for an enumeration of the inhabitants of the state in the year one thousand eight hundred and ninety-five, and every ten years thereafter; and at the first session after such enumeration, and also after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and house of representatives, according to the number of inhabitants, excluding Indians not taxed, soldiers, sailors, and officers of the United States army and navy in active service.

Wis., IV, 3; N. Y., Rev., III, 4, Amend. Cited in 15 Wash. 50.

§ 4. ELECTION OF REPRESENTATIVES AND TERM OF OFFICE.—Members of the house of representatives shall be elected in the year eighteen hundred and eighty-nine at the time and in the manner provided by this constitution, and shall hold their offices for the term of one year and until their successors shall be elected.

Cited in 49 Wash. 72.

§ 5. ELECTIONS, WHEN TO BE HELD.—The next election of the members of the house of representatives after the adoption of this constitution shall be on the first Tuesday after the first Monday of November, eighteen hundred and ninety, and thereafter members of the house of representatives shall be elected biennially, and their term of office shall be two years; and each election shall be on the first Tuesday after the first Monday in November, unless otherwise changed by law.

§ 6. ELECTION AND TERM OF OFFICE OF SENATORS.—After the first election the senators shall be elected by single districts of convenient and contiguous territory at the same time and in the same manner as members of the house of representatives are required to be elected, and no representative district shall be divided in the formation of a senatorial district. They shall be elected for the term of four years, one-half of their number retiring every two years. The senatorial districts shall be numbered consecutively, and the senators chosen at the first election had by virtue of this constitution, in odd-numbered districts, shall go out of office at the end of the first year, and the senators elected in the even-numbered districts shall go out of office at the end of the third year.

Cited in 4 Wash. 14.

§ 7. QUALIFICATIONS OF LEGISLATORS.—No person shall be eligible to the legislature who shall not be a citizen of the United States and a qualified voter in the district for which he is chosen.

§ 8. JUDGES OF THEIR OWN ELECTION AND QUALIFICATION—QUORUM.—Each house shall be the judge of the election, returns, and qualifications of its own members,¹ and a majority of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day and may compel the attendance of absent members in such manner and under such penalties as each house may provide.²

1. Judges of election and qualification: Ala., IV, 8; Ark., V, 11; Cal., IV, 7; Colo., V, 10; Del., II, 6; Fla., III, 6; Ga., III, 7 (1); Ida., III, 9; Ill., IV, 9; Ind., IV, 10; Ia., III, 7; Kan., II, 8; Ky., 38; La., 23; Minn., IV, 3; Mont., V, 9; Me., IV, Pt. III, 3; Md., III, 19; Mich., IV, 9; Miss., IV, 38; Mo., IV, 17; N. Y., Rev., III, 10; N. Dak., II, 47; Neb., III, 7; Nev., IV, 6; N. J., IV, 4 (2); N. C., II, 22; Ohio, II, 6; Or., IV, 11; R. I., IV, 6; S. C., II, 14; S. Dak., III, 9; Tenn., II, 11; Tex., III, 8; U. S., I, 5 (1); Vt., II, 9; Va., V, 7; Wy., III, 10; W. Va., VI, 24; Wis., IV, 7.

2. Quorum: Ala., IV, 10; Ark., IV, 11; Cal., IV, 8; Colo., V, 11; Conn., III, 7; Del., II, 6; Fla., III, 11; Ga., III, 4 (4); Ida., III, 10; Ia., III, 8; Ill., IV, 9; Kan., II, 8; Ky., 37; La., 32; Md., III, 20; Mont., V, 10; Me., IV, Pt. III, 3; Mich., IV, 8; Minn., IV, 3; Miss., IV, 54; Mo., IV, 18; Neb., III, 7; N. J., IV, 4 (2); N. Dak., II, 46; Nev., IV, 13; N. H., II, 20; N. Y., Rev., III, 10; Ohio, II, 6; Pa., II, 10; R. I., IV, 6; S. C., II, 14; S. Dak., III, 9; U. S., I, 5 (1); W. Va., VI, 24; Wis., IV, 7; and see Ind., IV, 11; Or., IV, 12; Tenn., II, 11; Tex., III, 10; Wy., III, 11.

§ 9. RULES OF PROCEDURE.—Each house may determine the rules of its own proceedings,¹ punish for contempt and disorderly behavior, and, with the concurrence of two-thirds of all the members elected, expel a member,² but no member shall be expelled a second time for the same offense.

1. Ala., IV, 11; Ark., V, 12; Conn., III, 3; Del., II, 7; Fla., III, 6; Ill., IV, 9; Ind., IV, 10; Ida., III, 9; Iowa, III, 9; Kan., II, 8; Ky., 39; La., 23; Md., III, 19; Mass., Pt. II, Ch. 1, §§ 2, 7, §§ 3, 10; Mich., IV, 9; Minn., IV, 4; Miss., IV, 55; Mo., IV, 17; Mont., V, 11; N. Dak., II, 48; N. Y., Rev., III, 10; Neb., II, 7; Nev., III, 6; N. H., II, 22, 37; N. J., IV, 4 (3); Ohio, II, 8; Or., IV, 11; Pa., II, 11; R. I., IV, 7; S. Dak., III, 9; S. C., II, 15; Tenn., II, 12;

Tex., III, 11; U. S., I, 5 (2); Va., V, 7; W. Va., VI, 24; Wis., IV, 8; Wy., III, 12.

2. Ala., IV, 11; Ark., V, 12; Cal., IV, 9; Colo., V, 12; Conn., III, 8; Del., II, 7; Fla., III, 6; Ga., III, 7 (1); Ill., IV, 9; Ida., III, 11; Ind., IV, 14; Ia., III, 9; Ky., 39; La., 23; Mich., IV, 9; Mo., IV, 17; Md., III, 19; Mont., V, 11; Minn., IV, 4; Miss., IV, 55; Neb., II, 7; Nev., III, 6; N. Dak., II, 48; Ohio, II, 8; Or., IV, 15; Pa., II, 11; R. I., IV, 7; S. C., II, 15; Tenn., II, 12; Tex., III, 11; Va., V, 7; Wis., IV, 8; Wy., III, 12.

§ 10. ELECTION OF OFFICERS.—Each house shall elect its own officers, and when the lieutenant-governor shall not attend as president, or shall act as governor, the senate shall choose a temporary president. When presiding, the lieutenant-governor shall have the deciding vote in case of an equal division of the senate.

Cf. Ark., V, 11; Cal., IV, 7; Colo., V, 10; Conn., III, 7; Del., II, 5; Ida., III, 8; Ill., IV, 9; Ia., III, 7; Ind., III, 19; La., 23; Mich., IV, 9; Miss., IV, 38; Mont., V, 9; Nev., IV, 6; N. Y., Rev., III, 10; N. C., II, 18-20; N. Dak., II, 31, 36; Ohio, II, 8; Pa., II, 9; S. C., II, 15; S. Dak., III, 9; Tenn.,

III, 11; Tex., III, 9; W. Va., VI, 24; Wis., IV, 9; Wy., III, 10.

Cited in 29 Wash. 340.

The lieutenant governor is relieved of the duty of presiding over the senate when the duties of governor devolve upon him: State ex rel. Murphy v. McBride, 29 Wash. 335.

§ 11. JOURNAL, PUBLICITY OF MEETINGS—ADJOURNMENTS.

Each house shall keep a journal of its proceedings and publish the same.¹ except such parts as require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall adjourn for more than three days, nor to any place other than that in which they may be sitting, without the consent of the other.

See Const., U. S., I, 5 (3).

Wis., IV, 10; N. Y., III, 11.

Cf. Cal., IV, 10; Colo., V, 13; Conn., III, 9; Del., II, 8; Fla., III, 12; Ga., III, 7 (4); Ida., III, 13; Ia., III, 9; Ill., IV, 10; Ind., IV, 12; Kan., II, 10; Ky., 40; La., 28; Md., III, 22; Minn., IV, 5; Mich., IV, 10; Miss., 55; Mo., IV, 42; Mont., V, 12; Nev., IV, 14; N. J., IV, 4 (4); Neb., III, 8; N. H., II,

24; N. C., II, 16; N. Dak., II, 49; Ohio, II, 19; Or., IV, 13; Pa., II, 12; R. I., IV, 8; S. C., II, 26; S. Dak., III, 13; Tex., III, 12; Tenn., II, 21; Va., V, 10; W. Va., VI, 24; Wy., III, 13.

Adjournment: Cal., IV, 14; Del., II, 10; Fla., III, 13; Ill., IV, 10; Ind., IV, 10; Ia., III, 14; Ky., 41; Kan., II, 10; Minn., IV,

6; Mich., IV, 12; Mont., IV, 14; Nev., IV, 15; N. J., IV, 4 (5); Neb., III, 8; Or., IV, 11; Ohio, II, 14; Pa., II, 14; Tex., III, 17; Wy., III, 15; W. Va., VI, 23; N. Y., Rev., III, 15; W. Va., VI, 23; N. Y., Rev., III, 11.

Publicity: Cal., IV, 13; Del., II, 9; Fla., III, 13; Ill., IV, 10; Ind., IV, 13; Ia., III, 13; Md., III, 21; Mich., IV, 12; Mont., V, 13; Nev., IV, 15; Neb., III, 8; N. Y., Rev., III, 2; Ohio, II, 13; Pa., II, 13; Tex., III, 16; Tenn., II, 22; Wy., III, 14.

§ 12. SESSIONS, WHEN—DURATION.—The first legislature shall meet on the first Wednesday after the first Monday in November, A. D. 1889. The second legislature shall meet on the first Wednesday after the first Monday in January, A. D. 1891, and sessions of the legislature shall be held biennially thereafter, unless specially convened by the governor, but the times of meeting of subsequent sessions may be changed by the legislature. After the first legislature the sessions shall not be more than sixty days.

§ 13. LIMITATION ON MEMBERS HOLDING OFFICE IN THE STATE.—No member of the legislature during the term for which he is elected shall be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected.

See U. S. Const., I, 6 (2).

See next section and references.

Ala., IV, 17; Cal., IV, 19; Colo., V, 8; Ia., III, 21; Ky., 44; Me., IV, 3, 10; Miss., IV, 45; Mo., IV, 12; Mont., V, 7; Nev., IV,

8; N. Dak., II, 39; S. Dak., III, 12; Va., V, 8; Pa., II, 6; Wy., III, 8.

§ 14. SAME, FEDERAL OR OTHER OFFICE.—No person being a member of congress, or holding any civil or military office under the United States or any other power, shall be eligible to be a member of the legislature; and if any person after his election as a member of the legislature shall be elected to congress or be appointed to any other office, civil or military, under the government of the United States, or any other power, his acceptance thereof shall vacate his seat: Provided, That officers in the militia of the state who receive no annual salary, local officers, and postmasters, whose compensation does not exceed three hundred dollars per annum, shall not be ineligible.

Cf. Ala., XVI, 1; Cal., IV, 20; Colo., V, 8; Conn., X, 4; Del., III, 8; Ga., III, 4, (7); Ill., IV, 3; Ind., II, 9; Ia., III, 22; Kan., II, 5; Mont., V, 7; Me., Art. IV, Pt. III, 11; Md., III, 10; Mass., Amend. VIII; Mich., IV, 6; Mo., XIV, 4; N. Dak., II, 37;

Neb., III, 6; Nev., IV, 9; N. Y., III, 8; Or., II, 10; Pa., XII, 2; R. I., IX, 6; S. C., II, 28; S. Dak., III, 3; Tex., XVI, 12; Vt., II, 26; Wy., III, 8; W. Va., VI, 13; Wis., XIII, 3; U. S. Const., I, 6 (2).

§ 15. WRITS OF ELECTION TO FILL VACANCIES.—The governor shall issue writs of election to fill such vacancies as may occur in either house of the legislature.

Del. Sched., 9; Cal., IV, 12; Colo., V, 11; Ill., IV, 2; Ind., V, 19; Ia., III, 12; Mont., V, 45; Nev., IV, 12; N. Dak., II, 44; S.

Dak., III, 10; Tenn., II, 15; Wy., III, 4; Ark., V, 6; Ala., IV, 9; Ga., V, 1, (13); Mo., IV, 14.

§ 16. PRIVILEGES FROM ARREST.—Members of the legislature shall be privileged from arrest in all cases except treason, felony, and breach of the peace; they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement of each session.

Ala., IV, 14; Ark., V, 15; Cal., IV, 11; Solo., V, 16; Mont., V, 15; Mich., IV, 7;

Miss., IV, 48; Neb., III, 12; Pa., II, 15; Wis., IV, 15.

§ 17. FREEDOM OF DEBATE.—No member of the legislature shall be liable in any civil action or criminal prosecution whatever for words spoken in debate.

Cf. Ala., IV, 14; Ark., V, 15; Colo., V, 16; Conn., III, 10; Ga., III, 7 (3); Ill., IV, 14; Ind., IV, 8; Ida., III, 7; Kan., II, 22; Ky., 43; La., 26; Me., IV, Pt. III, 8; Mich., IV, 7; Minn., V, 8; Mont., V, 15;

N. Y. (Rev.), III, 12; Neb., II, 23; N. J., IV, 4 (8); Or., IV, 9; Tenn., II, 13; N. Dak., II, 42; S. Dak., III, 11; Va., V, 11; W. Va., VI, 17; Wis., IV, 16; Wy., III, 16.

§ 18. STYLE OF LAWS.—The style of the laws of the state shall be: "Be it enacted by the legislature of the state of Washington"; and no laws shall be enacted except by bill.

Cf. Ala., IV, 2; Ark., V, 19; Cal., IV, 1; Colo., V, 18; Conn., III, 1; Fla., III, 15; Ill., IV, 11; Ind., IV, 1; Ia., III, 1; Ida., III, 1; Kan., II, 20; Md., III, 29; Mich., IV, 4; Minn., IV, 13; Miss., IV, 56; Mo., IV, 24; Mont., V, 20; Neb., III, 10; Nev., IV, 23; N. J., IV, 7; N. Y. (Rev.), III, 14;

N. C., II, 21; N. Dak., II, 59; Ohio, II, 18; Or., IV, 1; S. C., II, 19; S. Dak., III, 18; Tenn., II, 20; Tex., III, 29; Wis., IV, 17; Wy., III, 21.

Formal requisites of acts, enacting clause: See Seat of Government Case, 1 W. T. 15.

§ 19. BILL TO CONTAIN ONE SUBJECT.—No bill shall embrace more than one subject, and that shall be expressed in the title.

Cf. Ala., IV, 2; Cal., IV, 24; Colo., V, 21; Ida., III, 16; Ill., IV, 13; Ind., IV, 19; Ia., III, 29; Kan., II, 16; Ky., 51; Mont., V, 23; Mich., IV, 20; Mo., IV, 28; Neb., III, 11; Nev., IV, 17; N. J., IV, 7 (4); N. Dak., II, 61; Pa., III, 3; Or., IV, 20; S. C., II, 20; Tex., III, 35; Va., V, 15; W. Va., VI, 30; Wis., IV, 18; Wy., III, 24; N. Y. (Rev.), III, 16.

Cited in 1 Wash. 294; 1 Wash. 307; 1 Wash. 311; 1 Wash. 387; 2 Wash. 495; 3 Wash. 275; 6 Wash. 149; 10 Wash. 149; 15 Wash. 10; 15 Wash. 481; 17 Wash. 450; 17 Wash. 634; 19 Wash. 398; 19 Wash. 443; 19 Wash. 448; 21 Wash. 383; 24 Wash. 256; 25 Wash. 126; 28 Wash. 321; 31 Wash. 192; 35 Wash. 166; 35 Wash. 341; 36 Wash. 32; 36 Wash. 537; 38 Wash. 312; 39 Wash. 185; 40 Wash. 407; 41 Wash. 4; 42 Wash. 193, 194; 42 Wash. 499; 43 Wash. 664; 46 Wash. 597; 48 Wash. 44; 48 Wash. 71; 49 Wash. 623; 50 Wash. 518.

See 2 Remington's Digest, pp. 2614-2620, §§ 13-32.

The object of the requirement that the subject of an act shall be expressed in its title is, that no person may be deceived as to what matters are being legislated upon: *Seymour v. Tacoma*, 6 Wash. 138, 148; as the constitution has not indicated the degree of particularity necessary to express in its title the subject of an act, technical interpretations should not prevail, but the objection should be grave and the conflict palpable: *Id.*, 149; see *Marston v. Humes*, 3 Wash. 267.

It is not necessary to the validity of a penal statute that it declare in its title the purpose for which it was enacted: *Ah Lim v. Territory*, 1 Wash. 156, 165.

If the title of an act relates only to proceedings by information, a section of the

act dispensing with grand juries, unless ordered by the judge, is properly within the title, and does not bring another subject into the act: *In re Rafferty*, 1 Wash. 382; see Art. 1, § 26.

A provision in an act giving any person losing money at gaming a cause of action to recover from the dealer or winner is fairly embraced within the title of the act, which reads "An act to prevent and punish gaming": *Maling v. Crummey*, 5 Wash. 222.

The title of the act (Laws 1890, p. 131) relating to "incorporation" of cities and towns is broad enough to include the sections of the act providing for enlargement and consolidation: *King Co. v. Davies*, 1 Wash. 290.

The provisions of the act (Laws 1890, p. 520) authorizing cities to purchase waterworks, etc., is sufficiently expressed in the title: *Seymour v. Tacoma*, 6 Wash. 138.

So also the provisions of the act authorizing the consolidation of municipal corporations (Laws 1890, p. 138): *State v. New Whatcom*, 3 Wash. 7.

The title of the act of March 26, 1890 (Laws 1890, p. 520) is not invalid on the ground that the subject is not expressed in the title: *Yesler v. Seattle*, 1 Wash. 308.

The subject matter of the act amending § 109, Code of 1881, is included within the title of "An act relating to pleadings in civil actions, and amending §§ 76, 77 and 109 of the Code of Washington of 1881": *Marston v. Humes*, 3 Wash. 267; but see *Heilig v. Puyallup*, 7 Wash. 29, 32; compare *Harland v. Territory*, 3 W. T. 131; *Speck v. Gray*, 14 Wash. 589; *State v. Halbert*, 14 Wash. 306; distinguished in *State v. Halbert*, 14 Wash. 308.

The act (Laws 1890, p. 51) providing for the extending the issuing of bonds, regardless of population, to five per cent of its taxable property to be taken from the last assessment for city purposes: Held, that the title embraced but one subject, and such provisions were within the title and valid though the remainder of the act might be unconstitutional: *Van Houten v. Routhe*, 1 Wash. 306.

The act (Laws 1890, p. 249) creating a mining bureau and defining its powers does not authorize the mining bureau either to direct or superintend a geological or mineralogical survey of the state, nor disburse moneys appropriated for such purposes; if it had attempted to so enlarge them it would have been in contravention of this section of the constitution: *Parrish v. Reed*, 2 Wash. 491, 494.

The act (Laws 1890, p. 225) empowering cities and towns organized prior to the adoption of the constitution to extend their credit and fund their indebtedness, and validate existing indebtedness, is not unconstitutional under this section: *Baker v. Seattle*, 2 Wash. 577.

The law of 1893, page 407, being an act to provide for the manner of commencing civil actions in the superior court, and bringing the same to trial, does not violate this section: *McMaster v. Thresher Co.*, 10 Wash. 147.

The act of February 2, 1888, entitled "an act to regulate, restrain or prohibit the sale of intoxicating liquors," does not contravene the provisions of the organic act (§ 1924): *State v. Spokane Falls*, 2 Wash. 40.

The title being "An act to secure to the owners of livestock payment of the full value of all animals killed or maimed by railroad trains," and providing a liability for all animals killed or maimed where roads are not fenced: Held, to embrace but one object, which was expressed in the title: *O. R. & N. Co. v. Smalley*, 1 Wash. 206, 209.

If the title of an act is comprehensive enough to embrace all of its provisions, when the act is construed as a whole, the fact that certain sections are held unconstitutional will not necessarily render the remainder unconstitutional on the ground that the title of the act is not broad enough to include the same: *Jolliffe v. Brown*, 14 Wash. 155; see *Van Houten v. Routhe*, 1 Wash. 306.

An act of the legislature will not be declared void on the ground of violating this section unless the violation is most clear—sound policy and legislative convenience requiring that this provision should be liberally construed: *Lancey v. King Co.*, 15 Wash. 9.

The act of Feb. 12, 1895 (§ 5629 et seq., this code), entitled "An act to grant and

prescribe powers of counties relative to public works undertaken or proposed by the state of Washington, or the United States," contains but one subject matter, which is fairly embraced within the scope of its title: *Id.*

The subject matter of the act of March 19, 1895, page 176, providing for the election of superior court judges by newly established districts is sufficiently embraced in the title reciting that it is "an act in relation to superior courts and the election of superior court judges": *State v. Rusk*, 15 Wash. 403.

The title of an act (Laws 1895, p. 451), showing that its object is to provide for the organization and government of irrigation districts and the sale of bonds arising therefrom is not broad enough to embrace a provision in the act for validating the indebtedness of a district previously organized and the levying of a tax to pay the same: *Percival v. Cowychee etc. Dist.*, 15 Wash. 480; see *Marston v. Humes*, 3 Wash. 267; *In re Rafferty*, 1 Wash. 382.

This provision must be liberally construed: *Dacres v. Oregon R. & Nav. Co.*, 1 Wash. 525; *Lancey v. King County*, 15 Wash. 9.

Acts relating to one or more subjects: *Clarke County v. Brazee*, 1 W. T. 199; *In re Rafferty*, 1 Wash. 382; *State v. Spokane Falls*, 2 Wash. 40; *Baker v. Seattle*, 2 Wash. 576; *McMaster v. Advance Thresher Co.*, 10 Wash. 147; *Bettman v. Cowley*, 19 Wash. 207; *Bogue v. Seattle*, 19 Wash. 396; *Merritt v. Corey*, 22 Wash. 444; *State v. Hall*, 24 Wash. 255, 64 Pac. 153; *Jensen-King-Byrd Co. v. Williams*, 35 Wash. 161; *Seattle & Lake Wash. Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503; *Weed v. Goodwin*, 36 Wash. 31; *State ex rel. Nettleton v. Case*, 39 Wash. 177; *State v. Packenham*, 40 Wash. 403; *State v. Moran*, 46 Wash. 596.

Expression in title of subject of act in general: *Baker v. Prewett*, 3 W. T. 474; *Ah Lim v. Territory*, 1 Wash. 156; *State v. Ames*, 47 Wash. 328; *State v. Winsor*, 50 Wash. 508; *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164.

The purpose of the title is only to call attention to the subject matter, and the act must be looked to for full description: *Marston v. Humes*, 3 Wash. 267; *Lancey v. King County*, 15 Wash. 9; *Seattle v. Barto*, 31 Wash. 141; *State v. Fraternal Knights and Ladies*, 35 Wash. 338.

The title of an act is sufficient if the object is fairly embraced therein: *Baker v. Prewett*, 3 W. T. 474; *Marston v. Humes*, 3 Wash. 267; *State ex rel. Dustin v. Rusk*, 15 Wash. 403; *Percival v. Cowychee & Wide Hollow Irr. Dist.*, 15 Wash. 480; *State ex rel. American Sav. Union v. Whittlesey*, 17 Wash. 447; *Karasek v. Peier*, 22 Wash. 419; *Hathaway v. McDonald*, 27 Wash. 659; *Seymour v. Tacoma*, 6 Wash. 138.

A general title includes all specific matters relating thereto without naming them: *Percival v. Cowychee* etc. Irr. Dist., 15 Wash. 580; *Johnson v. Wood*, 19 Wash. 441; *Callvert v. Winsor*, 26 Wash. 368; State ex rel. *Smith v. Dental Examiners*, 31 Wash. 492; *Weed v. Goodwin*, 36 Wash. 31.

Hence the title of an act need not be a complete index thereof: State v. *Sharpless*, 31 Wash. 191; State ex rel. *Zenner v. Graham*, 34 Wash. 81; *McKnight v. McDonald*, 34 Wash. 98; *Seattle & Lake Wash. W. Co. v. Seattle Dock Co.*, 35 Wash. 503; State ex rel. *Zent v. Nichols*, 50 Wash. 508.

Amending or repealing acts: *Harland v. Territory*, 3 W. T. 131; *White v. Territory*, 3 W. T. 397; *Rumsey v. Territory*, 3 W. T. 332; *Marston v. Humes*, 3 Wash. 267; State v. *Halbert*, 14 Wash. 306; State v. *Dillon*, 14 Wash. 703; In re *Nolan*, 21 Wash. 395; State ex rel. *Seattle Electric Co. v. Superior Court*, 28 Wash. 317; State v. *Scott*, 32 Wash. 279; In re *Donnellan*, 49 Wash. 460.

Titles and provisions of acts relating to particular subjects: In re *O'Neill*, 41 Wash. 174; State v. *Fraternal Knights and Ladies*, 35 Wash. 338; State ex rel. *Osborne etc. Co. v. Nichols*, 38 Wash. 309; State v. *Sharpless*, 31 Wash. 191; State ex rel. *Smith v. Dental Examiners*, 31 Wash. 492.

Rights of property, transfers, and encumbrances: *McKnight v. McDonald*, 34 Wash. 98; *Goudy v. Meath*, 38 Wash. 126.

Contracts and rights and liabilities under contracts: *Johnston v. Wood*, 19 Wash. 441; *Armour & Co. v. Western Const. Co.*, 36 Wash. 529; *Shortall v. Puget Sound B. & D. Co.*, 45 Wash. 290.

Civil remedies and proceedings: *Marston v. Humes*, 3 Wash. 267; *Maling v. Crummey*, 5 Wash. 222; *Swinburne v. Mills*, 17 Wash. 611; *Fletcher v. Seattle*, 43 Wash. 627.

Crimes and criminal prosecutions and punishments: In re *Rafferty*, 1 Wash. 382; *Hathaway v. McDonald*, 27 Wash. 659; State v. *Tieman*, 32 Wash. 294; State ex rel. *Zenner v. Graham*, 34 Wash. 81.

Counties, towns, and municipal corporations: *Commissioners of King County v. Davies*, 1 Wash. 290; State ex rel. *Cole v. New Whatcom*, 3 Wash. 7.

Taxation and public funds: State ex rel. *American Savings Union v. Whittlesey*, 17 Wash. 447; In re *White's Estate*, 42 Wash. 360.

Schools and school districts: *Van Houten v. Routh*, 1 Wash. 306; State ex rel. *Henry v. Macdonald*, 25 Wash. 122; *Callvert v. Winsor*, 26 Wash. 368; State v. *Packenhams*, 40 Wash. 403.

Public works and improvements: *Yesler v. Seattle*, 1 Wash. 308; *Seymour v. Tacoma*, 6 Wash. 138; *Lancey v. King County*, 15 Wash. 9; *Tacoma Land Co. v. Young*, 18 Wash. 495; *Lewis County v. Gordon*, 20 Wash. 80; *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503.

Courts and judges: State ex rel. *Dustin v. Rusk*, 15 Wash. 403; *Bogue v. Seattle*, 19 Wash. 396; *Grant v. Cole*, 23 Wash. 542.

Public officers: State ex rel. *Griffith v. Newland*, 37 Wash. 428.

Validity of acts as affected by expression in title: State v. *Clark*, 43 Wash. 664; *Jolliffe v. Brown*, 14 Wash. 155; *Howlett v. Cheetham*, 17 Wash. 626.

A statute can cover no subject not specially mentioned in nor germane to its title: *Harland v. Territory*, 3 W. T. 131; State v. *Halbert*, 14 Wash. 306; *Percival v. Cowychee & Wide Hollow Irr. Dist.*, 15 Wash. 480; *Howlett v. Cheetham*, 17 Wash. 626; *Armour & Co. v. Western Const. Co.*, 36 Wash. 529; State ex rel. *Henry v. Macdonald*, 25 Wash. 122; State ex rel. *Nettleton v. Case*, 39 Wash. 177; *Anderson v. Whatcom County*, 15 Wash. 47; *Sengfelder v. Hill*, 21 Wash. 371; State v. *Clark*, 43 Wash. 664.

Invalidity of provisions not expressed in title of act: State v. *Tieman*, 32 Wash. 294; State v. *Poole*, 42 Wash. 192; State ex rel. *Matson v. Superior Court*, 42 Wash. 491; State ex rel. *Potter v. King County*, 49 Wash. 619. The insufficiency of a title of an act does not affect the validity of sections which were simply the re-enactment of valid existing laws: In re *Donnellan*, 49 Wash. 460.

The object of this section is to secure protection and enlightenment of the members of the legislature and to give fair notice of the purpose of the bill: State ex rel. *Potter v. King County*, 49 Wash. 619.

§ 20. ORIGIN AND AMENDMENT OF BILLS.—Any bill may originate in either house of the legislature, and a bill passed by one house may be amended in the other.

Cf. Cal., IV, 15; Fla., III, 14; Ill., IV, 12; Ind., IV, 17; Ia., III, 15; Kan., II, 12; Mich., IV, 13; Md., III, 27; Mo., IV, 26; Miss., IV, 59; Neb., III, 9; Nev., IV, 16; N. Y., Rev., III, 13; Or., IV, 18; S. C., II,

18; Tex., III, 31; Va., V, 9; W. Va., VI, 28.

Id. Ida., III, 14; N. Y., III, 13; N. Dak., II, 57; S. Dak., III, 20; Wis., IV, 19.

§ 21. YEAS AND NAYS.—The yeas and nays of the members of either house shall be entered on the journal on the demand of one-sixth of the members present.

Fla., III, 12; N. Dak., II, 49; Ohio, II, 9; S. Dak., III, 13; Va., V, 10; Wy., III, 13.

§ 22. PASSAGE OF BILLS.—No bill shall become a law unless, on its final passage, the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal of each house, and a majority of the members elected to each house be recorded thereon as voting in its favor.

Cf. Ala., IV, 21; Ark., V, 22; Cal., IV, 15; Colo., V, 22; Ill., IV, 12; Ia., III, 17; Kan., II, 13; Md., III, 28; Mich., IV, 19; Mo., IV, 31; Neb., III, 10; Nev., IV, 18; N. J., IV, 4 (6); N. Y., Rev., III, 15; N. Dak., II, 65; Ohio, II, 9; Pa., III, 4; S. Dak., III, 18; Va., V, 10; W. Va., VI, 29. Yeas and nays: Fla., III, 12; Ind., IV, 18; Mont., V, 24; Wy., III, 25; and see ref. above.

§ 23. COMPENSATION OF MEMBERS.—Each member of the legislature shall receive for his services five dollars for each day's attendance during the session, and ten cents for every mile he shall travel in going to and returning from the place of meeting of the legislature, on the most usual route.

Cf. Ala., IV, 6; Cal., IV, 23; Colo., V, 6; Ida., III, 23; Ill., IV, 21; Kan., II, 3; La., 27; Ky., 42; Mo., IV, 16; Md., III, 15; Mich., IV, 15; Minn., IV, 7; Mont., V, 5; N. Y., Rev., III, 6; N. Dak., II, 45; Or., IV, 29; S. Dak., III, 6; Tex., III, 24; Wis., IV, 21; Wy., III, 6.

§ 24. LOTTERIES AND DIVORCE.—The legislature shall never authorize any lottery, or grant any divorce.

Lotteries: Cf. Ala., IV, 26; Ark., XIX, 14; Cal., IV, 26; Colo., XVIII, 2; Fla., III, 23; Ill., IV, 27; Ind., XV, 8; Ia., III, 28; Ida., III, 10; Kan., XV, 3; Mont., XIX, 2; Md., III, 36; Mich., IV, 27; Minn., IV, 31; Miss., IV, 98; Mo., XIV, 10; Neb., III, 21; Nev., IV, 24; N. J., IV, 7; N. Y., I, 10; N. Y., Rev., I, 9; Ohio, XV, 6; Or., XV, 4; R. I., IV, 12; S. C., XIV, 2; S. Dak., III, 25; Tex., III, 47; Tenn., XI, 5; Va., V, 8; W. Va., VI, 36; Wis., IV, 24.

Divorces: Ala., IV, 30; Ark., V, 24; Cal., IV, 25 (5); Colo., V, 25; Fla., III, 20; Ida., III, 19; Ill., IV, 22; Ind., IV, 22; Ia., III, 27; Kan., II, 18; Ky., 59; La., 46; Mont., V, 26; Md., III, 33; Mich., IV, 26; Minn., IV, 28; Miss., IV, 90 (a); Mo., IV, 53; N. Dak., II, 69; N. Y., Rev., I, 9; Neb., III, 15; Nev., IV, 20; N. J., IV, 7 (i); N.

Y., II, 18, Amend.; N. C., II, 10; Ohio, II, 32; Or., IV, 23; Pa., III, 7; S. Dak., III, 23; S. C., XIV, 5; Tenn., XI, 4; Tex., III, 56; Va., V, 20; W. Va., VI, 39; Wis., IV, 24; Wy., III, 27.

Cited in 19 Wash. 40.

The organic act of the territory of Oregon authorized a special act of the legislature divorcing parties from the bonds of matrimony: *Maynard v. Hill*, 2 W. T. 321.

The marriage relation being a status, rather than a contract, its dissolution by the legislature is not the impairment of the obligation of a contract: *Id.*; see *Maynard v. Valentine*, 2 W. T. 1.

This section is mandatory and self-executing: *Seattle v. Chin Let*, 19 Wash. 38.

§ 25. EXTRA COMPENSATION, PROHIBITED.—The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office.

See *infra*, Art. III, § 25, compensation of state officers, and references.

Cf. Ala., IV, 29; Ark., V, 27; Cal., IV, 32; Colo., V, 28; Ill., IV, 19; Mo., IV, 48; Mont., V, 29; N. Y., X, 9, Amend.; N. Y., Rev., X, 9; Ohio, II, 29; Pa., III, 11; Tex., III, 53; W. Va., VI, 38; Wy., III, 30; Wis., IV, 26.

Cited in 4 Wash. 92; 6 Wash. 258; 7 Wash. 450; 9 Wash. 232; 19 Wash. 488; 21 Wash. 439; 22 Wash. 268; 47 Wash. 375; 48 Wash. 465.

See 2 Remington's Digest, p. 2181, §§ 43, 44.

The prohibition found in this section does not apply to officers who receive specific fees for specific services, hence, the fees of justices and constables may be reduced by a law passed subsequent to their election and qualification: *State v. Grimes, ex rel. Thurston County*, 7 Wash. 445.

A legislative act which provides that the county treasurer shall be charged with the duty of assessing and collecting city taxes, and that the city shall pay him therefor the sum of five hundred dollars per year, does not violate this section: *State v. Carson*, 6 Wash. 250. See *Rhode v. Seavey*, 4 Wash. 91, question as to justices' of the peace salaries in cities over five thousand inhabitants raised, but not decided.

Attorneys' fees paid by delinquent taxpayers upon collections made by county attorneys under Laws of 1891, page 321, § 105, cannot be allowed as extra compensation under this section: *Spokane County v. Allen*, 9 Wash. 229, 232; affirming and distinguishing *State v. Carson*, 6 Wash. 250.

The legislature has no power to grant extra compensation to employees of the legislature, where no services in addition to their regular duties were rendered; but extra compensation can be granted to clerks for services additional to their regular duties: *State ex rel. Eshelman v. Cheetham*, 21 Wash. 437. And the restriction applies as well to either branch as to both branches of the legislature: *Id.*

Allowing a policeman witness fees, although he draws a regular salary, does not fall within the inhibition of this section or § 8 of Art. XI: *State v. Saillard*, 22 Wash. 267.

The state treasurer is not entitled to compensation in addition to his salary for

services in disposing of the securities deposited with him by a foreign insurance company as trustee for the policy holders: *Young v. Millett*, 19 Wash. 486.

As to members of a city council, see *Tacoma v. Lillis*, 4 Wash. 797; *James v. Seattle*, 22 Wash. 654.

Where the commissioner of public lands, an office created by the constitution, was elected for the term of four years, and served for two years drawing a salary under the general appropriation acts, which for ten years theretofore allowed a salary of \$2,000 per annum, his salary cannot be increased during his term by a general act fixing his compensation at \$3,000, even if the same were the first general act fixing his salary: *State ex rel. Ross v. Clausen*, 47 Wash. 607.

Laws 1907, changing the title of county surveyor to county engineer and changing the compensation from \$5 per day for the time employed to a fixed salary per year, violates the provisions of this section and of § 8, Art. XI, prohibiting such increase, etc., of the "salary" of "county officers" under like circumstances, as the two provisions must be construed together: *State ex rel. Funke v. Board of Commrs. of Pierce County*, 48 Wash. 461.

A law requiring the city council in cities of the third class to sit as a board of equalization, for which they may receive compensation, merely imposes a special duty, and the repeal of such law does not violate the provisions of this section: *Heilig v. Puyallup City Council*, 7 Wash. 29.

The allowance of a deputy to a county officer does not violate the provisions of this section as to increasing compensation of an officer during his term: *Nelson v. Troy*, 11 Wash. 435.

§ 26. SUITS AGAINST THE STATE.—The legislature shall direct by law in what manner and in what courts suits may be brought against the state.

Cal., XX, 6; Del., I, 9; Pa., I, 11; Tenn., I, 17.

Cited in 2 Wash. 497; 18 Wash. 75; 27 Wash. 291.

See 2 Remington's Digest, p. 2206, §§ 33-36.

This section was intended to permit actions against the state in like manner as against individuals: *Northwestern & Pacific Hypotheek Bank v. State*, 18 Wash. 73.

The word "claim," used in the statute directing how suits may be brought against the state, must be held to mean cause of action: *Northwestern & Pac. Hypotheek*

Bank v. State, 18 Wash. 73. A statute permitting suits to be brought against a state does not of itself subject the state to a liability that did not exist before: *Billings v. State*, 27 Wash. 288.

Conditions precedent to action against state: See *Nye v. Kelly*, 19 Wash. 73.

The state auditor cannot plead an offset in favor of the state against a county when mandamus at the suit of the county to issue warrants for the amount of school funds duly apportioned to the county: *State ex rel. Tanner v. Cheetham*, 23 Wash. 666.

§ 27. ELECTIONS—VIVA VOCE VOTE.—In all elections by the legislature the members shall vote viva voce, and their votes shall be entered on the journal.

Cal., IV, 28; Ia., III, 38; Minn., IV, 30; Neb., III, 8; N. C., II, 9; Tenn., IV, 4; Wis., IV, 30.

§ 28. SPECIAL LEGISLATION.—The legislature is prohibited from enacting any private or special laws in the following cases:—

1. For changing the names of persons, or constituting one person the heir at law of another.

2. For laying out, opening, or altering highways, except in cases of state roads extending into more than one county, and military roads to aid in the construction of which lands shall have been or may be granted by congress.

3. For authorizing persons to keep ferries wholly within this state.

4. For authorizing the sale or mortgage of real or personal property of minors, or others under disability.

5. For assessment or collection of taxes,^a or for extending the time for collection thereof.^b

6. For granting corporate powers or privileges.

7. For authorizing the apportionment of any part of the school fund.

8. For incorporating any town or village, or to amend the charter thereof.

9. From giving effect to invalid deeds, wills, or other instruments.

10. Releasing or extinguishing, in whole or in part, the indebtedness, liability, or other obligation of any person or corporation to this state, or to any municipal corporation therein.

11. Declaring any person of age, or authorizing any minor to sell, lease, or encumber his or her property.

12. Legalizing, except as against the state, the unauthorized or invalid act of any officer.

13. Regulating the rate of interest on money.

14. Remitting fines, penalties, or forfeitures.

15. Providing for the management of common schools.

16. Authorizing the adoption of children.

17. For limitation of civil or criminal action.

18. Changing county lines, locating or changing county seats: Provided, This shall not be construed to apply to the creation of new counties.

See Art. XI., § 10.

(1). Ark., V, 24; Cal., IV, 25 (6); Colo., 30; Ida., III, 19; Ill., IV, 22; Ky., 59 (16); La., 46; Mont., V, 26; Mich., IV, 23; Mo., IV, 53; Neb., III, 15; Nev., IV, 20; N. J., IV, 7; N. Y., Rev., III, 18; N. Dak., II, 69; Or., IV, 23; Pa., III, 7; Tex., III, 56; W. Va., VI, 39; Wy., III, 27.

(2). Ark., V, 24; Cal., IV, 25 (7); Colo., V, 25; Fla., III, 20; Ind., IV, 22; Ia., III, 30; Ida., III, 39; Ky., 59 (16); La., 46; Mont., V, 26; Mich., IV, 23; Mo., IV, 53; Neb., III, 15; Nev., IV, 20; N. J., IV, 7; N. Y., Rev., III, 18; N. Dak., II, 69; Or., IV, 23; Pa., III, 7; Tex., III, 56; W. Va., VI, 39; Wy., III, 27; Ill., IV, 22.

(3). Cf. Cal., IV, 25 (25); Colo., V, 25; Ga., III, 7 (18); Ill., IV, 22; Ida., III, 19; Mo., IV, 53; Mont., V, 26; N. Dak., II, 69; Neb., III, 15; N. Y., Rev., II, 18; Pa., III, 7; S. Dak., III, 23; Tex., III, 56; W. Va., VI, 39; Wy., III, 27.

(4). Cf. Fla., III, 20; Ida., III, 19; Ind., IV, 22; Ky., 59 (6); La., 46; Md., III, 33; Mo., IV, 53; Mont., V, 26; N. Dak., II, 69; Nev., IV, 20; N. J., IV, 7; Or., IV, 23; S.

Dak., III, 6; Va., V, 20; Wis., IV, 31, Amend.; Wy., III, 27.

(5). (a) Cf. Cal., IV, 25 (10); Fla., III, 20; Ind., IV, 22; Ia., III, 30; Ida., III, 19; Ky., 59 (15); La., 46; Mo., IV, 53; Mont., V, 26; Nev., IV, 20; N. Dak., II, 69; Or., IV, 23; Wis., IV, 31; Wy., III, 27.

(b) Cal., IV., 25 (13); Ida., III, 19; Ky., 59 (15); La., 46; Md., III, 33; Mo., IV, 27; Mont., V, 26; N. Dak., II, 69; Tex., III, 56; Wis., IV, 31, Amend.; Wy., III, 27.

(6). Cf. Cal., IV, 25 (19); Colo., V, 25; Ga., III, 7 (18); Ind., IV, 22; Mo., IV, 63; Mont., V, 26; Neb., III, 15; N. Y., III, 18; N. Y., Rev., III, 18; N. Dak., II, 69; Pa., III, 7; S. Dak., III, 23; Wy., III, 27.

(8). Cf. Ill., IV, 22; Ky., 59 (17); N. Dak., II, 69; N. Y., Rev., III, 18; S. Dak., III, 23; Wy., III, 27.

(9). Cal., IV, 25 (14); Colo., V, 25; Ida., III, 19; Ky., 59 (12); La., 46; Md., III, 33; Mo., IV, 53; Mont., V, 26; N. Dak., II, 69; Tex., III, 56; Wy., III, 27.

(10). Cal. IV, 25 (16); Ida., III, 19; Mont., V, 26; N. Dak., II, 69; Tex., III, 55; Wy., III, 27.

(11). Cf. Cal., IV, 25 (17); Colo., V, 25; Mo., IV, 53.

(12). Cal., IV, 25 (18); Ida., III, 19; Ky., 59 (13); La., 46; Mo., IV, 53; N. Dak., II, 69.

(13). Cal., IV, 25 (23); Colo., V, 25; Ida., III, 19; Ky., 59 (21); La., 46; Mo., IV, 53; Mont., V, 26; Neb., III, 15; N. Y., III, 18, Amend.; N. Dak., II, 69; Or., IV, 23; Pa., III, 7; Tex., III, 56; W. Va., VI, 39; Wy., III, 27.

(14). Cal., IV, 25 (26); Colo., V, 25; Ill., IV, 22; Ida., III, 19; Ky., 59 (4); La., 46; Mo., IV, 53; Mont., V, 26; Neb., III, 15; N. Dak., II, 69; Pa., III, 7; S. Dak., III, 23; Tex., III, 56; W. Va., VI, 39; Wy., III, 27.

(15). Cal., IV, 25 (27); Colo., V, 25; Ill., IV, 22; Ida., III, 19; Ky., 59 (25); Mo., IV, 53; Mont., V, 26; Neb., III, 15; N. Dak., II, 69; N. J., IV, 7; Pa., III, 7; Tex., III, 56; S. Dak., III, 23; Wy., III, 27.

(16). Ark., V, 24; Cal., IV, 25 (31); Ida., III, 19; Ky., 59 (9); La., 46; Mo., IV, 53; Mont., V, 26; N. Car., II, 2; Pa., III, 7; Tenn., XI, 6; Tex., III, 56.

(17). Cal., IV, 25 (32); Colo., V, 25; Ida., III, 19; Ky., 59 (5); Mont., V, 26; Md., III, 33; Mo., IV, 53; N. Dak., II, 69; Tex., III, 56; Wy., III, 27.

(18). Locating or changing county seats: Cal., IV, 25 (21); Colo., V, 25; Ida., III, 19; Ill., IV, 22; Ia., III, 30; Ky., 59 (26); Mo., IV, 53; Mont., V, 26; Neb., III, 15; N. Y., Rev., III, 18; N. Dak., II, 69; Pa., III, 7; S. Dak., III, 23; Tex., III, 56; W. Va., VI, 39; Wis., IV, 31, Amend.; Wy., III, 27.

The proviso does not appear in any other constitution.

Changing county lines: Ia., III, 30; Wy., XII, 2.

Cited in 3 Wash. 11; 7 Wash. 231, 232; 15 Wash. 140; 33 Wash. 503; 43 Wash. 64.

See 1 Remington's Digest, pp. 533, 534, §§ 99-102; pp. 2613, 2614, §§ 10-12.

SPECIAL MUNICIPAL CHARTERS.—The constitutional prohibition against special legislation incorporating cities and towns is purely prospective in its operation and does not affect existing special charters: *Tacoma Land Co. v. Pierce Co.*, 1 Wash. 482; see *State v. New Whatcom*, 3 Wash. 7.

The contention that by the terms of the act under which Dist. No. 10 was incorporated a different and better system of education was provided for cities than was enjoyed by the rest of the state, amounting to special legislation, will not be sustained: *Holmes & Bull F. Co. v. Hedges*, 13 Wash. 696, 707.

The special act of the territorial legislature, Laws of 1869, page 437, incorporating the city of Seattle, does not come within the prohibition of the organic law (Rev. Stats. U. S., sec. 1889) against granting private charters or special privileges, as such act of incorporation is the grant of a public charter: *Alger v. Hill*, 2 Wash. 344. See *Seattle v. Yesler*, 1 W. T. 571.

Laws of 1890, page 135, § 6, providing for the organization, classification, incorporation and government of municipal corporations, violates the constitutional inhibition against creating municipal corporations by special laws: *Denver v. Spokane Falls*, 7 Wash. 226.

A law is not necessarily a general law merely because it applies to all communities in the state similarly situated: *Denver v. Spokane Falls*, 7 Wash. 226.

As to regulation of government and affairs of counties, towns and municipalities, see *Newman v. North Yakima*, 7 Wash. 220.

Laws of 1903, page 209, chapter 115, appropriating certain sums for the construction of armories in three specified cities, violates the provisions of subdivision 6 of this section: *Terry v. King County*, 43 Wash. 61.

A law conferring the right of eminent domain upon boom companies does not violate subdivision 6 of this section: *North River Boom Co. v. Smith*, 15 Wash. 138.

The drainage act of 1895, page 143, granting the power of eminent domain, applying alike to all lands and persons similarly situated, is not special legislation: *Lewis County v. Gordon*, 20 Wash. 80; *Skagit County v. McLean*, 20 Wash. 92.

A law authorizing the validation of invalid warrants of a city is not special legislation, but is a curative act, applicable only to what has been done before the date of the act: *Baker v. Seattle*, 2 Wash. 576; *Hunt v. Fawcett*, 8 Wash. 396. And so, of a law authorizing a municipal corporation to assume and ratify an indebtedness created by the residents of a de facto municipality: *State ex rel. Traders' Bank v. Winter*, 15 Wash. 407. And the legislature may authorize the payment of an indebtedness incurred under an unconstitutional law: *Lewis County v. Gordon*, 20 Wash. 80; *Skagit County v. McLean*, 20 Wash. 92; *State ex rel. Lattimer v. Henry*, 28 Wash. 38. Or the legislature may validate municipal contracts entered into by a de facto municipality: *Pullman v. Hungate*, 8 Wash. 519; *State ex rel. Hemen v. Ballard*, 16 Wash. 418; *Abernethy v. Medical Lake*, 9 Wash. 112.

§ 29. CONVICT LABOR.—After the first day of January, eighteen hundred and ninety, the labor of convicts of this state shall not be let out by contract to any person, copartnership, company, or corporation, and the legis-

lature shall by law provide for the working of convicts for the benefit of the state.

Cal., X, 6; cf. Mont., XVIII, 2.

§ 30. BRIBERY OR CORRUPT SOLICITATION.—The offense of corrupt solicitation of members of the legislature, or of public officers of the state or any municipal division thereof, and any occupation or practice of solicitation of such members or officers to influence their official action, shall be defined by law, and shall be punished by fine and imprisonment. Any person may be compelled to testify in any lawful investigation or judicial proceeding against any person who may be charged with having committed the offense of bribery or corrupt solicitation, or practice of solicitation, and shall not be permitted to withhold his testimony on the ground that it may criminate himself or subject him to public infamy, but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving testimony; and any person convicted of either of the offenses aforesaid shall, as part of the punishment therefor, be disqualified from ever holding any position of honor, trust, or profit in this state. A member who has a private interest in any bill or measure proposed or pending before the legislature shall disclose the fact to the house of which he is a member, and shall not vote thereon.

Cf. Ala., IV, 40-42; Ark., V, 35; Cal., IV, 35; Colo., V, 40-42; Mont., V, 41-42; N. Dak., II, 40; N. Y., Rev., XIII, 2, 3, 4; Pa., III, 29-32; S. Dak., III, 28; Tex., XVI, 41; Wy., III, 42-46.

Private interest: Ala., IV, 43; La., 50; N. Dak., II, 43; Mont., V, 44; Pa., IV, 33; Wy., III, 46.

§ 31. LAWS, WHEN TO TAKE EFFECT.—No law, except appropriation bills, shall take effect until ninety days after the adjournment of the session at which it was enacted, unless in case of any emergency (which emergency must be expressed in the preamble or in the body of the act) the legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house; said vote to be taken by yeas and nays and entered on the journals.

Cf. Colo., V, 19; Fla., III, 18; Ill., IV, 13; Ind., IV, 28; Ia., III, 22; Ky., 55; Mo., IV, 36; N. Dak., XI, 67; S. Dak., III, 22.

Cited in 24 Wash. 419; 25 Wash. 612.

If two conflicting acts passed at the same session cannot be harmonized, and one contains an emergency clause and the other does not, the one containing the emergency clause must be taken to overcome the other: *Heilig v. Puyallup City Council*, 7 Wash. 29.

Where an act passed two years previously is amended in various particulars, and by adding another section which provided that "an emergency exists and this act shall take effect immediately," the emergency clause has reference to the amendatory act and not to the original act, which accordingly takes effect upon approval: *State ex rel. Oregon R. & Navigation Co. v. Railroad Commission*, 52 Wash. 17.

§ 32. LAWS, HOW SIGNED.—No bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session, and under such rules as the legislature shall prescribe.

Ill., IV, 13; Ia., III, 15; Mont., V, 27; Neb., III, 2.

An enrolled bill properly certified is conclusive, and courts cannot inquire into the proceedings before its passage: *State ex rel. Reed v. Jones*, 6 Wash. 452. Distinguished in *Scouten v. Whatcom*, 33 Wash. 280, allowing the enrolled bill to be impeached to determine the legislative

intent when there was an ambiguity. If it appears from the history of the act that a clause repealing a former act was included through inadvertence, such clause will be held qualified by the intention of the legislature as manifested in other parts of the same act: *Howlett v. Cheetham*, 17 Wash. 626.

§ 33. OWNERSHIP OF LANDS BY ALIENS, PROHIBITED—EXCEPTIONS.—The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition.

Cited in 16 Wash. 167; 16 Wash. 172; 16 Wash. 375; 18 Wash. 664; 19 Wash. 85; 29 Wash. 230; 33 Wash. 546; 45 Wash. 340; 46 Wash. 105; 46 Wash. 221.

See 1 Remington's Digest, pp. 58, 59, §§ 3, 4.

A lease of lands for ninety-nine years is within the prohibition against alien ownership: State ex rel. Winston v. Morrison, 18 Wash. 664. So is a lease for forty-five years to a corporation upon the majority of its stock being conveyed to aliens: State ex rel. Winston v. Hudson Land Co., 19 Wash. 85. But a deed to an alien of mortgaged lands in satisfaction of a bona fide mortgage debt is not void: Oregon Mortgage Co. v. Carstens, 16 Wash. 165. The inhibition against alien ownership of lands applies to the acquisition of a right of way for a water flume under the condemnation laws by a corporation the majority of whose stock is held by aliens: State ex rel. Morrell v. Superior Court, 33 Wash. 542. But the inhibition in this section places no restriction upon the granting of fishing licenses to such a corporation:

See Hastings v. Anacortes P. Co., 29 Wash. 224. An alien can acquire land in this state containing deposits of limestone, silica and silicated rock, such deposits being minerals within the meaning of this section, and not to be restricted by the words "metals, iron, coal or fireclay": State ex rel. Atkinson v. Evans, 46 Wash. 219.

A deed to an alien will pass a title good against all the world except the state, and one which can only be attacked by a direct proceeding on the part of the state: Oregon Mortgage Co. v. Carstens, 16 Wash. 165; Goon Gans v. Richardson, 16 Wash. 373. One who conveys land to an alien has no right to the property on the theory that the deed is void under this section, since the deed is void as against the state only, which alone can raise objections against the alien ownership of real property: Abrahams v. State, 45 Wash. 327. In eminent domain proceedings the objection may be raised by the owner of the land: State ex rel. Morrell v. Superior Court, 33 Wash. 542.

§ 34. BUREAU OF STATISTICS, AGRICULTURE AND IMMIGRATION.—There shall be established in the office of the secretary of state a bureau of statistics, agriculture, and immigration, under such regulations as the legislature may provide.

§ 35. PROTECTION OF EMPLOYEES.—The legislature shall pass necessary laws for the protection of persons working in mines, factories, and other employments dangerous to life or deleterious to health, and fix pains and penalties for the enforcement of the same.

See 1 Remington's Digest, pp. 522, 523, §§ 44-51.

Restricting the hours of labor of females in certain occupations is a legitimate exercise of the police power of the state, in behalf of the welfare of society at large: State v. Buchanan, 29 Wash. 602.

A law forbidding the employment of females in places where intoxicating liquors are sold as a beverage is a prohibition on contracts against good morals and clearly within legislative power: State v. Conside, 16 Wash. 358.

The enactment of Sunday laws requiring

the cessation of labor on the score of the physical and moral well-being of society is an appropriate exercise of the police power of the state: State v. Nichols, 28 Wash. 628.

Prohibiting the use of opium is a valid exercise of the police power: Ah Lim v. Territory, 1 Wash. 156.

Laws enacted for the promotion of health are a proper exercise of the police power: State v. Carey, 4 Wash. 424; Hathaway v. McDonald, 27 Wash. 659; State v. Sharpless, 31 Wash. 191; In re Thompson, 36 Wash. 377.

§ 36. WHEN BILLS MUST BE INTRODUCED.—No bill shall be considered in either house unless the time of its introduction shall have been at least ten days before the final adjournment of the legislature, unless the legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house, said vote to be taken by yeas and nays and entered upon the journal, or unless the same be at a special session.

Cf. Ark., V, 34; Colo., V, 19; Md., III, 27; Mich., IV, 28; and Tex. III, 37; Wy., III, 22.

§ 37. REVISION OR AMENDMENT.—No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.

Cal., IV, 24; Fla., III, 16; Ill., IV, 13; Ind., IV, 21; Kan., II, 15; La., 30; Mont., V, 25; Nev., IV, 17; N. Dak., II, 64; Or., IV, 22; Tex., XII, 18; Va., V-VI, 30.

Cf. Ala., IV, 2; Colo., V, 24; Mo., IV, 33; Neb., III, 11; N. J., II, 7; Pa., III, 6; Tex., III, 36.

Cited in 9 Wash. 65; 14 Wash. 486; 26 Wash. 482; 32 Wash. 281; 32 Wash. 473; 40 Wash. 457; 50 Wash. 520; 51 Wash. 17.

See 2 Remington's Digest, p. 2621, §§ 33-36.

A repealed law is incapable of amendment: *Howlett v. Cheetham*, 19 Wash. 626.

Setting forth provision as altered or amended: *Bierer v. Blurock*, 9 Wash. 63; *State ex rel. Redpath v. Caldwell*, 9 Wash. 336; *Copland v. Pirie*, 26 Wash. 481; *State v. Scott*, 32 Wash. 279; *In re Dietrich*, 32 Wash. 471; *State v. Lawson*, 455.

Implied amendment: *State ex rel. Redpath v. Caldwell*, 9 Wash. 336; *Dexter v. Olsen*, 40 Wash. 199.

Invalidity of amendatory act as affecting act amended: *Poncin v. Furth*, 15 Wash. 201; *State ex rel. Zent v. Nichols*, 50 Wash. 508.

Repeal and revival of acts: See 2 Remington's Digest, pp. 2622-2628, §§ 37-52; *Howlett v. Cheetham*, 17 Wash. 626; *Pierce v. Commercial Inv. Co.*, 30 Wash. 272.

General repeal of inconsistent acts and provisions: *State v. Carson*, 6 Wash. 250; *Baer v. Choir*, 7 Wash. 631; *McMaster v. Advance Thresher Co.*, 10 Wash. 147; *Tacoma School District v. Hedges*, 13 Wash. 69; *State v. Allen*, 14 Wash. 103; *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619.

The primary election law does not violate this section; since the constitution was not intended to prevent the enactment of statutes complete in themselves which repealed or amended existing statutes, without setting forth the repealed statutes: *State ex rel. Zent v. Nichols*, 50 Wash. 508. So, also, of the drainage act, Laws 1903, page 90; *Northern Pac. R. Co. v. Pierce County*, 51 Wash. 12.

Implied repeals: *Davidson v. Carson*, 1 W. T. 307; *Northern Pacific R. Co. v. Haas*, 2 Wash. 376; *Debenture Corporation v. Warren*, 9 Wash. 312; *Coleman v.*

Cravens, 41 Wash. 1; *State v. Bengfeldt*, 41 Wash. 234.

Repeals by implication are not favored: *Meade v. French*, 4 Wash. 11; *State ex rel. Purves v. Moyer*, 17 Wash. 643; *State v. Binnard*, 21 Wash. 349; *Leavenworth v. Billings*, 26 Wash. 1; *Callvert v. Winsor*, 26 Wash. 368.

The later of two repugnant sections upon the same subject impliedly repeals earlier sections: *Graetz v. McKenzie*, 3 Wash. 194; *Northern Pac. R. Co. v. Ellison*, 3 Wash. 225; *Dahl v. Tibbals*, 5 Wash. 259; *Philbrick v. Andrews*, 8 Wash. 7; *Pierce v. Commercial Inv. Co.*, 30 Wash. 272. See, also, *Mansfield v. First Nat. Bank*, 5 Wash. 665; *Baum v. Sweeny*, 5 Wash. 712; *State v. Harding*, 20 Wash. 556; *Leavenworth v. Billings*, 26 Wash. 1; *Callvert v. Winsor*, 26 Wash. 368; *Nelson v. John*, 43 Wash. 483; *State v. Carbon Hill Coal Co.*, 4 Wash. 422; *State v. Hoepfner*, 9 Wash. 680; *State ex rel. Dustin v. Rusk*, 15 Wash. 403; *Leavitt v. Chambers*, 16 Wash. 353; *Wiss v. Stewart*, 16 Wash. 376; *Norfor v. Busby*, 19 Wash. 450; *Bingnam v. Kevlor*, 19 Wash. 555; *State ex rel. Christie v. Meek*, 26 Wash. 405; *Seattle v. Clark*, 28 Wash. 717; *Nelson v. Nelson Bennett Co.*, 31 Wash. 116; *State ex rel. Hammond v. Ross*, 39 Wash. 233; *State ex rel. Spokane Terminal Co. v. Superior Court*, 40 Wash. 453; *Gibson v. Slater*, 42 Wash. 347; *State v. Davis*, 43 Wash. 116.

Acts passed on same day or at same session: *Commissioners of King County v. Davies*, 1 Wash. 290; *Heilig v. City Council etc.*, 7 Wash. 29; *In re Wilbur's Estate*, 14 Wash. 242; *State ex rel. Rippetoe v. Cheetham*, 17 Wash. 483; *Howlett v. Cheetham*, 17 Wash. 626.

Repeal of special by general act: *Cascades R. R. Co. v. Sohns*, 1 W. T. 557; *Callvert v. Winsor*, 26 Wash. 368; *Tacoma Land Co. v. Pierce County*, 1 Wash. 482.

A special act may be impliedly repealed by a general act, where the intention of the legislature to so repeal plainly appears: *Northern Pac. R. Co. v. Haas*, 2 Wash. 376; *State ex rel. Whatecom County v. Purdy*, 14 Wash. 343; *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619. See, also, *Meade v. French*, 4 Wash. 11; *Seattle & Montana Ry. Co.*

v. O'Meara, 4 Wash. 17; *Germond v. Tacoma*, 6 Wash. 365; *State ex rel. Maloney v. Spike*, 19 Wash. 652; *State v. Binnard*, 21 Wash. 349; *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619; *State v. Seattle*, 31 Wash. 149; *Coleman v. Cravens*, 41 Wash. 1; *May v. Sutherland*, 41 Wash. 609; *Denton v. Walla Walla*, 50 Wash. 77.

A special act will not repeal a general law unless it expressly so declares, or unless it is in necessary conflict with the general law: *Corbett v. Territory*, 1 W. T. 431.

Repeal by amendatory act: *State v. Wilson*, 9 Wash. 218; *State ex rel. Redpath v. Caldwell*, 9 Wash. 336; *Mudgett v.*

Liebes, 14 Wash. 482; *State ex rel. Orr v. Fawcett*, 17 Wash. 188; *State ex rel. Harkins v. Roundtree*, 28 Wash. 669; *Cochrane v. King County*, 12 Wash. 518.

As to implied repeal by revision or codification, see *State ex rel. Christie v. Meek*, 26 Wash. 405. Nonuser of a statute will not affect its abrogation, unless its obsolescence is in some way recognized by subsequent legislation: *State ex rel. Christie v. Meek*, 26 Wash. 405.

Re-enactment or revival of act repealed: *King County v. Neely*, 1 W. T. 241; *Emigh v. State Ins. Co.*, 3 Wash. 122; *Cochrane v. King County*, 12 Wash. 518.

§ 38. LIMITATION ON AMENDMENTS.—No amendment to any bill shall be allowed which shall change the scope and object of the bill.

Cf. *Mont.*, V, 19; *N. Dak.*, II, 58; *Wy.*, III, 20.

§ 39. FREE TRANSPORTATION TO PUBLIC OFFICERS PROHIBITED.—It shall not be lawful for any person holding public office in this state to accept or use a pass or to purchase transportation from any railroad or other corporation, other than as the same may be purchased by the general public, and the legislature shall pass laws to enforce this provision.

See *infra*, Art. XII, § 20.

Cf. *Ala.*, XIII, 23; *Ark.*, XVII, 7; *Cal.*, XII, 19; *Fla.*, XVI, 31; *Mo.*, XII, 24; *N. Y.*, *Rev.*, XIII, 5; *Pa.*, XVII, 8.

Cited in 45 Wash. 584.

ARTICLE III.

THE EXECUTIVE.

§ 1. EXECUTIVE DEPARTMENT.—The executive department shall consist of a governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands, who shall be severally chosen by the qualified electors of the state at the same time and place of voting as for the members of the legislature.

Cf. *Ala.*, V, 2, 3; *Ark.*, VI, 2; *Colo.*, IV, 1; *Conn.*, IV, 2; *Del.*, III, 2; *Fla.*, IV, 1; *Ia.*, IV, 2; *Ida.*, IV, 1; *Kan.*, I, 1; *Ky.*, 69; *La.*, 58; *Me.*, V, 2; *Md.*, II, 2; *Mass.*, II, 1, 3; *Mich.*, V, 3; *Miss.*, V, 116; *Mont.*, VII, 1; *N. J.*, V, 2; *Nev.*, V, 2; *N. Y.*, IV, 3; *N. Dak.*, III, 1, 2; *Or.*, V, 4; *Pa.*, IV, 2; *S. C.*, III, 2; *S. Dak.*, V, 1; *Tenn.*, III, 2; *Va.*, IV, 2, 22; *Wis.*, V, 3; *Wy.*, IV, 1, 11.

Cited in 4 Wash. 25, 26; 28 Wash. 497; 33 Wash. 459; 47 Wash. 608.

The language of this section is mandatory: *State v. Womack*, 4 Wash. 19, 26.

A member of the state board of education is an executive officer within the meaning of this section: *Id.*; *State v. Smith*, 6 Wash. 496.

This section does not limit the executive officers of the state to those enumerated therein. The object was to classify the executive department, rather than to exclusively establish its officers: *State v. Womack*, *supra*.

§ 2. GOVERNOR, TERM OF OFFICE.—The supreme executive power of this state shall be vested in a governor, who shall hold his office for a term of four years, and until his successor is elected and qualified.

Cf. *Ala.*, V, 2; *Ark.*, VI, 2; *Cal.*, V, 1; *Fla.*, IV, 2; *Colo.*, IV, 2; *Conn.*, IV, 1; *Del.*, III, 1; *Ga.*, V, 1 (2); *Ia.*, IV, 1; *Ill.*, V, 6; *Ind.*, V, 1; *Ida.*, IV, 1; *Kan.*, I, 2; *Ky.*, 70; *La.*, 59; *Mo.*, V, 5; *Me.*, V, Pt. I, 1; *Md.*, II, 1; *Mass.*, II, § I, 1; *Mich.*, V, 1; *Miss.*, V, 116; *Mont.*, VII, 5; *Nev.*, V, 1; *Neb.*, V, 6; *N. H.*, Pt. II, 41; *N. J.*, V, 1; *N. C.*, III, 1; *N. Dak.*, III, 71; *N. Y.*, *Rev.*, IV, 1; *Ohio*, III, 5; *Or.*, V, 1; *Pa.*, IV, 2;

R. I., VII, 1; S. C., III, 1; S. Dak., IV, 1; Tenn., III, 1; Tex., IV, 1; Vt., VIII, Amend.; Va., IV, 1; W. Va., VII, 5; Wy., IV, 1; Wis., V, 1.

Cited in 28 Wash. 16; 28 Wash. 498; 29 Wash. 337.

Under this section the governor is to be

considered the head of the executive department, in which department other officers may exist whose functions are executive: State v. Womack, 4 Wash. 19; see State v. Smith, 9 Wash. 195; State v. Smith, 6 Wash. 496.

§ 3. OTHER EXECUTIVE OFFICERS, TERMS OF OFFICE.—The lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and commissioner of public lands shall hold their offices for four years respectively, and until their successors are elected and qualified.

Cited in 4 Wash. 26; 28 Wash. 16; 29 Wash. 338.

§ 4. RETURNS OF ELECTIONS, CANVASS, ETC.—The returns of every election for the officers named in the first section of this article shall be sealed up and transmitted to the seat of government by the returning officers, directed to the secretary of state, who shall deliver the same to the speaker of the house of representatives at the first meeting of the house thereafter, who shall open, publish, and declare the result thereof in the presence of a majority of the members of both houses. The person having the highest number of votes shall be declared duly elected, and a certificate thereof shall be given to such person, signed by the presiding officers of both houses; but if any two or more shall be highest and equal in votes for the same office, one of them shall be chosen by the joint vote of both houses. Contested elections for such officers shall be decided by the legislature in such manner as shall be decided by law. The terms of all officers named in section one of this article shall commence on the second Monday in January after their election, until otherwise provided by law.

Cf. Ark., VI, 4; Ala., V, 4; Colo., IV, 3; Del., III, 2; Ind., V, 4; Ia., IV, 3, 4; Ind., V, 4; Ida., IV, 2; Ill., V, 4; La., 59; Kan., I, 2; Mich., V, 4; Me., V, Pt. I, 3; Md., II, 3; Minn., V, 2; Mo., V, 3; Mont., VII, 2; Neb., V, 3; N. J., V, 2; Nev., V, 4; N.

C. III, 3; N. Dak., III, 74; N. Y., Rev., IV, 3; Ohio, III, 3; Or., V, 5; Pa., IV, 2; S. C., III, 4; S. Dak., IV, 3; Tex., IV, 3; Tenn., III, 2; Va., IV, 2; Vt., IX, Amend.; W. Va., VII, 3; Wis., V, 3; Wy., IV, 3.

§ 5. GENERAL DUTIES OF GOVERNOR.—The governor may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed.

Execution of laws: Cf. Ala., V, 8; Ark., VI, 7; Cal., V, 7; Colo., IV, 2; Conn., IV, 9; Del., III, 13; Fla., IV, 6; Ida., IV, 5; Ill., V, 6; Ind., V, 6; Ia., IV, 9; Kan., I, 3; Ky., 81; La., 72; Me., Pt. I, 12; Md., II, 9; Mich., V, 6; Minn., V, 4; Miss., V, 123; Mo., V, 6; Mont., VII, 5; Neb., V, 6; Nev., V, 7; N. J., V, 6; N. C., III, 7; N. Dak., III, 71; Ohio, III, 6; Or., V, 10; Pa., II, 13; R. I., VII, 2; S. C., III, 12; S. Dak., IV, 1; Tenn., III, 10; Tex., IV, 10; Vt., Pt. II, 11; Va., IV, 5; W. Va., VII, 5; Wis., V, 5; Wy., IV, I.

Information: Cf. Ala., V, 6; Ark., VI, 7; Cal., V, 6; Colo., IV, 8; Conn., IV, 6; Del., III, 10; Ia., IV, 8; Ida., IV, 8; Ind., V, 15; Kan., I, 4; Ky., 78; La., 70; Mich., V, 5; Miss., V, 120; Me., V, Pt. I, 10; Md., II, 18; Minn., V, 4; Mont., VII, 10; Neb., Exec. 7; Nev., V, 6; N. C., III, 7; N. Y., Rev., IV, 4; N. Dak., III, 45; Ohio, III, 6; Or., V, 13; Tenn., III, 18; Tex., III, 26; Va., IV, 6; Wis., V, 4; W. Va., V, 4; N. Y., IV, 4, Amend.

Cited in 19 Wash. 637; 28 Wash. 498.

§ 6. MESSAGES.—He shall communicate at every session by message to the legislature the condition of the affairs of the state, and recommend such measures as he shall deem expedient for their action.

Ala., V, 7; Cal., V, 10; Colo., IV, 8; Ida., IV, 8; Kan., I, 5; Ky., 79; La., 71; Minn., V, 4; Me., V, Pt. I, 9; Md., II, 19; Mich., V, 8; Miss., V, 122; Mo., V, 10; Mont., VII, 10; Neb., V, 7; N. Y., VI, 4;

Nev., V, 10; N. Dak., III, 45; Ohio, III, 7; Or., V, 2; Pa., IV, 11; S. C., III, 15; S. Dak., IV, 5; Tenn., III, 2; Va., IV, 5; W. Va., VII, 6; Wis., V, 4; Wy., IV, 4.

§ 7. EXTRA LEGISLATIVE SESSIONS.—He may, on extraordinary occasions, convene the legislature by proclamation, in which shall be stated the purposes for which the legislature is convened.

Cf. Ala., V, 10; Ark., VI, 19; Cal., IV, 9; Colo., IV, 9; Del., III, 12; Fla., 8; Ga., V, 1 (13); Ia., IV, 11; Ill., V, 8; Ida., IV, 9; Kan., I, 5; Ky., 80; La., 72; Me., V, Pt. I, 13; Md., II, 16; Mich., V, 7; Minn., V, 4; Mo., V, 9; Mont., VII, 11; Neb., V, 8; N. Y., Rev., IV, 4; Nev., V, 9; N. J., V, 6; N. Car., III, 9; N. Dak., III, 75; Ohio, III, 8; Or., V, 12; Pa., IV, 12; R. I., VII,

7; S. Car., III, 16; S. Dak., IV, 4; Tenn., III, 9; Tex., IV, 8; Wis., V, 4; W. Va., VII, 7; Wy., IV, 4.

Cited in 35 Wash. 130.

This section does not restrict legislative action at an extra session to the purposes for which it was called, nor has the governor power to do so: *State v. Fair*, 35 Wash. 127.

§ 8. COMMANDER-IN-CHIEF.—He shall be commander-in-chief of the military in the state, except when they shall be called into the service of the United States.

Cf. Ia., IV, 7; Ida., IV, 4; Mo., V, 7; Mont., VII, 6; Neb., V, 14; N. C., III, 8; N. Dak., III, 75; Pa., IV, 7; S. Dak., IV, 4; W. Va., VII; Wy., IV, 4.

Id., Ala., V, 18; Ark., VI, 6; Colo., IV, 5; Conn., IV, 5; Del., III, 7; Fla., IV, 4; Ga., V, 1 (11); Ill., V, 14; Ind., V, 12; Ky.,

75; Me., V, Pt. I, 7; Md., II, 8; Mass., II, 1, 7; Minn., V, 4; Miss., V, 119; Nev., V, 5; N. H., Pt. II, 51; N. J., V, 6; N. Y., Rev., IV, 4; Ohio, III, 10; Or., V, 9; R. I., VII, 3; S. C., III, 10; Tenn., III, 5; Tex., IV, 7; Wis., V, 4.

§ 9. PARDONING POWER.—The pardoning power shall be vested in the governor, under such regulations and restrictions as may be prescribed by law.

Cf. Ala., V, 12; Ark., IV, 18; Ill., V, 13; Ia., IV, 16; Ida., IV, 7; Minn., V, 4; Mo., V, 8; Mont., VII, 9; Nev., V, 13; N. Dak., III, 76; N. Y., Rev., IV, 5; Or., V, 14; Pa., IV, 9; S. Dak., IV, 5; Tex., IV, 2; Wis., V, 6; Wy., IV, 5.

Cited in 3 Wash. 611; 20 Wash. 79; 47 Wash. 280.

This section is not violated by Laws of 1890, page 276, § 17, authorizing trustees

of the reform school to return an incorrigible youth to the committing court for discharge or sentence: *In re Mason*, 3 Wash. 609.

Bal. Code, §§ 204-208, creating a board of pardons, regulating and restricting the procedure, does not abrogate or limit the pardoning power conferred on the governor by this section: *State ex rel. Rogers v. Jenkins*, 20 Wash. 78.

§ 10. VACANCY IN.—In case of the removal, resignation, death, or disability of the governor, the duties of the office shall devolve upon the lieutenant governor, and in case of a vacancy in both the offices of governor and lieutenant governor, the duties of governor shall devolve upon the secretary of state, who shall act as governor until the disability be removed or a governor be elected.

See *infra*, § 16.

Cf. Cal., V, 16; Colo., IV, 13; Conn., IV, 14; Fla., IV, 19; Ill., V, 17; Ind., V, 10; Ia., IV, 17; Ida., IV, 12; Ky., 84; La., 62; Me., V, 1; Mass., XI, 2; Mich., V, 12; Miss., V, 131; Mo., V, 16; Mont., VII, 14; Neb., V, 16; Nev., V, 18; N. H., XI, 49; N. J., V, 12; N. Y., Rev., IV, 6, 7; N. Car., III, 12; N. Dak., III, 72; Ohio, III, 15; Or., V, 8; Pa., IV, 13; R. I., VII, 9; S. C., III, 9; S. Dak., IV, 6; Tenn., III, 12; Tex., IV, 17; Wis., V, 7.

Cited in 29 Wash. 338.

Upon the death of the governor the duties of the office devolve upon the lieutenant governor for the balance of the term, and there is no vacancy in the office of governor required to be filled by an election; and in such case the office of lieutenant governor does not thereby become vacant: *State ex rel. Murphy v. McBride*, 29 Wash. 335.

§ 11. REMISSION OF FINES AND FORFEITURES.—The governor shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law, and shall report to the legislature at its next meeting each case of reprieve, commutation, or pardon granted, and the reasons for granting the same, and also the names of all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted, and the reasons for the remission.

Cf. Fla., IV, 11; Ga., V, 1 (12); Ida., IV, 7; Ky., 77; Mont., VII, 9; N. Dak., III, 76; N. Y., Rev., IV, 5; S. Dak., IV, 5; Wy., IV, 5.

Cited in 20 Wash. 79.

§ 12. VETO POWER.—Every act which shall have passed the legislature shall be, before it becomes a law, presented to the governor. If he approves, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, which house shall enter the objections at large upon the journal, and proceed to reconsider. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present, it shall become a law; but in all such cases the vote of both houses shall be determined by the yeas and nays, and the names of the members voting for or against the bill shall be entered upon the journal of each house respectively. If any bill shall not be returned by the governor within five days, Sundays excepted, after it shall be presented to him, it shall become a law without his signature, unless the general adjournment shall prevent its return, in which case it shall become a law unless the governor, within ten days next after the adjournment, Sundays excepted, shall file such bill, with his objections thereto, in the office of the secretary of state, who shall lay the same before the legislature at its next session, in like manner as if it had been returned by the governor. If any bill presented to the governor contain several sections or items, he may object to one or more sections or items while approving other portions of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the section or sections, item or items, to which he objects, and the reasons therefor, and the section or sections, item or items, so objected to, shall not take effect unless passed over the governor's objection, as hereinbefore provided.

Cf. Ala., V, 13; Ark., VI, 15, 16; Colo., IV, 11; Cal., IV, 16; Conn., IV, 12; Fla., III, 28; Ga., V, 1 (16); Ida., IV, 10; Ill., V, 16; Ind., V, 14; Ia., III, 16; Kan., II, 14; Ky., 88; La., 73; Me., IV, Pt. III, 2; Md., III, 30; Mass., Pt. II, Ch. I, 2; Mich., IV, 14; Minn., IV, 11; Miss., IV, 72; Mo., V, 12; Mont., VII, 12; N. Dak., III, 79; Neb., V, 15; Nev., V, 35; N. H., Pt. II, 44; N. J., V, 7; N. Y., Rev., IV, 9; Or., V, 15;

Pa., IV, 15, 16; S. C., IV, 22; S. Dak., IV, 9; Tenn., IV, 18; Tex., IV, 14; Vt., Amend. XII; Va., IV, 8; W. Va., VII, 14; Wis., V, 10; Wy., IV, 8.

Disapproval of items: Ala., IV, 14; Ark., VI, 17; Colo., IV, 12; Fla., IV, 18; Ga., V, 1 (16); La., 74, Amend.; N. J., V, 7, Amend.

See State ex rel. Rippetoe v. Cheetham, 17 Wash. 483.

§ 13. VACANCY IN APPOINTIVE OFFICE.—When, during a recess of the legislature, a vacancy shall happen in any office the appointment to which is vested in the legislature, or when at any time a vacancy shall have occurred in any other state office for the filling of which vacancy no provision is made elsewhere in this constitution, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified.

See *infra*, Art. XIII, § 1, appointment of officers.

Cf. Ark., VI, 23; Colo., IV, 6; Fla., IV, 7; Ind., V, 8; Ia., IV, 10; Ida., IV, 6; Kan., I, 14; La., 69; Md., II, 10; Minn., V, 4; Mo., V, 2; Mont., VII, 7; Neb., V, 10; Nev., V, 8; N. J., V, 12; N. Dak., III, 78; Or., V, 16; R. I., VII, 5; S. Dak., IV, 8; Tenn., III, 14; Tex., IV, 12; W. Va., VII, 9.

Cited in 9 Wash. 199.

If the term of a state officer expires, without provision for holding over, the governor may fill the vacancy under this provision, and an appointee continues to hold until the election of a successor: *State v. Smith*, 9 Wash. 195, 199.

§ 14. SALARY.—The governor shall receive an annual salary of four thousand dollars, which may be increased by law, but shall never exceed six thousand dollars per annum.

Cf. Ala., V, 19; Ark., VI, 1; Cal., V, 19; Conn., IV, 4; Ida., IV, 19; La., 67; Md., IX, 1; Mont., VII, 4; N. C., III, 15; N. Dak., III, 84; N. Y., IV, 8; N. Y., Rev.,

IV, 4; Ohio, III, 19; R. I., VII, 11; S. C., III, 14; Wis., V, 5.

Cited in 35 Wash. 173.

§ 15. COMMISSIONS, HOW ISSUED.—All commissions shall issue in the name of the state, shall be signed by the governor, sealed with the seal of the state, and attested by the secretary of state.

Ala., V, 13; Ark., VI, 17; Cal., V, 15; Conn., IV, 11; Fla., IV, 14; Ind., XV, 6; Ia., IV, 21; Ida., IV, 16; Kan., I, 9; La., 79; Mont., VII, 18; Me., IX, 3; Md., IV, Pt. I, 13; Mass., Pt. II, Ch. VI, 4; Mich., V, 19; Miss., V, 127; Mo., V, 23; Neb., Exec.

14; Nev., V, 16; N. H., Pt. II, 86; N. J., VIII, 3; N. C., III, 16; Ohio, III, 13; Or., V, 18; Pa., IV, 22; R. I., VII, 8; S. C., III, 19; Tenn., III, 16; Tex., IV, 20; Vt., Pt. II, 23; Va., IV, 7; W. Va., II, 8.

§ 16. LIEUTENANT GOVERNOR, DUTIES AND SALARY.—The lieutenant governor shall be presiding officer of the state senate, and shall discharge such other duties as may be prescribed by law. He shall receive an annual salary of one thousand dollars, which may be increased by the legislature, but shall never exceed three thousand dollars per annum.

See *supra*, Art. II, § 10; Art. III, § 10.

Cf. Cal., V, 15-16; Colo., IV, 13-15; Ida., IV, 13-14; Ill., V, 17-19; Ind., V, 10-11; Ia., IV, 17-18; Kan., I, 12; Ky., 84-87; Mont., VII, 14-16; Me., V, Pt. I, 14; Md., II, 7; Mich., V, 12-14; Minn., V, 6; Miss., V, 131;

Mo., V, 15-17; Nev., V, 17-18; N. Y., IV, 6-8; N. Dak., III, 77; Neb., V, 16-18; Ohio, III, 15-17; Tex., IV, 16-18; N. C., III, 11-12; S. Dak., IV, 6-7; Wis., V, 7-8.

Cited in 29 Wash. 340.

§ 17. SECRETARY OF STATE, DUTIES AND SALARY.—The secretary of state shall keep a record of the official acts of the legislature and the executive department of the state, and shall, when required, lay the same, and all matters relative thereto, before either branch of the legislature,¹ and shall perform such other duties as shall be assigned him by law.² He shall receive an annual salary of twenty-five hundred dollars, which may be increased by the legislature, but shall never exceed three thousand dollars per annum.

1. Cal., V, 18; Fla., IV, 21; Nev., V, 20; Or., VI, 2; Wis., VI, 2.

2. Cf. Ala., VI, 21; Ark., VI, 6; Cal., V, 8; Conn., IV, 18; Del., III, 15; Ill., V, 1; Ind., VI, 1; Ia., IV, 22; Ky., 93; Mo., V, 16; Md., II, 23; Nev., V, 20; N. Dak., III, 83; Or., VI, 2; Pa., II, 18; S. Dak., VI, 13;

Tenn., III, 17; Tex., IV, 21; Va., IV, 13; Wis., VI, 2; Wy., IV, 12.

Cited in 20 Wash. 79.

As to duties of secretary of state, see *State ex rel. Rogers v. Jenkins*, 20 Wash. 78; *State ex rel. Gorman v. Nichols*, 40 Wash. 437.

§ 18. SEAL.—There shall be a seal of the state kept by the secretary of state for official purposes, which shall be called "The seal of the state of Washington."

See *infra*, Art. XVIII, § 1, seal of the state.

Cal., V, 13; Colo., IV, 18; Ida., IV, 15; Ohio, III, 12; Pa., IV, 22; S. Dak., XXI, 1;
Ia., IV, 20; Kan., I, 8; Miss., V, 11; Mo., S. C., III, 18; Tenn., III, 15; Tex., IV, 19;
V, 20; Mont., VII, 17; N. Dak., XVII, 207; Wy., IV, 15.
Neb., V, 23; Nev., V, 15; N. C., III, 16;

§ 19. STATE TREASURER, DUTIES AND SALARY.—The treasurer shall perform such duties as shall be prescribed by law. He shall receive an annual salary of two thousand dollars, which may be increased by the legislature, but shall never exceed four thousand dollars per annum.

Cited in 35 Wash. 174.

§ 20. STATE AUDITOR, DUTIES AND SALARY.—The auditor shall be auditor of public accounts, and shall have such powers and perform such duties in connection therewith as may be prescribed by law. He shall receive an annual salary of two thousand dollars, which may be increased by the legislature, but shall never exceed three thousand dollars per annum.

§ 21. ATTORNEY GENERAL, DUTIES AND SALARY.—The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law. He shall receive an annual salary of two thousand dollars, which may be increased by the legislature, but shall never exceed thirty-five hundred dollars per annum.

Cited in 28 Wash. 498; 35 Wash. 172;
35 Wash. 174, 175; 42 Wash. 655.

See 1 Remington's Digest, p. 328, §§ 1-3.

The act of 1887-88, providing that the attorney general shall receive a certain salary and ten per cent on all moneys collected upon legal process instituted by him to enforce claims due the territory, is repugnant to the provisions of this sec-

tion: State ex rel. Stratton v. Maynard, 35 Wash. 168.

The attorney general has no power to employ an architect as an expert to assist him, when the public interests require it: Ritchie v. State, 42 Wash. 653. The attorney general has no authority upon his own motion to inquire by quo warranto into wrongful exercise of public franchises: State ex rel. Attorney General v. Seattle Gas etc. Co., 28 Wash. 488.

§ 22. SUPERINTENDENT OF PUBLIC INSTRUCTION, DUTIES AND SALARY.—The superintendent of public instruction shall have supervision over all matters pertaining to public schools, and shall perform such specific duties as may be prescribed by law. He shall receive an annual salary of twenty-five hundred dollars, which may be increased by law, but shall never exceed four thousand dollars per annum.

Cited in 35 Wash. 174.

§ 23. COMMISSIONER OF PUBLIC LANDS—COMPENSATION.—The commissioner of public lands shall perform such duties and receive such compensation as the legislature may direct.

Cited in 47 Wash. 608.

§ 24. RECORDS, WHERE KEPT, ETC.—The governor, secretary of state, treasurer, auditor, superintendent of public instruction, commissioner of public lands, and attorney general shall severally keep the public records, books, and papers relating to their respective offices at the seat of government, at which place also the governor, secretary of state, treasurer, and auditor shall reside.

Office at Seat of Government: S. Dak., IV, 12.

§ 25. QUALIFICATIONS.—No person except a citizen of the United States and a qualified elector of this state shall be eligible to hold any state office, and the state treasurer shall be ineligible for the term succeeding that for which he was elected. The compensation for state officers shall not be increased or diminished during the term for which they shall have been elected. The legislature may, in its discretion, abolish the offices of the lieutenant governor, auditor and commissioner of public lands.

See references to Art. II, § 25, *supra*.

See *infra*, § 14, Art. IV, of judges may be increased.

See *infra*, Art. XI, § 8.

See *supra*, § 25, Art. II, of officers generally not to be increased, etc.

Cf. Mont., VII, 1; N. Dak., III, 82; S. Dak., IV, 12; Wy., IV, 2.

Ineligibility of treasurer: Cf. Colo., IV, 21; Ill., V, 2; Mo., V, 2; Me., V, 4, 1; Mont., VII, 1; Neb., V, 3; Or., VI, 1; Pa., IV, 21; S. Dak., IV, 12.

Compensation not to be increased, etc.: Cal., V, 19; Conn., IV, 4; Ohio, III, 19; N. C., III, 15; S. C., III, 13.

Cited in 6 Wash. 497; 47 Wash. 375; 47 Wash. 609, 610; 51 Wash. 587.

As a general rule the term "state officer"

is applicable only to those superior executive officers who constitute the heads of the executive departments. The constitution does not in terms say who they shall be, but it is noticeable that this article is devoted entirely to superior state officers: *State v. Smith*, 6 Wash. 494, 496. See § 1 of this article.

Eligibility of a candidate who pays for advertising by publication of his photograph, under Laws of 1907: See *State ex rel. Coon v. Hay*, 51 Wash. 576.

ARTICLE IV.

THE JUDICIARY.

§ 1. JUDICIAL POWER, WHERE VESTED.—The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

Cf. Cal., VI, 1; Ida., V, 2; Ill., IV, 1; Mich., VI, 1; Mont., VIII, 1; Nev., VI, 1; N. C., IV, 4; N. Dak., IV, 85; S. C., IV, 1; S. Dak., V, 1; Wy., V, 1.

Cited in 3 Wash. 611; 7 Wash. 224; 19 Wash. 21; 19 Wash. 310; 20 Wash. 56; 23 Wash. 702.

See 1 Remington's Digest, pp. 520, 521, §§ 36-41.

A judicial court cannot exercise legislative functions, and the legislature cannot impose such powers upon it: *Territory v. Stewart*, 1 Wash. 98, 100; and a statute authorizing the creation of a municipal corporation by a judicial court is unconstitutional, as a delegation of legislative functions: *Id.*, 98.

The trustees of the reform school are invested with authority to decide what children are of such a vicious disposition as to be detrimental to its interests, and this authority does not contravene this section of the constitution: *In re Mason*, 3 Wash. 609.

By the constitution all the judicial power (which is a distinct branch of sovereignty) is vested in the courts therein created, independent of legislation, and the jurisdiction of the courts is universal, covering the whole domain of judicial power: *In re Cloherty*, 2 Wash. 137.

Settling a statement of facts is a judicial act and cannot be performed by a

judge whose term of office has expired: *Hallam v. Tillinghast*, 19 Wash. 20.

The judicial department is not charged with seeing that the mandatory provisions of the constitution are complied with; and when they are directed to either the executive or legislative department, the judiciary has no concern with them: *State ex rel. Reed v. Jones*, 6 Wash. 452.

The power to "hear and determine" conferred in various matters upon local administrative officers is not judicial power: *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 53.

Making trustees of the reform school judges of the fact that an incorrigible youth should be returned to the court committing him does not conflict with the prerogative of the court: *In re Mason*, 3 Wash. 609.

The legislature may provide new inferior courts, not specially mentioned in the constitution, with such inferior judicial power as it may deem wise; and may transfer from one court to another limited portions of judicial power: *Cloherty, In re*, 2 Wash. 137.

There is no court apart from the officer who is by the constitution designated as justice of the peace: *State ex rel. Maltby v. Superior Court*, 7 Wash. 223.

The power conferred upon the legislature by the constitution to create addi-

tional inferior courts is not one of its original inherent powers as the supreme legislative body of the state, but is a delegated power which must be exercised in the manner pointed out and cannot be redelegated to a city, which has not inherent power to create courts: *In re Cloherty*, 2 Wash. 137.

A municipal court is an inferior court under this section: *In re Barbee*, 19 Wash. 306.

Laws requiring the court to settle a statement of facts as agreed to by the parties is not unconstitutional as placing the settlement in the hands of the parties: *State ex rel. Hersner v. Arthur*, 7 Wash. 358.

Conceding the right to legislate upon a subject, courts cannot restrain the action of the legislature on considerations of pol-

icy or natural equity: *State v. Carey*, 4 Wash. 424; *Frederick v. Seattle*, 13 Wash. 428.

The vacation of a street by a city council is a legislative question and will not be disturbed by the courts, in the absence of an abuse of discretion: *Kakeldy v. Columbia & Puget Sound R. Co.*, 37 Wash. 675.

Section 7898, *infra*, authorizing a city council to enter a decision determining the regularity of an assessment for local improvements, and providing for an appeal from such decision, is not unconstitutional as an attempt to confer upon the council judicial powers in violation of this section: *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 53; *Heath v. McCrea*, 20 Wash. 342.

§ 2. SUPREME COURT.—The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision. The said court shall always be open for the transaction of business except on non-judicial days. In the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time, and may provide for separate departments of said court.

Cf. Cal., Art. VI, § 2.

Cited in 29 Wash. 342.

The legislature may increase the num-

ber of judges of the supreme court, and decrease the number to five: *State ex rel. Murphy v. McBride*, 29 Wash. 335.

§ 3. ELECTION AND TERMS OF SUPREME JUDGES.—The judges of the supreme court shall be elected by the qualified electors of the state at large, at the general state election, at the times and places at which state officers are elected, unless some other time be provided by the legislature. The first election of judges of the supreme court shall be at the election which shall be held upon the adoption of this constitution, and the judges elected thereat shall be classified by lot, so that two shall hold their office for the term of three years, two for the term of five years, and one for the term of seven years. The lot shall be drawn by the judges who shall for that purpose assemble at the seat of government, and they shall cause the result thereof to be certified to the secretary of state, and filed in his office. The judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and shall preside at all sessions of the supreme court, and in case there shall be two judges having in like manner the same short term, the other judges of the supreme court shall determine which of them shall be chief justice. In case of the absence of the chief justice, the judge having in like manner the shortest or next shortest term to serve shall preside. After the first election the terms of judges elected shall be six years from and after the second Monday in January next succeeding their election. If a vacancy occur in the office of a judge of the supreme court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold the office for the remainder of the unexpired term. The term of office of the judges of the supreme court first elected shall commence as soon as the state shall have been admitted into

the Union, and continue for the term herein provided, and until their successors are elected and qualified. The sessions of the supreme court shall be held at the seat of government until otherwise provided by law.

Wis., VII, 9; Nev., VI, 3.

Cited in 29 Wash. 343, 349.

The provision herein as to term of office does not apply to a judge elected to fill

a vacancy for the remainder of the unexpired term: *State ex rel. Murphy v. McBride*, 29 Wash. 335.

§ 4. JURISDICTION.—The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state, or any judge thereof.

See notes to Code, § 1, *infra*.

Cf. Cal., III, 4; Colo., VI, 3; Mont., VIII, 3; Nev., VI, 4; N. C., IV, 8; N. Dak., IV, 87; S. Dak., V, 3; Tex., V, 3; Wis., VII, 3.

Cited in 1 Wash. 367; 1 Wash. 383; 2 Wash. 160; 3 Wash. 60; 3 Wash. 62; 3 Wash. 78; 3 Wash. 690; 3 Wash. 701; 6 Wash. 167; 6 Wash. 497; 6 Wash. 499; 7 Wash. 238; 8 Wash. 271; 9 Wash. 372; 9 Wash. 638; 10 Wash. 226; 12 Wash. 684; 13 Wash. 170; 14 Wash. 255; 15 Wash. 671; 15 Wash. 697; 16 Wash. 385; 16 Wash. 418; 17 Wash. 6; 18 Wash. 693; 19 Wash. 10; 20 Wash. 98; 21 Wash. 112; 21 Wash. 604; 22 Wash. 161; 22 Wash. 633; 24 Wash. 542; 26 Wash. 283; 28 Wash. 5; 28 Wash. 476; 29 Wash. 494; 30 Wash. 224; 31 Wash. 639; 32 Wash. 53; 32 Wash. 451; 32 Wash. 511; 37 Wash. 260, 261; 37 Wash. 510; 40 Wash. 475; 40 Wash. 683; 41 Wash. 152; 41 Wash. 360; 48 Wash. 67; 49 Wash. 502; 49 Wash. 505; 51 Wash. 310.

The term "proceedings" in this section covers applications for relief not included in an ordinary proceeding, such as proceedings under the insolvency law, condemnation, habeas corpus, quo warranto, and the like; arrest in civil actions being a provisional remedy, ancillary to the main action, does not fall within the class covered by the term proceedings: *Cline v. Harmon*, 2 Wash. 155, 157; *Windt v. Banniza*, 2 Wash. 147, followed.

The supreme court being authorized to issue writs of mandamus, must in a proper case exercise the power granted: *State v. Superior Court*, 12 Wash. 677, 684.

A member of the board of regents of the state agricultural college is not a state officer over whom the supreme court has original jurisdiction in mandamus proceedings within the meaning of this section: *State v. Smith*, 6 Wash. 496; *State v. Smith*, 9 Wash. 195. Such officers are state officers, but not such as contemplated by this provision: *State v. Smith*, 6 Wash. 498.

While it is true that the constitution invests the supreme court with original jurisdiction in habeas corpus, under this section, it does not follow that it must take original jurisdiction in cases that have been commenced in the superior court or before a judge thereof: *In re Graham*, 7 Wash. 237, 238.

A garnishment, while auxiliary to the main cause, is a "proceeding" within the meaning of the statute regulating appeals to the supreme court: *Tatum v. Geist*, 40 Wash. 575.

The limitation on appellate jurisdiction has application to the amount sued for and not to the judgment rendered: *Bleeker v. Satsop Ry. Co.*, 3 Wash. 77.

But while the amount claimed is held to be the original amount in controversy, yet the bare allegation that property sought to be recovered is of certain value does not establish such value for the purpose of giving appellate jurisdiction. The value is that found by the court and jury: *Herrin v. Pugh*, 9 Wash. 637.

Where the object of the proceeding (in garnishment) is to ascertain the title and right of possession of personal property, and not the recovery of money, the action

is within the appellate jurisdiction of the supreme court, whether the principal debt be more or less than \$200: *Campbell v. Simkins*, 10 Wash. 160.

The supreme court has no jurisdiction if the amount in controversy is under \$200: See 1 Remington's Digest, p. 87, § 33; *Penter v. Straight*, 1 Wash. 365; *Lotz v. Mason County*, 6 Wash. 166; *Moskeland v. Stephens*, 18 Wash. 693; *National Grocery Co. v. Cann*, 39 Wash. 596; *State ex rel. Ide v. Coon*, 40 Wash. 682; *State ex rel. Bassett v. Freasure*, 39 Wash. 198; *State ex rel. Plaisie v. Cole*, 40 Wash. 474.

An appeal from a judgment dismissing an action for a writ of mandamus to compel the issuance of a city warrant for the sum of \$140.75 will be dismissed for the reason that the original amount in controversy is not within the appellate jurisdiction of the supreme court: *State ex rel. Lack v. Meads*, 49 Wash. 468.

The jurisdiction of the supreme court on appeal from a judgment for costs on dismissal of an action of ejectment is not affected by the amount in controversy, as only actions for the recovery of money or personal property are controlled thereby: *Hamilton v. Witner*, 50 Wash. 689.

As to what constitutes the claim, see *Durand v. Simpson Logging Co.*, 21 Wash. 21; *Leavitt v. Carr*, 22 Wash. 361; *Fidelity Deposit Co. v. Faben*, 51 Wash. 308.

As to aggregated claims, interests or judgments, see *Goodyear Rubber Co. v. Schreiber*, 29 Wash. 94; *Garneau v. Port Blakely Mill Co.*, 20 Wash. 97.

Where an appeal is taken by a garnishee the amount claimed from him must be at least \$200: *Schreiner v. Emel*, 26 Wash. 555.

Amount, how determined: See 1 Remington's Digest, pp. 88, 89, §§ 37-40; *Graves v. Thompson*, 35 Wash. 282; *Durand v. Simpson Log. Co.* 21 Wash. 21; *Leavitt v. Carr*, 22 Wash. 361; *Goodyear Rubber Co. v. Schreiber*, 29 Wash. 94; *Garneau v. Port Blakely Mill Co.*, 20 Wash. 97. In an action to foreclose a mechanics' lien for less than \$100, in which the defendants counterclaim for \$350 damages, the amount in controversy is over two hundred dollars, regardless of the finding of the court: *Sorrill v. McGougan*, 44 Wash. 558.

The jurisdiction of the supreme court on appeal in replevin cannot be determined by ex parte affidavits as to the value of the property; and if the value is not found by the court or jury, and the complaint and the only evidence on the subject show the value to be over \$200, the supreme court has jurisdiction: *Gilbert Co. v. Husted*, 49 Wash. 61.

In an action to recover personal property, and damages for its detention, under the claim and delivery statute, where the value of the property is not found by the court or jury, the test of the jurisdic-

tion of the appellate court is the value alleged in the complaint, if the demand appears to have been made in good faith: *Gilbert Co. v. Husted*, 49 Wash. 61.

Reduction below \$200, by amendment, remission, payment or satisfaction deprives the court of jurisdiction: See 1 Remington's Digest, pp. 88, 89, §§ 41, 42; *Huber v. Brown*, 17 Wash. 4; *Peters v. Lewis*, 28 Wash. 366; *Dodge v. Corliss*, 28 Wash. 474; *Taylor v. Spokane Falls etc. R. Co.*, 32 Wash. 450; *Fenton v. Morgan*, 16 Wash. 30; *Puyallup Light etc. Co. v. Stevenson*, 21 Wash. 604; *Stewart v. Hanna*, 35 Wash. 148.

In a trial of the rights of property attached by a third party an appeal will lie although the amount of the claim of the attaching creditor may be less than two hundred dollars, if the property is found to exceed that value: *Eidson v. Woolery*, 10 Wash. 225.

The supreme court has no jurisdiction to review by certiorari the action of the lower court, when the original amount in controversy is not sufficient to authorize an appeal: *State v. Superior Ct.*, 8 Wash. 271. In *State v. Superior Ct.*, 6 Wash. 352, it was held that the jurisdiction to inquire into the proceedings of the superior court by certiorari was not dependent upon the amount in controversy, but will lie whenever the judgment of the superior court is rendered without proper service of summons.

Where by certiorari the superior judge is directed to certify to the supreme court a transcript of the record in a certain action, it is his duty to make return thereto, and a return made by the clerk of the court is insufficient: *State v. Sachs*, 3 Wash. 496; *State v. Superior Ct.*, 15 Wash. 668.

The supreme court has original jurisdiction to entertain an application for temporary alimony, attorney's fees and suit money pending an appeal: *Holcomb v. Holcomb*, 49 Wash. 498; *Sullivan v. Sullivan*, 49 Wash. 508.

The jurisdiction of the supreme and superior courts is defined by the constitution, and reference must be had thereto to determine the question: *State ex rel. Amsterdamsch etc. v. Superior Court*, 15 Wash. 668; *Waugh, In re*, 32 Wash. 50.

The provisions of this section as to jurisdiction in quo warranto and mandamus must be construed in the light of the law as it existed, or as defined by the current of authority, at the time of the adoption of the constitution: *State ex rel. White v. Board of State Land Commrs.*, 23 Wash. 700; *Winsor v. Bridges*, 24 Wash. 540; *Peterson v. Dillon*, 27 Wash. 78; *State ex rel. Attorney General v. Seattle Gas & Elec. Co.*, 28 Wash. 488; *Board of Directors Middle Kittitas Irr. Dist. v. Peterson*, 4 Wash. 147.

The provision herein giving the supreme court original jurisdiction in quo

warranto and mandamus as to all state officers, does not exclude the jurisdiction of the superior courts in the issuance of injunctions against state officers: *Jones v. Reed*, 3 Wash. 57.

The adoption of the state constitution made no change in the method of appealing causes to the supreme court except that the power to regulate the practice on appeal was transferred to the state legislature: *Stenger v. Roeder*, 3 Wash. 412.

This section, conferring appellate jurisdiction on the supreme court in all cases, is not self-executing: *Western American Co. v. St. Ann Co.*, 22 Wash. 158.

The provision herein giving the supreme court original jurisdiction in habeas corpus is self-executing: *Rafferty, In re*, 1 Wash. 382.

The courts will not pass upon the operation and effect of legislative enactments prior to their going into effect: *State ex rel. Campbell v. Superior Court*, 25 Wash. 271.

The constitutionality of a law may be raised in mandamus proceedings by ministerial officers, proceeded against for its nonenforcement or for noncompliance therewith: *Hindman v. Boyd*, 42 Wash. 17.

Decisions of what courts and other tribunals subject to appeal to the supreme: See 1 Remington's Digest, pp. 82-84, §§ 15-22.

As to municipal and other local courts, see *Falsetto v. Seattle*, 18 Wash. 509. An appeal does not lie to the superior court from the county board of equalization: *Olympia Waterworks v. Thurston County*, 14 Wash. 268; *Knapp v. King County*, 15 Wash. 541; *Olympia Waterworks v. Gelbach*, 16 Wash. 482; *Baker v. King County*, 17 Wash. 622; *Noyes v. King County*, 18 Wash. 417; *Lewis v. Bishop*, 19 Wash. 312; *Templeton v. Pierce County*, 25 Wash. 377; *Seattle etc. R. Co. v. Simpson*, 19 Wash. 628; *Buchanan v. Adams County*, 15 Wash. 699.

From county commissioners: See *Hull v. Stephenson*, 19 Wash. 572; *Selde v. Lin-*

coln County, 25 Wash. 198 (overruling *Hull v. Stephenson*, supra); *State ex rel. Banks v. Board of Commissioners*, 18 Wash. 160.

The supreme court has no original jurisdiction to grant injunctive relief pending an appeal upon the application of an appellant, who alleges the commission of acts by the respondent entitling him to relief independent of the appeal, and which are not in violation of appellant's supersedeas bond: *Van Siclen v. Muir*, 44 Wash. 361.

What are suits in equity, within this section: See 1 Remington's Digest, p. 84, § 23; *Fenton v. Morgan*, 16 Wash. 30; *Trumbull v. Jefferson County*, 37 Wash. 604; *Griffith v. Maxwell*, 20 Wash. 403; *State ex rel. Dudley v. Daggett*, 28 Wash. 1 (said to be overruled in *State ex rel. Plaisie v. Cole*, 40 Wash. 474, and *State ex rel. Ide v. Coon*, 40 Wash. 682; *Bennett v. Thorne*, 36 Wash. 253; *Horrell v. California etc. Assn.*, 40 Wash. 531; *Spokane v. Smith*, 37 Wash. 583.

What are actions at law, for the recovery of money: See 1 Remington's Digest, p. 85, § 24; *Barto v. Seattle etc. R. Co.*, 28 Wash. 179; *Tom v. Sayward*, 5 Wash. 383; *Chapin v. Kenoyer*, 12 Wash. 536; *Durand v. Simpson Logging Co.*, 21 Wash. 21; *Garneau v. Port Blakely Mill Co.*, 20 Wash. 97; *Durk v. Scully*, 41 Wash. 357.

When is an action "civil" and not criminal, within this section: See 1 Remington's Digest, p. 85, § 25; *State ex rel. Olson v. Allen*, 14 Wash. 684; *State ex rel. Geiger v. Geiger*, 20 Wash. 181; *State v. Murrey*, 30 Wash. 383; *In re Garfinkle*, 37 Wash. 650.

When is the validity of statutes or ordinances involved: See 1 Remington's Digest, p. 86, § 26; *Doty v. Krutz*, 13 Wash. 169; *Jacobs v. Puyallup*, 10 Wash. 384; *Huber v. Brown*, 17 Wash. 4; *Shook v. Sexton*, 37 Wash. 509.

§ 5. SUPERIOR COURT—ELECTION OF JUDGES, TERMS OF, ETC.—There shall be in each of the organized counties of this state a superior court, for which at least one judge shall be elected by the qualified electors of the county at the general state election: Provided, That until otherwise directed by the legislature one judge only shall be elected for the counties of Spokane and Stevens; one judge for the county of Whitman; one judge for the counties of Lincoln, Okanogan, Douglas, and Adams; one judge for the counties of Walla Walla and Franklin; one judge for the counties of Columbia, Garfield, and Asotin; one judge for the counties of Kittitas, Yakima, and Klickitat; one judge for the counties of Clark, Skamania, Pacific, Cowlitz, and Wahkiakum; one judge for the counties of Thurston, Chehalis, Mason, and Lewis; one judge for the county of Pierce; one judge for the county of King; one judge for the counties of Jefferson, Island, Kitsap, San Juan, and Clallam; and one judge for the counties of Whatcom, Skagit, and Snohomish. In any

county where there shall be more than one superior judge, there may be as many sessions of the superior court at the same time as there are judges thereof, and whenever the governor shall direct a superior judge to hold court in any county other than that for which he has been elected, there may be as many sessions of the superior court in said county at the same time as there are judges therein or assigned to duty therein by the governor, and the business of the court shall be so distributed and assigned by law, or, in the absence of legislation therefor, by such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof. The judgments, decrees, orders, and proceedings of any session of the superior court held by any one or more of the judges of such court shall be equally effectual as if all the judges of said court presided at such session. The first superior judges elected under this constitution shall hold their offices for the period of three years, and until their successors shall be elected and qualified, and thereafter the term of office of all superior judges in this state shall be for four years from the second Monday in January next succeeding their election, and until their successors are elected and qualified. The first election of judges of the superior court shall be at the election held for the adoption of this constitution. If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Cf. Cal., VI. 6; Wis., VII, 9.

Cited in 4 Wash. 717; 15 Wash. 404; 19 Wash. 21; 20 Wash. 222; 29 Wash. 351; 42 Wash. 27.

The intention of the constitution is that the regular term of all superior court judges shall be uniform both as to duration, commencement and ending thereof, hence the act (Laws of 1890, p. 346) providing for additional judges is void in so far as it changed the term of office of judges appointed thereunder: *State v. Twichell*, 4 Wash. 715.

This section fixing the judicial districts "until otherwise directed by the legislature" vests the power in the legislature to change the districts: *State ex rel. Dustin v. Rusk*, 15 Wash. 403.

The constitution and laws of this state recognize the distinction between the superior courts and the judges thereof: *State ex rel. Romano v. Yakey*, 43 Wash. 15. The term "court" is broader than the term "judge," as the former continues while the latter may change: *Gunderson v. Cochran*, 3 Wash. 476; *Shepard v. Gove*, 26 Wash. 452.

A judge of the superior court, who has been elected to fill an unexpired term, is entitled to qualify and take office as soon as the result of the election has been declared, the provision herein as to beginning of term of office only applying to original terms, and not to unexpired terms: *State ex rel. Linn v. Millett*, 20 Wash. 221.

§ 6. JURISDICTION OF SUPERIOR COURTS.—The superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases

arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and non-judicial days.

Cf. Cal., VI, 5; Mont., VIII, 11; Nev., VI, 6; N. Dak., IV, 103; Tex., V, 8; Wis., VII, 8; Wy., V, 10.

Always open: N. C., IV, 22.

Cited in 2 Wash. 3; 2 Wash. 545; 2 Wash. 665; 3 Wash. 62; 3 Wash. 93; 12 Wash. 439; 14 Wash. 263; 14 Wash. 605; 15 Wash. 671; 16 Wash. 116; 16 Wash. 354; 16 Wash. 361; 21 Wash. 162; 24 Wash. 547; 27 Wash. 83; 27 Wash. 182; 31 Wash. 13; 31 Wash. 222; 31 Wash. 306; 32 Wash. 53; 33 Wash. 172; 37 Wash. 260; 43 Wash. 228; 46 Wash. 405; 47 Wash. 484; 50 Wash. 655.

See 1 Remington's Digest, pp. 720-728, §§ 1-45; Id., vol. 2, pp. 1567, 1568, §§ 1-5.

The superior courts of this state are courts of general jurisdiction: *State v. Jones*, 2 Wash. 662, 665.

They are given by the constitution universal original jurisdiction, leaving the legislature to carve out from that jurisdiction the jurisdiction of other courts; they have exclusive original jurisdiction of the matters enumerated as particularly within their "original jurisdiction": *Moore v. Perrott*, 2 Wash. 1, 4.

Under the provision that superior courts shall have jurisdiction in all cases in which some other court has not been given exclusive jurisdiction by law, the superior courts have concurrent jurisdiction with justices of the peace where the sum sued for is less than one hundred dollars: *State ex rel. Shannon v. Hunter*, 3 Wash. 92; and, under this section, they have jurisdiction to issue writs of certiorari in the common-law sense: *Wilson v. Seattle*, 2 Wash. 543, 545.

It is manifest, under this section, that it was not the intention of the framers of the constitution to exclude any sort of manner of causes from the jurisdiction of the superior court, and it seems that it is authorized to enjoin officers of a county, who, in excess of their powers, are seeking to create a burden on the taxpayers by directing an illegal expenditure of public money: *Krieschel v. County Commrs.*, 12 Wash. 428.

Prohibition will not lie to restrain courts having original jurisdiction of cases in equity from issuing injunctions in excess of their jurisdiction, when there is a complete remedy by appeal from any final judgment that may be rendered by said courts in such cases: *State v. Jones*, 2 Wash. 662.

The superior court has no jurisdiction over a contest of election of a city officer, in the absence of a statute authorizing such contest, notwithstanding the provisions of this section: *State v. Superior Court*, 14 Wash. 604.

The provision herein giving the superior court original jurisdiction in equity and special cases not otherwise provided for, is not a self-executing extension of jurisdiction over the contest of the election of a city officer: *State ex rel. Fawcett v. Superior Court*, 14 Wash. 604.

The method by which it shall exercise its jurisdiction must be conferred by the constitution and by legislative authority: *Howe v. Barto*, 12 Wash. 627. The state courts have jurisdiction of offenses committed by Indians who have severed their tribal relations: *State v. Williams*, 13 Wash. 335; *State v. Howard*, 33 Wash. 250; *State v. Smokalem*, 37 Wash. 91. And they have jurisdiction to determine questions between Indians regarding Indian lands, when: See *Bird v. Winyer*, 24 Wash. 269.

It is not a valid objection to the jurisdiction of the superior court that the judge was not a resident of the county, the constitution not requiring a local judge in each county: *American Bonding Co. v. Dufur*, 49 Wash. 632. Jurisdiction of superior courts in probate matters: See *Reformed Presbyterian Church v. McMillen*, 31 Wash. 643. There is no probate court in this state, but instead one court of general jurisdiction: *Filley v. Murphy*, 30 Wash. 1.

The provision herein that the courts shall always be open except on nonjudicial days, and the provision as to issuance of writs of prohibition, etc., cannot be construed as prohibiting the reception of a verdict on nonjudicial days: *State v. Straub*, 16 Wash. 111. Under the provision herein that courts shall always be open except on nonjudicial days, any act of a judicial nature performed by a judge is, in contemplation of law, done in open court, although done at chambers: *Peterson v. Dillon*, 27 Wash. 78.

As to jurisdiction in quo warranto to determine who is entitled to the office of councilman of a city, see *Blake v. Morris*, 14 Wash. 262; *State ex rel. Hyland v. Peter*, 21 Wash. 243. The superior courts have concurrent jurisdiction with municipal courts over misdemeanors com-

mitted within such cities: *State v. Con-
sidine*, 16 Wash. 358.

An act empowering the courts to re-
strain by injunction the commission of an
act not prohibited by any law is not un-
constitutional for that reason, since the
effect of the act authorizing injunction
is substantially to declare the action il-
legal: *Karasek v. Peier*, 22 Wash. 419.

Although terms of court are abolished,
the provision in a statute as to terms of
court must be construed as synonymous
with the "sessions of court," provided for
by the rules of the superior courts of the
state: *Krutz v. Batts*, 18 Wash. 460.

The superior courts have no term fixed
by statute, but are courts of continuous
session: *Coyle v. Seattle Elec. Co.*, 31
Wash. 181.

County commissioners in establishing
roads exercise quasi legislative authority,
and the superior court on appeal is not
authorized to revise or control the deci-
sion: *Selde v. Lincoln County*, 25 Wash.
198.

It is beyond the power of the federal
government to impose any burden on the
procedure of state courts: *Dawson v. Mc-
Carty*, 21 Wash. 314.

§ 7. EXCHANGE OF JUDGES—JUDGE PRO TEMPORE.—The
judge of any superior court may hold a superior court in any county at the
request of the judge of the superior court thereof, and upon the request of the
governor it shall be his duty to do so. A case in the superior court may be
tried by a judge pro tempore, who must be a member of the bar, agreed upon
in writing by the parties litigant or their attorneys of record, approved by the
court, and sworn to try the case.

Cal., VI, 8; Colo., VI, 12; Ida., V, 11;
Mont., VIII, 12; N. Dak., IV, 104; Wy., V,
11.

Cited in 12 Wash. 172.

See 2 Remington's Digest, p. 1569, §§
6-8.

The provision of this section empowering
the judge of any superior court to hold
court at the request of the superior judge

of any county is self-executing: *State v.
Holmes*, 12 Wash. 169, 173.

A visiting judge, in the absence of an
affirmative showing to the contrary, is pre-
sumed to possess jurisdiction to discharge
the duties of judge of the court to which
he has been called: *Id.*

A visiting judge may hold a session of
court at the request of a resident judge,
without any request of the governor:
Hindman v. Boyd, 42 Wash. 17.

§ 8. ABSENCE OF JUDICIAL OFFICER.—Any judicial officer who
shall absent himself from the state for more than sixty consecutive days shall
be deemed to have forfeited his office: Provided, That in cases of extreme
necessity the governor may extend the leave of absence such time as the neces-
sity therefor shall exist.

Cf. Cal., VI, 9; Mont., VIII, 37; Nev., VI, 17.

§ 9. REMOVAL OF JUDGES, ATTORNEY GENERAL, ETC.—Any
judge of any court of record, the attorney general, or any prosecuting attorney
may be removed from office by joint resolution of the legislature, in which
three-fourths of the members elected to each house shall concur, for incompe-
tency, corruption, malfeasance, or delinquency in office, or other sufficient cause
stated in such resolution. But no removal shall be made unless the officer com-
plained of shall have been served with a copy of the charges against him as the
ground of removal, and shall have an opportunity of being heard in his defense.
Such resolution shall be entered at length on the journal of both houses, and on
the question of removal the ayes and nays shall also be entered on the journal.

Cf. Cal., VI, 10.

§ 10. JUSTICES OF THE PEACE.—The legislature shall determine
the number of justices of the peace to be elected in incorporated cities or towns
and in precincts, and shall prescribe by law the powers, duties, and jurisdiction
of justices of the peace: Provided, That such jurisdiction granted by the

legislature shall not trench upon the jurisdiction of superior or other courts of record, except that justices of the peace may be made police justices of incorporated cities and towns. In incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use.

See *supra*, Art. IV, § 6.

Cf. Cal., VI, 11.

Cited in 2 Wash. 3; 4 Wash. 92, 93; 15 Wash. 49; 25 Wash. 267; 31 Wash. 306; 41 Wash. 48.

See 2 Remington's Digest, pp. 1662, 1663, §§ 1-8.

This section is self-executing with reference to the matter of population, merely the matter of fixing salaries being referred to the legislature, and the courts are justified in receiving testimony to determine the amount of population: *Anderson v. Whatcom Co.*, 15 Wash. 47.

The last clause of this section does not apply to justices of the peace in incorporated cities containing less than five thousand inhabitants by the last federal census, but which contain more than five thousand inhabitants by a census taken pursuant to § 2754 of the Code of 1881: *Rhode v. Seavey*, 4 Wash. 91.

Justices of the peace have no jurisdiction under this section, in causes in which the demand or value of the property in controversy is one hundred dollars or more: *Moore v. Perrott*, 2 Wash. 1; and a judgment rendered for a greater amount is void: *Id.*

In this case, cause removed to superior court held sufficient under Art. XXVII, § 5, although amount claimed exceeded constitutional jurisdiction: *Id.*

A justice of the peace has no jurisdiction of an action for the recovery of a sum due,

and interest thereon, arising on contract for payment of money, when the total amount claimed is in excess of one hundred dollars, inclusive of interest: *State ex rel. Egbert v. Superior Court*, 9 Wash. 369; and where a justice of the peace has no jurisdiction of the subject matter of an action brought before him, the superior court cannot acquire any by an appeal from the justice: *Id.*

A census taken pursuant to the provisions of § 2754 of the Code of 1881 is not a state census within the meaning of this section: *Rhode v. Seavey*, *supra*.

Where two cities have been consolidated, thereby making the population of the new city more than five thousand, the acting justice of the peace of one of the cities does not thereby become the justice of the peace of the consolidated city, and entitled to the salary provided for justices in cities of more than five thousand population: *Whiting v. Collier*, 9 Wash. 412.

Salary is not fixed for a justice of the peace in a city of less than five thousand inhabitants during the time after such city acquires more than five thousand inhabitants: *Ogden v. Chehalis County*, 41 Wash. 45.

Justices having jurisdiction to punish misdemeanors have power to punish criminally persons guilty of creating and maintaining nuisances, made misdemeanors: *State v. Schaffer*, 31 Wash. 305.

§ 11. COURTS OF RECORD.—The supreme court and the superior court shall be courts of record, and the legislature shall have power to provide that any of the courts of this state, excepting justices of the peace, shall be courts of record.

Cf. Cal., VII, 12.

§ 12. INFERIOR COURTS.—The legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this constitution.

See notes to § 1 of this article.

Cf. Cal., VI, 13.

The power conferred upon the legislature to create additional inferior courts is not one of its original, inherent powers, which can be delegated by it, but is a delegated power which must be exercised in the man-

ner pointed out, and cannot be again delegated: *In re Cloherty*, 2 Wash. 137.

The legislature being originally vested with authority to create police courts, it cannot delegate that power to a city: *Id.*, 139.

§ 13. SALARIES OF JUDICIAL OFFICERS—HOW PAID, ETC.—No judicial officer, except court commissioners and unsalaried justices of the

peace, shall receive to his own use any fees or perquisites of office.¹ The judges of the supreme court and judges of the superior courts shall severally, at stated times, during their continuance in office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election, nor during the term for which they shall have been elected. The salaries of the judges of the supreme court shall be paid by the state. One-half of the salary of each of the superior court judges shall be paid by the state, and the other one-half by the county or counties for which he is elected.² In cases where a judge is provided for more than one county, that portion of his salary which is to be paid by the counties shall be apportioned between or among them according to the assessed value of their taxable property, to be determined by the assessment next preceding the time for which such salary is to be paid.

1. Cal., VI, 15; Colo., VI, 18; Ida., V, 17; Mont., VIII, 30; Minn., VI, 6; N. Dak., IV, 99; Nev., VI, 10; N. Y., Rev., VI, 20; S. Dak., V, 30; Wy., V, 17.

2. Cal., VI, 17.
Cited in 47 Wash. 375.

§ 14. SALARIES OF SUPREME AND SUPERIOR COURT JUDGES.—Each of the judges of the supreme court shall receive an annual salary of four thousand dollars (\$4,000); each of the superior court judges shall receive an annual salary of three thousand dollars (\$3,000), which said salaries shall be payable quarterly. The legislature may increase the salaries of the judges herein provided.

Cf. Cal., VI, 17.

§ 15. INELIGIBILITY OF JUDGES.—The judges of the supreme court and the judges of the superior court shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected.

The terms of supreme and superior court judges commence from the second Monday in January, and of other state officers on the second Monday in January after their election and qualification: See §§ 3 and 5 of this article and § 4 of Art. III.

Cal., VI, 18; Nev., VI, 11; Ind., VII, 16; cf. Wis., VII, 10; Minn., VI, 11.

Cited in 13 Wash. 63.

The provisions of §§ 18, 19, Laws of 1893, page 301, are not open to the objec-

tion that they impose a public employment upon judges which is nonjudicial, in violation of this section: *Seanor v. County Commrs.*, 13 Wash. 48, 63.

§ 16. CHARGING JURIES.—Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

As to unlawful comment on the evidence in giving instructions to the jury, see notes to § 339, *infra*.

Cf., Ark., VII, 23; Cal. VI, 19; Nev., VI, 12; S. C., IV, 26; Tenn., VI, 9.

Cited in 3 Wash. 42, 43; 3 Wash. 121; 4 Wash. 445; 5 Wash. 125; 6 Wash. 487; 7 Wash. 250; 7 Wash. 341; 7 Wash. 343; 9 Wash. 333; 13 Wash. 663; 14 Wash. 680; 15 Wash. 183; 20 Wash. 236; 22 Wash. 246; 23 Wash. 659; 24 Wash. 653; 26 Wash. 269; 32 Wash. 66; 35 Wash. 334; 35 Wash. 569; 36 Wash. 366; 39 Wash. 202; 41 Wash. 647; 47 Wash. 46; 49 Wash. 28; 50 Wash. 569.

See 1 Remington's Digest, p. 801, §§ 215-217; *Id.*, pp. 809-812, §§ 255-269; 2 *Id.*, p. 2739, § 14; *Id.*, pp. 2755-2757, §§ 66-73.

All remarks and observations as to the facts before the jury are positively prohibited by this provision, and if any such are made, the judgment will be reversed, unless the appellate court can see that they were in no sense prejudicial: *State v. Walters*, 7 Wash. 246; remarks in this case held not prejudicial: *Id.* See, also, *Furth v. Snell*, 13 Wash. 660, 664.

An incidental allusion to the facts called to the court's attention in determining a motion for a nonsuit is not an infringement on this prohibition: *Patchen v. Parke & L. M. Co.*, 6 Wash. 486; following *Blue v. McCabe*, 5 Wash. 125. See *Waite v.*

Strand, 9 Wash. 333, 334, language attributed to nisi prius judge held violative of this provision.

In passing on a motion for a nonsuit, it is not error for the judge to comment on the testimony in presence of jury when defendant has not asked for their withdrawal during the consideration of the motion: *Blue v. McCabe*, supra; see *Pepperall v. City Park Transit Co.*, 15 Wash. 176, 183.

It is error under this section to tell the jury that there is no dispute in the testimony on a certain point, or that any fact is conclusively proven: *Bardwell v. Ziegler*, 3 Wash. 34.

The statement of the trial judge preliminary to instructing the jury, that "you will be left to determine between the demands of public justice and the defense of the prisoner at the bar," is not a comment that would lead the jury to understand that public justice could demand the conviction of an innocent person, under any circumstances, or to express an opinion as to defendant's guilt or innocence: *State v. Brooks*, 4 Wash. 328.

A defendant requested the court to charge that "the bare possession of stolen property, alone, is not sufficient to sustain a verdict of guilty," to which the court added, "It is only a circumstance tending to show guilt": Held, not violative of this provision: *State v. Duncau*, 7 Wash. 336.

An instruction informing the jury that they may consider the relations of the parties and witnesses, their interest, temper, bias, demeanor, intelligence and credibility in testifying, does not contravene the provisions of this section: *Klepsch v. Donald*, 4 Wash. 436.

The fact that the court, in charging the jury, rehearses the plaintiff's or defendant's theory of the case is not a comment on the facts in violation of the constitutional inhibition: *Binnian v. Jennings*, 14 Wash. 677, 680.

Remarks and conduct of judge during the trial, when not unlawful comment, under this section: *Patchen v. Parke & Lacy Machinery Co.*, 6 Wash. 486; *Earles v. Bigelow*, 7 Wash. 581; *Livesley v. Pier*, 11 Wash. 268; *State v. Burns*, 19 Wash. 52; *State v. Crotts*, 20 Wash. 245; *Knox v. Fuller*, 23 Wash. 34; *State v. Surry*, 23 Wash. 655; *Miller v. Dumon*, 24 Wash. 648; *Koontz v. Koontz*, 25 Wash. 336; *Myrberg v. Baltimore & S. M. R. Co.*, 25 Wash. 364; *Shoemaker v. Bryant Lumber etc. Co.*, 27 Wash. 637; *Nunn v. Jordan*, 31 Wash. 506; *Halverson v. Seattle Electric Co.*, 35 Wash. 600; *Cummings v. Weir*, 37 Wash. 42; *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346; *Patten v. Auburn*, 41 Wash. 644.

§ 17. ELIGIBILITY OF JUDGES.—No person shall be eligible to the office of judge of the supreme court or judge of a superior court unless he shall have been admitted to practice in the courts of record of this state or of the territory of Washington.

Cal., VI, 23; Colo., VI, 10; Mont., VIII, 10; N. Dak., IV, 94; S. Dak., V, 10; Wy., V, 10.

§ 18. SUPREME COURT REPORTER.—The judges of the supreme court shall appoint a reporter for the decisions of that court, who shall be removable at their pleasure. He shall receive such annual salary as shall be prescribed by law.

Cf. Ala., VI, 22; Ark., VII, 7; Cal., VI, 21; Kan., III, 4; Neb., VI, 8; S. C., IV, 7.

§ 19. JUDGES MAY NOT PRACTICE LAW.—No judge of a court of record shall practice law in any court of this state during his continuance in office.

Ala., VI, 20; Cal., VI, 22; Colo., VI, 18; Mont., VIII, 31; N. Dak., IV, 117; S. Dak., V, 31; Wy., V, 25.

§ 20. DECISIONS, WHEN TO BE MADE.—Every case submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof: Provided, That if within said period of ninety days a rehearing shall have been ordered, then the period within which he is to decide shall commence at the time the cause is submitted upon such a rehearing.

Cf. Cal., VI, 24.

Cited in 33 Wash. 202.

The failure of a judge to decide a case within ninety days from its submission, as

required by this section, does not render the judgment void for want of jurisdiction: *Demaris v. Barker*, 33 Wash. 200. The entry of a judgment some six months after its rendition is not void under this

section, where the decision of the court was in fact given orally at the close of the trial: *West Phila. Title & T. Co. v. Olympia*, 19 Wash. 150.

§ 21. PUBLICATION OF OPINIONS.—The legislature shall provide for the speedy publication of opinions of the supreme court, and all opinions shall be free for publication by any person.

Cf. Cal., VI, 16; N. Y., Rev., VI, 21; Wis., VII, 21.

§ 22. CLERK OF SUPREME COURT.—The judges of the supreme court shall appoint a clerk of that court, who shall be removable at their pleasure, but the legislature may provide for the election of the clerk of the supreme court and prescribe the term of his office. The clerk of the supreme court shall receive such compensation by salary only as shall be provided by law.

Cf. Cal., VI, 14; Colo., VI, 9; Fla., VI, 19; Ida., V, 15; Md., V, 9; Mich., X, 3; Mont., VIII, 9; N. Dak., IV, 93; S. Dak., V, 12; W. Va., VII, 5; Wy., V, 9.

§ 23. COURT COMMISSIONERS.—There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

Cf. Cal., VI, 14.

Cited in 27 Wash. 83; 44 Wash. 616; 49 Wash. 317.

A court commissioner has power to try causes in which a jury is not required, and to enter judgment, which stands as the final judgment of the court, when no proceedings are instituted for its review in the court below: *Peterson v. Dillon*, 27

Wash. 78. A court commissioner has no power to take the arraignment of a prisoner, accept a plea of guilty, and render judgment: *State v. Philip*, 44 Wash. 615. This section cannot be limited by the act of the legislature to superior courts in counties having a resident judge: *Howard v. Hansen*, 49 Wash. 314.

§ 24. RULES FOR SUPERIOR COURTS.—The judges of the superior courts shall, from time to time, establish uniform rules for the government of the superior courts.

Cf. Tex., V, 25.

The court has no power to establish rules which would have the effect of extending the statutory period within which amendments may be proposed to a statement of facts: *Warburton v. Ralph*, 9

Wash. 537. The court has a right, for good reasons, to suspend its own rules: *Washington Bank of Walla Walla v. Horn*, 24 Wash. 299. A rule of court is not a law: *Nichols v. Griffin*, 1 W. T. 374.

§ 25. REPORTS OF SUPERIOR COURT JUDGES.—Superior judges shall, on or before the first day of November in each year, report in writing to the judges of the supreme court such defects and omissions in the laws as their experience may suggest, and the judges of the supreme court shall, on or before the first day of January in each year, report in writing to the governor such defects and omissions in the laws as they may believe to exist.

Colo., VI, 27; Ida., V, 25.

§ 26. CLERK OF THE SUPERIOR COURT.—The county clerk shall be, by virtue of his office, clerk of the superior court.

§ 27. **STYLE OF PROCESS.**—The style of all process shall be "The State of Washington," and all prosecutions shall be conducted in its name and by its authority.

Cal., VI, 20; Colo., VI, 30; Mont., VIII, 27; Nev., VI, 13; N. Dak., IV, 97; S. Dak., V, 38; Wy., V, 15.

Cited in 14 Wash. 240; 19 Wash. 41; 20 Wash. 491.

A prosecution for the violation of a town ordinance may be brought in the name of the state, notwithstanding the provisions of a statute that such prosecu-

tion shall be in the name of the "People of the State of Washington": *State v. Fountain*, 14 Wash. 236. Or may be brought in the name of the municipality: *Seattle v. Chin Let*, 19 Wash. 38. It is not error to admit in evidence a void warrant not running in the name of the state: *State v. Symes*, 20 Wash. 484.

§ 28. **OATH OF JUDGES.**—Every judge of the supreme court, and every judge of a superior court shall, before entering upon the duties of his office, take and subscribe an oath that he will support the constitution of the United States and the constitution of the state of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state.

Cf. U. S., VI, 3; Ala., XV, 1; Ark., XIX, 20; Cal., XX, 3; Colo., XII, 8; Conn., X, 1; Del., VIII; Ill., IV, 5; Ia., XI, 5; Ind., XV, 4; Ky., 228; La., 148; Me., IX, 1; Minn., IV, 20; Md., I, 6; Mass., VI, 1; Mich., XVI, 1; Mo., IV, 15; Miss., 155;

Neb., XIV, 1; N. J., IV, 8; Nev., XV, 2; N. H., I, 84; N. Y., XII, 1; N. C., II, 24; Ohio, XV, 7; Or., XV, 3; Pa., VII, 1; R. I., IX, 3; S. C., II, 30; Tex., XVI, 1; Tenn., X, 2; Vt., II, 29; Va., III, 6; W. Va., VI, 16; Wis., IV, 23.

ARTICLE V.

IMPEACHMENT.

§ 1. **IMPEACHMENT—POWER OF AND PROCEDURE.**—The house of representatives shall have the sole power of impeachment. The concurrence of a majority of all the members shall be necessary to an impeachment. All impeachments shall be tried by the senate, and when sitting for that purpose, the senators shall be upon oath or affirmation to do justice according to law and evidence. When the governor or lieutenant governor is on trial, the chief justice of the supreme court shall preside. No person shall be convicted without a concurrence of two-thirds of the senators elected.

Cf. U. S. Const., I, 3 (6); Ark., XV, 2; Cal., IV, 17; Colo., XIII, 1; Conn., IX, 1-2; Del., V, 1; Fla., III, 29; Ga., III, 5 (3-5); Ill., IV, 24; Kan., II, 27; La., V, 196 et seq.; Mont., V, 16; Me., IV, Pt. II, 7; Md., III, 26; Mass., Pt. II, 8; Mich., XII, 1, 2; Minn., IV, 14; Miss., IV, 49; Mo., VII, 2; Neb., III, 14; Nev., VII, 1; N.

Dak., XIV, 194-195; N. H. Senate, 38; N. Y., Rev., VI, 13; N. C., IV, 3, 4; Ohio, II, 23; R. I., XI, 1-2; S. C., VII, 1-2; S. D., XVI, 1-2; Tenn., V, 1-2; Tex., XV, 1, 2, 3; Vt. Amend., Art. VII; Wy., III, 17.

Ala., IV, 24; Ia., III, 19; Ky., 66-68; Pa., VI, 1-2; Va., V, 16.

§ 2. **OFFICERS LIABLE TO.**—The governor and other state and judicial officers, except judges and justices of courts not of record, shall be liable to impeachment for high crimes or misdemeanors, or malfeasance in office, but judgment in such cases shall extend only to removal from office and disqualification to hold any office of honor, trust, or profit in the state. The party, whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial, judgment, and punishment according to law.

Ala., VII, 4; Ark., XII, 1; XV, 1; Cal., IV, 18; Colo., XIII, 2; Conn., IX, 3; Del., V, 2; Fla. Amend., 229; Ga., III, 2; Ia.,

III, 20; Kan., II, 28; Ky., V, 3; La., 96, 97; Minn., XIII, 1; Mo., VII, 1, 2; Mont., V, 17; Nev., VII, 2; N. Dak., XIV, 196;

N. Y., Rev., VI, 13; Ohio, II, 24; Pa., VI, 3; R. I., XI, 3; S. C., VII, 3; S. Dak., XVI, 3; Tenn., V, 4; Tex., XV, 2, 4; Wy., III, 18.

Cited in 6 Wash. 497.

Impeachments under this article are limited to superior state officers, of the executive and judiciary departments: *State v. Smith*, 6 Wash. 496, 498. See note to next section.

§ 3. REMOVAL FROM OFFICE.—All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law.

Ala., VI, 2; Cal., IV, 18; Colo., XIII, 3; Fla. Amend., II, 29; Ia., III, 20; Minn., XIII, 2; Mont., V, 18; Nev., VII, 4; N. Dak., XIV, 197; S. Dak., XVI, 4; Tenn., V, 5; Tex., XV, 7; W. Va., IV, 6; Wy., III, 19.

Cited in 6 Wash. 498; 8 Wash. 417; 19 Wash. 332.

Capitol commissioners appointed by the governor are not liable to impeachment and therefore may be removed by the governor under § 6938, *infra*: *State ex rel. McReavy v. Burke*, 8 Wash. 412, 417.

ARTICLE VI.

ELECTIONS AND ELECTIVE RIGHTS.

§ 1. QUALIFICATIONS OF ELECTORS.—All male persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote; they shall be able to read and speak the English language: Provided, That Indians not taxed shall never be allowed the elective franchise: And further provided, That this amendment shall not effect [affect] the right of franchise of any person who is now a qualified elector of this state. The legislature shall enact laws defining the manner of ascertaining the qualifications of voters as to their ability to read and speak the English language, and providing for punishment of persons voting or registering in violation of the provisions of this section.

This section is amended. See 2d amendment, *infra*.

See U. S., XIV, Amend.; cf. Ala., VIII, 1; Ark., III, 1; Cal., II, 1; Colo., VII, 1; Conn., VI, 1-3; Amends. VIII, IX; Del., IV, 1; Fla., VI, 1; Ga., II, 2 (1-2); Ida., VI, 2; Ill., VII, 1; Ind., II, 2; Ia., II, 1; Kan., V, 1, 2; Ky., 145; La., 185; Me., II, 1; Mass. Amend., XIII; Mich., VII, 1; Amend., VII; Minn., VII, 1, 2; Miss., XII, 241; Mo., VIII, 2, 9, 10; Mont., IX, 2; Neb., VII, 1; Nev., II, 1; N. H., Pt. II, 27; N. J., II, 1, 2; Amend., 75; N. Y., Rev., II, 1; N. Dak., V, 121; Amend. N. C., VI, 1, 5; Ohio, V, 1, 4; Or., II, 2, 3, 6; Pa., VIII, 1; R. I., II, 1, 2; S. C., VII, 2; S. Dak., VII, 1; Tenn., IV, 1; Tex., VI, 1, 2; Vt. II, 18; Va., III, 1, Amend.; W. Va., IV, 1; Wis., III, 1, 2; Wy., VI, 2. To be able to read: Wy., VI, 9. Educational qualification may be prescribed: Colo., VII, 3.

Cited in 8 Wash. 65; 12 Wash. 382; 13 Wash. 150; 13 Wash. 362; 13 Wash. 707; 42 Wash. 32.

The right to vote in this state at any election, general or special, resides in those

possessing the qualifications prescribed in this section, subject only to compliance with such reasonable provisions respecting registration and regulating the exercise of the right as the legislature may provide: *Stallcup v. Tacoma*, 13 Wash. 141, 151.

A provision, directing that votes not indorsed by initials of an election officer shall not be counted, is in conflict with this section of the constitution, entitling all male persons having certain qualifications to vote at all elections, as annulling the voter's right without fault on his part: *Moyer v. Van de Vanter*, 12 Wash. 377.

Persons of either sex may hold the office of county superintendent of schools without any violation of the constitution; and it is within the province of the legislature to provide that a person of either sex may hold such office: *Russell v. Guptill*, 13 Wash. 361, 362; *Holmes & Bull F. Co. v. Hedges*, 13 Wash. 696, 707. Section 3050, Code 1881, superseded: *Russell v. Guptill*, 13 Wash. 362.

§ 2. SCHOOL ELECTIONS—FRANCHISE, HOW EXTENDED.—The legislature may provide that there shall be no denial of the elective franchise at any school election on account of sex.

See note to last section.

Ida., VI, 2; Mont., IX, 10; N. Dak., V, 128; S. Dak., VII, 9.

Cited in 13 Wash. 362; 13 Wash. 707.

This section of the constitution confers

the elective franchise upon women to vote at school elections who are otherwise eligible: *Holmes & Bull F. Co. v. Hedges*, 13 Wash. 696, 707.

§ 3. WHO DISQUALIFIED.—All idiots, insane persons, and persons convicted of infamous crime unless restored to their civil rights, are excluded from the elective franchise.

Cf. Ala., VII, 3; Ark., III, 5; Cal., II, 1; Ga., II, 1 (2); Ida., VI, 3; Ill., VII, 7; Ia., II, 5; La., 187; Miss., XII, 241; Mont., IX, 8; Neb., VIII, 2; Nev., II, 1; N. Dak., V, 127; Ohio, V, 6; Or., II, 3; S. Dak., VII, 8;

Va., III, 1; Wy., VI, 6. Crime: Ark., III, 6; Ida., VI, 3; Ill., VII, 7; Ind., II, 8; Ia., II, 1; Mont., IX, 2, N. Dak., V, 127; S. Dak., VII, 8; Tenn., IV, 2. Cited in 13 Wash. 362.

§ 4. RESIDENCE, CONTINGENCIES AFFECTING.—For the purpose of voting and eligibility to office, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while in the civil or military service of the state or of the United States, nor while a student at any institution of learning, nor while kept at public expense at any poorhouse or other asylum, nor while confined in public prison, nor while engaged in the navigation of the waters of this state or of the United States, or of the high seas.

Ala., I, 32; Cal., II, 4; Colo., VII, 4; Ida., VI, 5; Ill., VII, 4; Ind., II, 4; Kan., V, 3; Ky., 146; La., 193; Mich., VII, 5; Minn., VII, 3; Mo., VIII, 7; Mont., IX, 3; Neb., VII, 3; Nev., II, 2, 3; N. Y., Rev., II, 3;

N. Dak., V, 125, 126; Ohio, V, 5; Or., II, 4; Pa., VIII, 6, 13; S. C., VIII, 4; S. Dak., VII, 6, 7; Wis., III, 4; Wy., VI, 7. Cited in 13 Wash. 362; 51 Wash. 556.

§ 5. VOTER—WHEN PRIVILEGED FROM ARREST.—Voters shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at elections and going to and returning therefrom.¹ No elector shall be required to do military duty on the day of any election except in time of war or public danger.²

1. Cf. Ala., VIII, 4; Ark., III, 4; Cal., II, 2; Colo., VII, 5; Conn., VI, 8; Del., IV, 2; Ga., II, 3 (1) Ill., VII, 3; Ind., II, 12; Ia., II, 2; Kan., V, 7; Ky., 149; La., 189; Me., II, 2; Mich., VII, 3; Miss., IV, 102; Mo., VIII, 4; Mont., IX, 4; Neb., VII, 5; Ohio, V, 3; Or., II, 12; Pa., VIII, 5; S.

Dak., VII, 5; S. C., VIII, 6; Tenn., IV, 3; Tex., VI, 5; Wy., VI, 3; W. Va., IV, 3.

2. Cal., II, 3; Ia., II, 3; Mont., IX, 5; Me., II, 2; Mich., VII, 4; Neb., VII, 5; Va., III, 5.

Cited in 28 Wash. 16.

§ 6. BALLOT.—All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.

Ballot: Ala., VIII, 3; Ark., III, 3; Cal., II, 5; Colo., VII, 8; Conn., VI, 7; Del., IV, 1; Fla., XIV, 5; Ga., II, 1; Ill., VII, 2; Ind., II, 13; Ia., II, 6; Ida., VI, 1; Kan., IV, 1; Ky., 147; La., 184; Mont., IX, 1; Me., II, 1; Md., I, 1, 2, 3; Mich., VII, 2; Minn., VII, 6; Miss., XII, 240; Mo., VII, 2; N. Dak., V, 129; N. Y., Rev., II, 5;

Neb., VII, 6; Nev., II, 5; N. H., Pt. II, 32; N. C., VI, 3; Ohio, V, 2; Pa., VIII, 4; R. I., VIII, 2; S. C., VIII, 1; S. Dak., VII, 3; Tenn., IV, 4; Tex., VI, 4; Vt., XII, 4; Va., III, 2; W. Va., IV, 2; Wis., III, 3; Wy., VI, 11.

Cited in 12 Wash. 382.

§ 7. REGISTRATION.—The legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote: Provided, That this provision is not compulsory upon the legislature, except as to cities and towns having a population of over five hundred inhabitants. In all other cases the legislature may or may not require registration as a prerequisite to the right to vote, and the same system of registration need not be adopted for both classes.

Cf. Fla., VI, 2; Ga., II, 2; Ky., 147; La., 186; Mont., IX, 9; Md., I, 5; Mo., VIII, 5; Miss., XII, 242; N. C., VI, 2; Nev., II, 6; N. Y., Rev., II, 4; S. Dak., VII, 3; S. C., VIII, 3; Wy., VI, 13.

Cited in 13 Wash. 145.

The mere failure or neglect of the legislature to make any provision for registration does not operate to deprive those having the constitutional qualifications from exercising the elective franchise: *Stallcup v. Tacoma*, 13 Wash. 141, 151.

§ 8. ELECTIONS, TIME OF HOLDING.—The first election of county and district officers not otherwise provided for in this constitution, shall be on the Tuesday next after the first Monday in November, eighteen hundred and ninety, and thereafter all elections for such officers shall be held biennially on the Tuesday next succeeding the first Monday in November. The first election of all state officers not otherwise provided for in this constitution, after the election held for the adoption of this constitution, shall be on the Tuesday next after the first Monday in November, eighteen hundred and ninety-two, and the elections for such state officers shall be held in every fourth year thereafter on the Tuesday succeeding the first Monday in November.

See *infra*, Art. XXVII, § 14, and notes.

Cited in 4 Wash. 717; 4 Wash. 720; 5 Wash. 460, 461; 9 Wash. 532; 16 Wash. 573.

A judge of the superior court is a "state officer" within the contemplation of this section: *State v. Twichell*, 4 Wash. 715.

Under this section and § 14 of the "Schedule," the term of office of county officers is for two years, commencing on the second Monday of January next succeeding their election; and the act of Feb. 4, 1886, prescribing the tenure of office in

Washington territory has been thereby abrogated: *McMurray v. Hollis*, 5 Wash. 458.

The act of Mar. 26, 1890 (p. 317), providing that counties shall be divided into commissioners' districts and county commissioners elected therein, and the act of Feb. 28, 1891 (p. 116), fixing the term of office of such commissioners, does not violate this section, providing that the election of county and district officers must be held biennially, as such section must be construed with Art. XI, § 5: *State ex rel. Hays v. Twichell*, 9 Wash. 530.

ARTICLE VII.

REVENUE AND TAXATION.

§ 1. ANNUAL STATE TAX.—All property in the state not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. And for the purpose of paying the state debt, if there be any, the legislature shall provide for levying a tax annually, sufficient to pay the annual interest and principal of such debt within twenty years from the final passage of the law creating the debt.

Cf. Ark., XI, 1; Cal., XIII, 1; Ida., VII, 2; Ill., IX, 1; La., 203; Miss., IV, 112; Mo., X, 4; Mich., XIV, 12; Mont., XII, 1;

Mass., II, 1, 1, 4; Me., IX, 8; Neb., IX, 1; N. Dak., XI, 174; N. J., IV, 7 (12); Or., IX, 1; S. C., I, 36; S. Dak., XI, 1;

Tex., VIII, 1; Va., X, 1; W. Va., X, 1; Wy., XV, 4.

Cited in 3 Wash. 304; 17 Wash. 12; 18 Wash. 252; 20 Wash. 678; 21 Wash. 54; 21 Wash. 554; 23 Wash. 77; 28 Wash. 100; 29 Wash. 163; 30 Wash. 445; 35 Wash. 31; 39 Wash. 179; 45 Wash. 639; 50 Wash. 173.

See 2 Remington's Digest, pp. 2663-2677, §§ 1-66; Id., p. 2708, §§ 185-188.

Laws 1897, page 139, § 5, providing for exemption from taxation of personal property to a certain amount, is in conflict with this and the next section: *State ex rel. Chamberlain v. Daniel*, 17 Wash. 111.

The power to impose and the method of collecting taxes rest in the discretion of

the legislature, and the expediency thereof will not be questioned by the courts: *Nathan v. Spokane County*, 35 Wash. 26.

The absence of specially delegated power to tax inheritances is not to be construed as a restriction on the legislative power to provide such a tax: *State v. Clark*, 30 Wash. 439.

Franchises, being a species of personal property, are taxable under this section: *Commercial Elec. L. & P. Co. v. Judson*, 21 Wash. 49.

The title of Laws 1901, page 67, which is confined to the taxation of "inheritances," is sufficiently broad to include a tax on the right of succession by a will as well as by operation of law: *In re White's Estate*, 42 Wash. 360.

§ 2. TAXATION—UNIFORMITY AND EQUALITY—EXEMPTION.—The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property: Provided, That a deduction of debts from credits may be authorized: Provided further, That the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation.

This section is amended. See 3d amendment, *infra*.

See notes and references to preceding section.

Cf. Ark., XVI, 5; Cal., XIII, 1; Colo., X, 3; Fla., IX, 1; Ga., VII, 2 (1); Ind., X, 1; Ida., VII, 5; Kan., XI, 1; La., 203; Mich., XIV, 2; Minn., IX, 1, 3; Mont., XII, 1 and 11; Mo., X, 3; Miss., IV, 112; N. Dak., XI, 176; N. Car., V, 3; N. J., IV, 7, 12; Nev., X, 1; Or., I, 32, IX, 1; Ohio, XII, 2; Pa., IX, 1; S. C., IX, 1; Tex., VIII, 1; Tenn., II, 28; Va., X, 1; Wy., XV, 2; Wis., VIII, 1; W. Va., X, 1; U. S. Rev. Stats., 1924.

Cited in 5 Wash. 146; 6 Wash. 254; 7 Wash. 107; 7 Wash. 271; 8 Wash. 549; 14 Wash. 267; 17 Wash. 112; 17 Wash. 452; 18 Wash. 253; 18 Wash. 276; 20 Wash. 152; 20 Wash. 683; 21 Wash. 101; 21 Wash. 554; 28 Wash. 258; 29 Wash. 164; 30 Wash. 445; 35 Wash. 483; 37 Wash. 16; 44 Wash. 66; 44 Wash. 468; 48 Wash. 482; 49 Wash. 173; 50 Wash. 173; 50 Wash. 177.

Our constitution requires uniform and equal taxation; and whether there is such uniformity and equality according to value must be a judicial question: *Whatcom County v. Fairhaven L. Co.*, 7 Wash. 101, 107.

A set of abstract books is personal property, and the subject of assessment and taxation under this section: *Booth & Hanford Abstract Co. v. Phelps*, 8 Wash. 549.

Officers of a national bank may be compelled to exhibit to a county assessor a list of names and residences of all stockholders in the bank, with the number of their

shares, as required by § 5210, U. S. Rev. Stats.: *Paul v. McGraw*, 3 Wash. 296; *Paul v. Chapin*, 3 Wash. 433.

School districts are, within the contemplation of the constitution, municipal corporations: *Maxon v. School Dist.*, 5 Wash. 142; *Board of Directors v. Peterson*, 4 Wash. 147; *State v. Grimes*, 7 Wash. 270, 272.

Municipal corporations are subject to the constitutional requirement that assessments and taxation shall be uniform and equal, etc., but are not restricted, except by their charters, as to the time of making assessments or of the collection of taxes, or the instrumentalities or agencies used therein: *State v. Carson*, 6 Wash. 250, 254.

The act of 1883 (Laws 1883, p. 64), providing for taxing "gross earnings" of railroad companies, was not repugnant to § 1924 of the organic act, requiring all taxes to be equal and uniform, etc.: *C. & P. S. Ry. Co. v. Chilberg*, 6 Wash. 612.

Statutes exempting persons and property from taxation are to be strictly construed; and exemptions are not to be extended by judicial construction to property other than that expressly designated by law: *Thurston Co. v. Sisters of Charity*, 14 Wash. 264, 267.

The legislature could exempt under this provision the property of any person or

corporation from taxation, but could not establish a different rule of taxation as to any other class of property from that imposed upon other classes: *Id.*

The assessment of mortgages at their par value and lands and other property at one-fourth or one-fifth their cash value, is in violation of the organic act (§ 1924, U. S. Rev. Stats.): *Andrews v. King Co.*, 1 Wash. 46.

An assessment upon property for local improvements is not a tax within the meaning of this section, requiring all taxes to be uniform and according to value: *Austin v. Seattle*, 2 Wash. 667; *Seanor v. County Commrs.*, 13 Wash. 48; *State ex rel. Olmstead v. Mudgett*, 21 Wash. 99. And such assessments are not in conflict with the organic act (Rev. Stats. U. S., § 1924): *Spokane Falls v. Browne*, 3 Wash. 84. Assessment of property in local district for the benefit of improvements has nothing to do with taxation: *Board of Directors v. Peterson*, 4 Wash. 147.

Neither subsequent legislative construction nor acquiescence for any length of time can affect the meaning of the constitutional enactment: *State ex rel. Chamberlain v. Daniel*, 17 Wash. 111.

The provision of the statute for issuance of certificates of delinquency, which shall draw fifteen per cent interest does not violate this section as to uniformity of taxation: *State ex rel. American Sav. Union v. Whittlesey*, 17 Wash. 447.

Laws 1897, page 77, requiring the county treasurer to collect assessments for street improvements, does not violate the provision for uniform taxation: *State ex rel. Olmstead v. Mudgett*, 21 Wash. 99.

Laws 1907, page 69, § 1, exempting moneys from taxation, violates the constitutional requirement that all property be taxed: *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164.

A tax on trades, professions and occupations is not within the inhibition in relation to uniformity of taxation: *Fleetwood v. Reed*, 21 Wash. 547; *Stull v. De Mattos*, 23 Wash. 71; *Garfinkle, In re*, 37 Wash. 650.

The requirement of a uniform and equal rate of taxation is not a requirement of uniform methods of assessments: *Pacific National Bank v. Pierce County*, 20 Wash. 675. A statute providing for the taxation of mining property at the price it would bring at "a fair voluntary sale for cash" does not violate this or the next section as to uniformity and method of assessing corporate property: *Eureka District Gold Min. Co. v. Ferry County*, 28 Wash. 250. The defense of double taxation is not available to a defendant unless he first shows that he has paid one tax: *Heath v. McCrea*, 20 Wash. 342. Double taxation is not invalid unless expressly prohibited: *Pacific National Bank v. Pierce County*, 20 Wash. 675. Double taxation will not be inferred unless necessarily imposed to

carry out the law: *Ridpath v. Spokane County*, 23 Wash. 436; *Lewiston Water etc. Co. v. Asotin County*, 24 Wash. 371. Tax on bank shares is not a property tax, but an excise tax upon the corporate franchise: *Pacific National Bank v. Pierce County*, 20 Wash. 675; *Ridpath v. Spokane County*, 23 Wash. 436. And so is the annual license fee imposed upon corporations doing business in this state: *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135.

A tax upon franchises is not invalid because the legislature has not specifically provided a method of ascertaining their value: *Commercial Elec. L. & P. Co. v. Judson*, 21 Wash. 49.

Corporate franchises are taxable under the laws of the state: *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135; *Edison Elec. Illuminating Co. v. Spokane County*, 32 Wash. 168.

Franchises may be taxed in connection with the tangible property of a corporation: *Ridpath v. Spokane County*, 23 Wash. 436; *Lewiston Water etc. Co. v. Asotin County*, 24 Wash. 371.

DEDUCTION OF DEBTS FROM CREDITS.—The provision in this section authorizing a deduction of debts from credits is not in conflict with the 14th amendment of the constitution of the United States: *Newport v. Mudgett*, 18 Wash. 271. A proviso that debts may be deducted from credits in the assessment of property does not recognize debts as property within the requirement of the section that all property be taxed: *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164. Credits are not property within the meaning of this and the next previous section requiring all property to be taxed in proportion to its value by uniform law, and providing that the deduction of debts from credits may be authorized, and Laws 1907, page 69, § 1, exempting the same, is valid: *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164. Under the laws of 1893 and 1895 only partnership debts could be deducted from the assessed value of the credits: *Barnes v. Flummerfelt*, 21 Wash. 498. Bank stocks are credits within the meaning of this section: *Pullman State Bank v. Manring*, 18 Wash. 250; *Anderson County v. First Nat. Bank*, 38 Wash. 255. As to liability of shares of stockholders after insolvency, see *Baker v. King County*, 17 Wash. 622; *Bramel v. Manring*, 18 Wash. 421; *Hewitt v. Traders' Bank*, 18 Wash. 326.

Laws 1903, page 290, prescribing a scale of fees in probate, based upon the valuation of the estate is void because not uniform and having no relation to the services rendered: *State ex rel. Nettleton v. Case*, 39 Wash. 177. Laws 1895, page 105, "migratory stock tax," is not unconstitutional on the ground of making a distinction between different kinds of per-

sonal property for the purposes of taxation: *Wright v. Stinson*, 16 Wash. 368.

Laws 1899, page 295, § 12, the "migratory stock tax," is not unconstitutional on account of making distinctions as to the manner of assessments, but is unconstitutional so far as authorizing an abatement

or reduction from the next regular assessment corresponding to the portion of the year that the goods were in the state: *Nathan v. Spokane Count*, 35 Wash. 26. See *Eureka District Gold Min. Co. v. Ferry County*, 28 Wash. 250.

§ 3. ASSESSMENT OF CORPORATE PROPERTY.—The legislature shall provide by general law for the assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property.

Cf. Ala., XI, 6; Colo., X, 10; Ida., VII, 8; Ia., VIII, 2; Mont., XII, 7; Nev., VIII, 2; Ohio, XIII, 4; S. C., XII, 2.

§ 4. NO SURRENDER OF POWER OR SUSPENSION OF TAX ON CORPORATE PROPERTY.—The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party.

Cf. Ark., XVI, 7; Cal., XIII, 6; Colo., X, 9; Ida., VII, 8; La., 205; Mont., XII, 7; Me., IX, 9; Mo., X, 2; N. Dak., XI, 178; Pa., IX, 3; S. Dak., XI, 3; Tex., VIII, 4; Wy., XV, 14.

§ 5. TAXES, HOW LEVIED.—No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.

Cf. Mont., XII, 11.
Cited in 14 Wash. 381; 17 Wash. 141; 28 Wash. 45; 30 Wash. 445; 31 Wash. 146; 36 Wash. 454; 50 Wash. 256.

There is no limitation, under the constitution, upon the legislature's making provision for levy of taxes by county commissioners, for payment of obligations theretofore incurred by the county, as well as

those to be incurred during the ensuing fiscal year: *Mason v. Purdy*, 11 Wash. 591.

Funds raised by a county for general purposes cannot be applied to the payment of assessment for local improvements: *State ex rel. Latimer v. Henry*, 28 Wash. 38. A charge made upon the passing of an estate is not a tax on property: *State v. Clark*, 30 Wash. 439.

§ 6. TAXES, HOW PAID.—All taxes levied and collected for state purposes shall be paid in money only into the state treasury.

Cf. Mont., XII, 10.

§ 7. ANNUAL STATEMENT.—An accurate statement of the receipts and expenditures of the public moneys shall be published annually in such manner as the legislature may provide.

§ 8. TAX TO COVER DEFICIENCIES.—Whenever the expenses of any fiscal year shall exceed the income, the legislature may provide for levying a tax for the ensuing fiscal year, sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of the ensuing fiscal year.

Cf. Mont., XII, 12; Minn., IX, 2; Nev., IX, 2; Or., IX, 6; S. C., IX, 3; S. Dak., XI, 1; Wis., VIII, 5; W. Va., X, 5.

This section has application to matters

of state revenue and expenses, and not to those of counties: *Mason v. Purdy*, 11 Wash. 591, 593.

§ 9. SPECIAL ASSESSMENTS OR TAXATION FOR LOCAL IMPROVEMENTS.—The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate pur-

poses, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.

See reference to Art. VII, § 2, uniformity, etc.

See notes to Art. XI, § 12.

Ark., XIX, 27; Cal., XI, 19; Ill., IX, 9; Minn., IX, 1; Neb., IX, 6.

Corporate authorities' power over taxation: Cal., XI, 12; Neb., IX, 7.

Cited in 2 Wash. 586; 2 Wash. 668, 670; 4 Wash. 134; 6 Wash. 255; 11 Wash. 594; 15 Wash. 316; 20 Wash. 63; 20 Wash. 279; 21 Wash. 554; 25 Wash. 306; 30 Wash. 446; 35 Wash. 584, 585, 589; 39 Wash. 180; 40 Wash. 147; 42 Wash. 41; 42 Wash. 498; 44 Wash. 353, 354; 47 Wash. 203.

See 2 Remington's Digest, pp. 2033-2035, §§ 169-179.

This section is identical with the Const. of Illinois (Const., § 9, Art. IX): *Austin v. Seattle*, 2 Wash. 667, 669; *Baker v. Seattle*, 2 Wash. 576; see notes to § 2 of this article.

There is no vested right, either in a municipal corporation or in the citizen, to have property assessed in any particular way, these matters, like others pertaining to such corporations, are entirely within legislative control: *Heilig v. Puyallup*, 7 Wash. 29.

The provisions of this section and of Art. XI, § 12, do not render invalid the act of March 9, 1893 (Laws 1893, p. 167), making the assessment-roll of a city of the first class the same as that of the county, and making the county treasurer ex-officio tax collector: *State v. Carson*, 6 Wash. 250; compare *Baker v. Seattle*, 2 Wash. 576.

The act of March 9, 1893, entitled "an act relating to internal improvements in cities, authorizing the issuance and collection of bonds upon the property benefited by local improvements, and declaring an emergency," is constitutional: *Germond v. Tacoma*, 6 Wash. 365.

Charging the indebtedness of each of the former cities, consolidated under act of March 27, 1890, to the property within its limits is a regulation in accordance with equity and justice, and not forbidden by the provisions of this section: *DeMattos v. New Whatcom*, 4 Wash. 127.

The authority given by the legislature to validate certain municipal indebtedness, under act of Feb. 26, 1890 (§ 5, p. 225), already created in excess of the limit of one and one-half per cent, is not a void exercise of legislative power, or an attempt to assess and collect taxes on municipal corporations in violation of this section: *Baker v. Seattle*, 2 Wash. 576.

Where a municipal corporation has done an act beyond its statutory powers, but

within the powers competent for the legislature to have conferred upon it, the act may be validated by a curative statute: *Id.*, 587.

The requirement of the organic act, § 1924, refers to general taxation only, and not to special assessments for local improvements; § 7 of the Charter of Spokane Falls (Laws 1886, p. 302), providing that "real estate only shall be assessed" for local improvements, is, therefore, constitutional: *Spokane Falls v. Brown*, 3 Wash. 84.

The act relating to diking districts contained in § 4096, *infra*, is not unconstitutional under this section: *Hansen v. Hammer*, 15 Wash. 315.

Laws 1899, page 234, authorizing laying of water mains as local improvement is valid: *Smith v. Seattle*, 25 Wash. 300. The improvement by the state of its own tide lands, lying within the corporate limits of a city, does not violate this section: *Mississippi Valley Trust Co. v. Seattle & Lake Wash. W. Co.*, 20 Wash. 272.

The act authorizing a city to initiate special assessments for local improvements, which provides that the apportionment of the tax shall be made by commissioners appointed by the superior court subject to revision by the court, is not obnoxious to this section: *In re Westlake Avenue*, 40 Wash. 144. Assessing property for local improvements in proportion to the assessment of the property for general taxation is void: *Monk v. Ballard*, 42 Wash. 35.

This section does not restrict the delegation of legislative power to authorize local improvements by special taxation of property benefited, to the corporate authority of cities, towns and villages: *Hansen v. Hammer*, 15 Wash. 15.

Section 7685, *infra*, providing that cities of the third class may levy and collect an annual street poll tax upon male inhabitants between certain ages, not members of a volunteer fire company, violates this section: *State v. Ide*, 35 Wash. 576. See *Thurston County v. Tenino Stone Quarries*, 44 Wash. 351. Laws 1905, page 140, authorizing cities of the third and fourth class to impose and collect an annual poll tax from male inhabitants over twenty-one years of age does not, by reason of the exemption of females and minors, violate the provisions of this section requiring uniformity in city taxes in respect to persons and property: *Tekoa v. Reilly*, 47 Wash. 202.

The drainage act of 1895 (§ 4275, *infra*) does not violate the provisions of

this section in that it imposes upon the court and jury the duty of making an assessment: *State ex rel. Matson v. Superior Court*, 42 Wash. 491.

Laws 1905, page 84, § 22, in relation to

assessments for local improvements, is not invalid as delegating the levy of assessments to the superior court, or to other than corporate authorities: *Seattle v. Seattle and Montana R. Co.*, 50 Wash. 132.

ARTICLE VIII.

PUBLIC INDEBTEDNESS.

§ 1. LIMITATION ON STATE DEBT.—The state may, to meet casual deficits or failure in revenues or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dollars (\$400,000), and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debts so contracted, and to no other purpose whatever.

Cf. Cal., XVI, 1; Colo., XI, 3; Ida., VIII, 1; Mont., XIII, 2; N. Dak., XII, 182; N. Y., Rev., VII, 2 (identical); S. Dak., XIII, 2; Wy., XVI, 1.

Cited in 12 Wash. 542; 16 Wash. 572; 21 Wash. 208.

This section constitutes an "impassable barrier" to the creation of any indebtedness in excess of the limitation for any period of time, however brief, or for any purpose, however worthy: *State v. McGraw*, 12 Wash. 541, 543.

The act of March 22, 1895, creating a board of finance, is unconstitutional, under the provisions of this section: *State v. McGraw*, 12 Wash. 541.

School bonds issued against one fund and sold to another fund of the state do not constitute an increase of indebtedness within the prohibition of this section: *State ex rel. Winston v. Rogers*, 21 Wash. 206.

§ 2. POWERS EXTENDED IN CERTAIN CASES.—In addition to the above limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or to defend the state in war, but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, and to no other purpose whatever.

Compare reference to last section.

N. Y., Rev., VII, 3 (identical).

Cited in 12 Wash. 542.

§ 3. SPECIAL INDEBTEDNESS, HOW AUTHORIZED.—Except the debt specified in sections one and two of this article, no debts shall hereafter be contracted by or on behalf of this state, unless such debt shall be authorized by law for some single work or object to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof. No such law shall take effect, until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election, and all moneys raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county, if one be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people.

N. Y., Rev., VII, 4.

Cited in 1 Wash. 301; 22 Wash. 542; 25 Wash. 583; 35 Wash. 514; 49 Wash. 74.

The majority required by this provision is a majority of those who vote upon the proposition, and not of those who may vote: *Metcalf v. Seattle*, 1 Wash. 297.

The act of 1893, authorizing the excavation of public waterways, and providing for liens upon the tide lands belonging to the state, does not violate this section: *Seattle & Lake Wash. Waterway*

Co. v. Seattle Dock Co., 35 Wash. 503. As to validity of proposed plan to issue warrants for erection of a capitol building, see *State ex rel. Attorney General v. McGraw*, 13 Wash. 311.

§ 4. MONEYS DISBURSED ONLY BY APPROPRIATIONS.—No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years from the first day of May next after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

Ala., IV, 33; Ark., V, 29; Cal., IV, 22; Colo., V, 33; Del., II, 15, Fla., IX, 4; Ida., VII, 13; Ill., IV, 17; Ind., X, 3; Ia., III, 24; Kan., II, 24; Ky., 230; La., 53-55; Me., V, Pt., IV, 4; Md., III, 32; Mass., Pt. II, Ch. II, § 1, Art. 11; Mich., XIV, 5; Minn., IX, 9; Miss., IV, 63, 64; Mo., XI, 6, IV, 43; Mont., V, 34; N. Dak., XIII, 186; N. Y., Rev., III, 21; Neb., III, 22; Nev., IV, 19; N. H., Pt. II, 56; N. J., IV, 6; N. C., XIV, 3; Ohio, II, 22; Or., IX, 4; Pa., I, 22; S. C., IX, 12; Tenn., II, 24; Tex., VIII, 6; Vt., Pt. II, 17; Va., X, 10; W. Va., VIII, 4; Wis., V-III, 2; Wy., III, 35.

Cited in 3 Wash. 137; 7 Wash. 192; 13 Wash. 322; 19 Wash. 661; 51 Wash. 556; 52 Wash. 689.

Where the legislature designates the amount to be paid, and that it be paid out

of any moneys in the state treasury not otherwise appropriated, it is a sufficient compliance with this section without using the formal words "there is hereby appropriated," etc.: *State v. Grimes*, 7 Wash. 191, 193.

Under this section, forbidding payment of money out of the treasury, except in pursuance of an appropriation by law, the state treasurer may, on that ground, lawfully question the legality of any warrant issued by the state auditor: *State v. Lind-sley*, 3 Wash. 125.

The proposed plan of the state capitol commission for the exchange, etc., of certain state warrants for the purpose of erecting a state capitol building, is not a violation of this provision of the constitution: *State v. McGraw*, 13 Wash. 311, 322.

§ 5. CREDIT NOT TO BE LOANED.—The credit of the state shall not, in any manner, be given or loaned to or in aid of any individual, association, company, or corporation.

See reference to § 7, *infra*.

See *infra*, Art. XII, § 9.

Cf. Ala., IV, 54; Ark., XII, 7; Cal., IV, 31, XII, 13; Ia., VII, 1; Ida., VIII, 2, 4; Kan., XIII, 5; Mich., XIV, 6, 8; Minn., IX, 10; Miss., XV, 258; Mont., XIII, 1; Me., IX, 14; Neb., XII, 3; Nev., VIII, 9;

N. Dak., XII, 185; N. Y., Rev., VII, 1, XII, 9; Or., XI, 6, S. Dak., XIII, 1; Va., X, 17; W. Va., X, 6; Wis., VIII, 3; Wy., XVI, 6.

Cited in 35 Wash. 513.

§ 6. LIMITATIONS UPON MUNICIPAL INDEBTEDNESS.—No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes: Provided, That no part of the

indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes: Provided further, That any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality.

See notes to § 5629, *infra*.

Cf. Cal., XI, 18; Colo., XI, 6, 7, 8; Ill., IX, 12; Mo., X, 12.

Cited in 1 Wash. 298; 1 Wash. 318; 2 Wash. 675; 2 Wash. 679; 4 Wash. 148; 4 Wash. 150; 5 Wash. 146; 5 Wash. 454; 6 Wash. 430; 6 Wash. 435; 7 Wash. 271; 8 Wash. 397; 8 Wash. 402; 12 Wash. 370; 12 Wash. 526; 13 Wash. 698; 15 Wash. 11; 15 Wash. 317; 15 Wash. 375; 16 Wash. 570; 19 Wash. 448; 21 Wash. 208; 22 Wash. 410; 25 Wash. 310; 25 Wash. 581; 26 Wash. 232; 26 Wash. 239; 28 Wash. 12; 37 Wash. 16; 42 Wash. 302; 42 Wash. 656; 43 Wash. 76; 45 Wash. 524; 48 Wash. 76; 49 Wash. 73.

See 2 Remington's Digest, pp. 2089-2092, §§ 385-392.

This provision is self-executing and sufficient, without further legislative sanction: *Holmes & Bull F. Co. v. Hedges*, 13 Wash. 696, 698; cited in *State v. Hopkins*, 14 Wash. 59, 67.

School districts are, within the contemplation of the constitution, municipal corporations: *Maxon v. School Dist.*, 5 Wash. 142; but irrigation districts formed under Laws of 1890 (p. 671) are not: *Board of Directors v. Peterson*, 4 Wash. 147.

The limitation of this section, on counties contracting indebtedness in excess of one and one-half of one per cent, applies to the total indebtedness of counties, whether contracted prior or subsequent to the adoption of the constitution: *Rehmke v. Goodwin*, 2 Wash. 676.

Under the act of March 21, 1890, county commissioners are authorized to issue bonds for the purpose of funding existing county indebtedness up to the one and one-half per cent limit without a vote of the people: *Id.*; and if authorized to issue bonds for funding indebtedness without such vote, the fact that the bonds are issued pursuant to an election will not affect their validity: *Hunt v. Fawcett*, 8 Wash. 396; but they are not authorized to submit to a vote the question of ratifying county indebtedness incurred in excess of one and one-half per cent limitation; and, in order to validate additional indebtedness, there must be prior assent given thereto by a three-fifths vote at an election held for that purpose: *Rahmke v. Goodwin*, *supra*; see *Baker v. Seattle*, 2 Wash. 576.

The repayment of moneys for taxes illegally collected is not the incurring of a

debt within the meaning of this section: *Phelps v. Tacoma*, 15 Wash. 367, 375.

A county is not authorized, under the Laws of 1890 (p. 37, § 3), after it has reached the one and one-half per cent limit, to borrow money upon an issue of bonds voted by the people and apply any of the proceeds to the redemption of its outstanding warrants within that limit, for the purpose of issuing new warrants in their stead for current expenses: *Hunt v. Fawcett*, 8 Wash. 396; cited in *State v. Hopkins*, 14 Wash. 59, 68.

The constitutional limitation of county indebtedness in this section does not include the necessary expenditures made mandatory in the constitution and provided for in the legislature, and which are thereby imposed upon the county: *Ranch v. Chapman*, 16 Wash. 568; *Duryee v. Friars*, 18 Wash. 55; *Farquharson v. Yeargin*, 24 Wash. 549.

Liabilities incurred by a county in conforming to the constitution and laws of the state, and those current expenses which are necessary to the maintenance and life of county government itself, are primary obligations, which, of necessity, always continue, and which are entitled to priority over liabilities incurred by the county for other purposes: *Id.*

If the municipal indebtedness, at date of incurring, is within five per cent of taxable property, as shown by last previous assessment, it may be validated by a subsequent vote, irrespective of assessed value at time of election: *West v. Chehalis*, 12 Wash. 369; see *William v. Shoudy*, 12 Wash. 362.

The constitution has cut off from every municipal corporation every subject of expense and indebtedness except those within the legitimate intendment of its organization; and as to cities it has fixed the one and one-half per cent limitation, beyond which they cannot incur indebtedness without the assent of their constituents: *Yesler v. Seattle*, 1 Wash. 308, 318.

The act of Feb. 26, 1890, confers on cities the power to become indebted to the limit prescribed by this section, the method and details of which are left to the city, except that the people must be consulted after the one and one-half per cent limit is reached: *Id.*

This provision is a limitation upon the powers, and not a grant of the right to

incur indebtedness, and has no effect on cities until the data which gives life to such limitation is first ascertained: *Childs v. Anacortes*, 5 Wash. 452.

The assessment-roll for city purposes is made the basis for such limitation: *Id.*

Where a city has been recently incorporated and until a regular assessment for city purposes can be made, such city may take the last assessment-roll of the county as the basis of the valuation of the property, and declare the same to be the valuation of the city for the purpose of establishing a basis for incurring indebtedness: *Id.*

The term "assessment," as used in the constitution, and "assessment-roll," as used in the statutes, are correlative terms, and are interpreted to mean the aggregate of all taxable property as finally determined by official ascertainment: *Seymour v. Tacoma*, 6 Wash. 427, 435.

Although warrants issued by a city may make its indebtedness in excess of the lawful limit, according to the valuation at the time when issued, yet, if such indebtedness was legal according to the valuation for the year in which it was incurred, the warrants are valid: *Childs v. Anacortes*, *supra*.

Municipal indebtedness for water, sewerage and light purposes is no part of the general indebtedness of a city, but is authorized, under this section, in excess of the five per cent permitted for general purposes: *Austin v. Seattle*, 2 Wash. 676; and such indebtedness is authorized in any sum, provided the total municipal indebtedness does not exceed ten per cent of its assessed valuation: *Metcalf v. Seattle*, 1 Wash. 297.

The act of March 7, 1891, providing for validation of warrants issued in excess of the one and one-half per cent limit, is not special legislation, but a curative act applicable only to what had been done before the date of its passage: *Baker v. Seattle*, 2 Wash. 576; *West v. Chehalis*, 12 Wash. 369.

A contract entered into by a city with one advancing moneys to it for the completion of a water system, providing for the creation of a special fund for repayment out of receipts, and that no obligation is to be assumed by the city except to make payments out of the special fund, is not an incurring of an indebtedness within the meaning of this section: *Winston v. Spokane*, 12 Wash. 524; *Baker v. Seattle*, *supra*.

The three-fifths majority required to carry an election, etc., is three-fifths of those persons who actually vote at the election, and not three-fifths who may have the right to vote: *Metcalf v. Seattle*, *supra*; *Fox v. Seattle*, 43 Wash. 74.

As the language of the constitutional provision permitting cities to incur an indebtedness up to five per cent of their

taxable property, when authorized by the legislature, is not certain to the effect that the legislature must provide that the three-fifths vote of the citizens therefor shall be an antecedent one, the act of March 7, 1891, authorizing elections to ratify existing indebtedness in excess of one and one-half per cent limit, is not unconstitutional: *Baker v. Seattle*, 2 Wash. 576, 578.

An act authorizing counties to condemn land for a ship canal, entirely within the county, does not violate the provision of this section as to incurring debt for any other than county purposes: *Lancey v. King County*, 15 Wash. 9. For any general county purpose, the county commissioners may, without a vote, incur indebtedness not exceeding one and one-half per cent, etc.: *Cochrane v. King County*, 12 Wash. 518.

As to validity of warrants issued in excess of the limit, where bonds had been issued and proceeds partly diverted to other purposes, see *State Savings Bank v. Davis*, 22 Wash. 406.

A proposition to increase the indebtedness of a county, submitted at a general election, need only receive three-fifths of the votes cast by voters who specially voted thereon: *Strain v. Young*, 25 Wash. 578.

The provision prohibiting cities from incurring indebtedness cannot be construed as a prohibition upon the method of payment for water mains other than out of a general fund for that purpose: *Smith v. Seattle*, 25 Wash. 300. The transfer of general funds to a special fund for the purpose of constructing an extension to a water system is not the incurring of a municipal debt, within constitutional inhibition, where the special fund is solvent and the general fund is not impaired: *Griffin v. Tacoma*, 49 Wash. 525.

As to debts and expenditures subject to limitation, see *Childs v. Anacortes*, 5 Wash. 452; *Phelps v. Tacoma*, 15 Wash. 367; *German-Amer. Sav. Bank v. Spokane*, 17 Wash. 315; *Hazeltine v. Blake*, 26 Wash. 231. Current or necessary expenses: See *Hull v. Ames*, 26 Wash. 272; *Gladwin v. Ames*, 30 Wash. 608.

For public improvements, property or works, see *Metcalf v. Seattle*, 1 Wash. 297; *Austin v. Seattle*, 2 Wash. 667; *Seymour v. Tacoma*, 6 Wash. 427. Warrants payable out of a special fund or from special assessments are no part of the municipal indebtedness limited by the constitution: *Thomas & Co. v. Olympia*, 12 Wash. 465; *German-Amer. Sav. Bank v. Spokane*, 17 Wash. 315; *Wilson v. Aberdeen*, 19 Wash. 89; *Northwestern Lumber Co. v. Aberdeen*, 22 Wash. 404; *Potter v. Whatcom*, 25 Wash. 207; *Winston v. Spokane*, 12 Wash. 524; *Kenyon v. Spokane*, 17 Wash. 57. The fact that the special fund which is to be provided is not in existence would not make expen-

ditures incurred on the credit of such fund an indebtedness against the city: *Faulkner v. Seattle*, 19 Wash. 320. The limitation has no application to debt incurred in laying water mains charged against abutting property: *Smith v. Seattle*, 25 Wash. 300.

COMPUTATION OF LIMIT OR AMOUNT.—Taxes due and cash in the treasury must be deducted to determine the debt limit of a municipal corpora-

tion: *State ex rel. Barton v. Hopkins*, 14 Wash. 59; *Graham v. Spokane*, 19 Wash. 447; *Rands v. Clark County*, 15 Wash. 697; *Kelley v. Pierce County*, 15 Wash. 697; *Eidenmiller v. Tacoma*, 14 Wash. 376; also interest due on taxes assessed, levied and unpaid: *State ex rel. American Sav. Union v. Whittlesey*, 17 Wash. 447. See, also, *State ex rel. Atkinson v. Ross*, 43 Wash. 290.

§ 7. CREDIT NOT TO BE LOANED.—No county, city, town, or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company, or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company, or corporation.

See reference to § 5, *supra*.

Cf. Ala., IV, 55; Cal., IV, 31; Colo., XI, 2; Ill., IV, 20; Ida., VIII, 2, 4; Mont., XIII, 1; Minn., IX, Amend.; Mo., IV, 45; Neb., XII, 3; N. J., I, 19; N. Y., Rev., VIII, 10, 11; N. Dak., XI, 185; Ohio, VIII, 4; Pa., IX, 7; S. Dak., XIII, 1; Tenn., II, 29; Tex., III, 50; Wy., XVI, 6.

Cited in 5 Wash. 146; 7 Wash. 271; 15 Wash. 11; 16 Wash. 574; 18 Wash. 624; 20 Wash. 537; 36 Wash. 454.

School districts are municipal corporations within the contemplation of the constitution: *Maxon v. School Dist.*, 5 Wash. 142; *State v. Grimes*, 7 Wash. 270; but

irrigation districts are not: *Board of Directors v. Peterson*, 4 Wash. 147.

An act authorizing counties to condemn land for a ship canal, does not violate this section forbidding any county giving money or property, etc., to or in aid of any individual, etc.: *Lancey v. King County*, 15 Wash. 9. An ordinance of a city which in effect provides an arrangement whereby the city loans its credit is void: *Moran v. Thompson*, 20 Wash. 525. A county has no power to issue its negotiable bonds in aid of the acquisition by the United States of a completed ship canal in such county: *State ex rel. Potter v. King County*, 45 Wash. 519.

ARTICLE IX.

EDUCATION.

§ 1. PREAMBLE.—It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

Cf. Cal., IX, 1; N. Y., Rev., IX, 1.

Cited in 13 Wash. 699; 16 Wash. 576; 17 Wash. 139; 40 Wash. 105.

§ 2. PUBLIC SCHOOL SYSTEM.—The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools.

Cf. Cal., IX, 5, 6; Colo., IX, 2; Ida., IX, 1; Mont., XI, 1; Minn., VIII, 1; Miss., VIII, 201; N. Dak., VIII, 147, 148; S. Dak., VIII, 1; Wy., VII, 1.

Cited in 6 Wash. 121; 29 Wash. 595; 51 Wash. 501.

The act of Jan. 31, 1888 (p. 15), requiring bonds to be taken from contractors by school districts, does not violate the last

clause of this section: *Pacific Mfg. Co. v. School Dist. No. 7*, 6 Wash. 21; *Maxon v. School Dist.*, 5 Wash. 142, distinguished.

The model training school in a state normal school is not a common school within this section: *School District v. Bryan*, 51 Wash. 498.

The act of the legislature providing for school districts in cities of ten thousand

or more inhabitants is not unconstitutional on the ground that it affords a different and better system of education to

such cities, which amounts to special legislation: *Holmes & Bull Furniture Co. v. Hedges*, 13 Wash. 696.

§ 3. FUNDS FOR SUPPORT OF.—The principal of the common school fund shall remain permanent and irreducible. The said fund shall be derived from the following named sources, to wit: Appropriations and donations by the state to this fund; donations and bequests by individuals to the state or public for common schools; the proceeds of lands and other property which revert to the state by escheat and forfeiture; the proceeds of all property granted to the state, when the purpose of the grant is not specified or is uncertain; funds accumulated in the treasury of the state for the disbursement of which provision has not been made by law; the proceeds of the sale of timber, stone, minerals, or other property from school and state lands, other than those granted for specific purposes; all moneys received from persons appropriating timber, stone, minerals, or other property from school and state lands other than those granted for specific purposes, and all moneys other than rental recovered from persons trespassing on said lands; five per centum of the proceeds of the sale of public lands lying within the state which shall be sold by the United States subsequent to the admission of the state into the Union, as approved by section thirteen of the act of Congress enabling the admission of the state into the Union; the principal of all funds arising from the sale of lands and other property which have been and hereafter may be granted to the state for the support of common schools. The legislature may make further provisions for enlarging said fund. The interest accruing on said fund, together with all rentals and other revenues derived therefrom, and from lands and other property devoted to the common school fund, shall be exclusively applied to the current use of the common schools.

Cf. Ala., XII, 5; Cal., IX, 4; Colo., IX, 3; Ida., IX, 3; Mont., XI, 2, 3; N. Dak., IX, 153, 154; S. Dak., VIII, 2, 13; Wy., VII, 4.

Cited in 51 Wash. 501.

Interest only on the school fund can

be appropriated under the enabling act: *State ex rel. Houston v. Maynard*, 31 Wash. 12. Laws 1895, page 55, providing for the creation of a state normal school fund, etc., conflicts with the enabling act, section eleven: *Id.*

§ 4. SECTARIAN CONTROL OR INFLUENCE PROHIBITED.—All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

Cf. Cal., IX, 8; Colo., IX, 7; Ida., IX, 5; 11; Nev., XI, 9; S. Dak., VIII, 16; Wy., Ky., 189; La., 228; Mont., XI, 9; Miss., VII, 8. VIII, 208; N. Dak., VIII, 152; Neb., VIII,

§ 5. LOSS OF PERMANENT FUND TO BECOME STATE DEBT.—All losses to the permanent common school or any other state educational fund which shall be occasioned by defalcation, mismanagement, or fraud of the agents or officers controlling or managing the same shall be audited by the proper authorities of the state. The amount so audited shall be a permanent funded debt against the state in favor of the particular fund sustaining such loss, upon which not less than six per cent annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized and limited elsewhere in this constitution.

See *infra*, Art. XVI, § 5, investment of permanent school fund.

Cf. Ala., XII, 5; Colo., IX, 3; Ida., IX, 3; N. C., IX, 4; S. Dak., VIII, 2, 3; Wy., VII, 3; Mont., XI, 3, 5; N. Dak., IX, 153, 154; 4.

Cited in 21 Wash. 393.

The provision in this section that "The amount so audited shall be a permanent funded debt against the state in favor of

the particular fund sustaining the loss," etc., was not to render the fund less, but more, secure: State *ex rel. Hellar v. Young*, 21 Wash. 391.

ARTICLE X.

MILITIA.

§ 1. WHO LIABLE TO MILITARY DUTY.—All able-bodied male citizens of this state between the ages of eighteen and forty-five years, except such as are exempt by laws of the United States or by the laws of this state, shall be liable to military duty.

Cf. Ala., XI, 1; Ark., XI, 2; Colo., XVII, 1; Fla., XII, 1; Ga., VIII, 1; Ill., XII, 1; Ind., XII, 1; Ia., VI, 1; Ida., XIV, 1; Kan., VIII, 1; Ky., VII, 1; La., VIII, 144; Mich., XVII, Amend.; Miss., IX, 1; Mo., XIII, 1; Mont., XIV, 1; Minn., XII, 1; N. Dak., XIII, 188; Neb., XIII, 1; Nev., XII, 1; N. Y., Rev., XI, 1; Ohio, IX, 1; Or., X, 1; Pa., XI; S. Dak., XV, 1; S. C., XIII; Tenn., VIII; Wy., XVII, 1.

§ 2. ORGANIZATION—DISCIPLINE—OFFICERS—POWER TO CALL OUT.—The legislature shall provide by law for organizing and disciplining the militia in such manner as it may deem expedient, not incompatible with the constitution and laws of the United States.¹ Officers of the militia shall be elected or appointed in such manner as the legislature shall from time to time direct, and shall be commissioned by the governor. The governor shall have power to call forth the militia to execute the laws of the state to suppress insurrections and repel invasions.²

1. Ark., XI, 2; Cal., VIII, 1; Kan., VIII, 2; Mich., XVII, 2.

2. Cal., VIII, 1; Ill., V, 14; Ind., V, 12; Kan., VIII, 4; Mich., V, 4; Minn., V, 4; Nev., XII, 2; Ohio, IX, 4; Or., V, 9; Tex., VII, 1.

* See Ala., XI, 2; Cal., VIII, 1; Colo., XVII; Fla., XIV, 2; Ga., X, 1; Ill., XII, 2; Ida., XIV, 2; Ind., XII, Ia., VI; Ky., 220; La., 181; Me., VII, Amend. X; Md., IX; Mich., XVII, Amend. I; Minn., XII; Miss., 215; Mo., XIII, 2; Mont., XIV, 2; N. Dak., XIII, 189; Neb., XIII; N. J.,

VII; N. C., XII; N. Y., Rev., XI, 2, 3; Or., X; Pa., XI; S. C., XIII; S. Dak., XV, 3; Tenn., VIII; Va., IX; Wy., XVII, 2.

Cited in 3 Wash. 397.

The supreme executive power of the state is vested in the governor, and by the terms of this article he has power to call forth the militia to execute the laws of the state. It places in his hands the sole power of judging and determining when the exigency has arisen for the exercise of this power: Chapin v. Ferry, 3 Wash. 386.

§ 3. SOLDIERS' HOME.—The legislature shall provide by law for the maintenance of a soldiers' home for honorably discharged Union soldiers, sailors, marines and members of the state militia disabled while in the line of duty, and who are bona fide citizens of the state.

§ 4. PUBLIC ARMS.—The legislature shall provide by law for the protection and safe keeping of the public arms.

Ala., XI, 4; Colo., XVII, 4; Ida., XIV, 4; Ky., 223; Mo., XIII, 4; Mont., XIV, 4; S. Dak., XV, 6.

§ 5. PRIVILEGE FROM ARREST.—The militia shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during the attendance at musters and elections of officers, and in going to and returning from the same.

Cal., I, 15; Ia., I, 19; Mich., VI, 33; N. J., I, 17; Nev., I, 14.

§ 6. EXEMPTION FROM MILITARY DUTY.—No person or persons having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace: Provided, Such person or persons shall pay an equivalent for such exemption.

Colo., XVII, 5; Fla., XII, 1; Ga., VIII, 3; Ill., XII, 6; Ind., XII, 6; Ia., VI, 1; Ida., XIV, 1; Kan., VIII, 1; Ky., 220; Mich., XVII, Amend. I; Mo., XIII, 1; N. Y., XI, 1; N. Dak., XIII, 188; Ohio, IX, 5; Or., X, 2; S. Dak., XV, 7; Wy., XVII, 1.

ARTICLE XI.

COUNTY, CITY AND TOWNSHIP ORGANIZATION.

§ 1. EXISTING COUNTIES RECOGNIZED.—The several counties of the territory of Washington existing at the time of the adoption of this constitution are hereby recognized as legal subdivisions of this state.

Cal., XI, 1; Colo., XIV, 1; Ida., XVII, 1; Mo., IX, 1; Mont., XVI, 1; N. Dak., X, 166; S. Dak., IX, 1;

A county is a quasi municipal corporation organized exclusively in the interests

of the public and as an agency of the state: *State ex rel. Summerfield v. Tyler*, 14 Wash. 494. A county is a municipal corporation under Art. I, § 16: *Lincoln County v. Brook*, 37 Wash. 14.

§ 2. COUNTY SEATS—LOCATION AND REMOVAL.—No county seat shall be removed unless three-fifths of the qualified electors of the county voting on the proposition at a general election shall vote in favor of such removal, and three-fifths of all votes cast on the proposition shall be required to relocate a county seat. A proposition of removal shall not be submitted in the same county more than once in four years.

Ark., XIII, 3; Cal., XI, 2; Colo., XIV, 2; Fla., VIII, 4; Ill., X, 4; Ida., XVIII, 2; Mich., X, 8; Mo., IX, 2; Mont., XVI, 2; N. Dak., X, 169; S. Dak., IX, 1-3.

See *supra* Art. II, § 28 (18), special legislation prohibited: Wy., XII, 2.

Cited in 1 Wash. 301; 8 Wash. 65; 12 Wash. 435; 25 Wash. 583; 49 Wash. 74.

See 1 Remington's Digest, p. 693, §§ 4-8.

The majority required to carry the question submitted to the electors under this section and § 6, Art. VIII, is a majority of those who vote upon that proposition: *Metcalf v. Seattle*, 1 Wash. 297.

The superior court has no jurisdiction of the subject matter of an action which seeks to enjoin the removal of a county seat on the ground of fraud committed in the election thereof: *Parmeter v. Bourne*, 8 Wash. 45.

The removal of a county seat is a political question, the regulation and control of which are within the exclusive jurisdiction of the legislative department: *Id.*, 55. A private citizen and taxpayer has no such property interest in the loca-

tion of a county seat as will give him a right of action to contest its removal: *Id.*, 45; but in *Rickey v. Williams*, 8 Wash. 479, held, that an injunction will lie at the suit of a county officer to enjoin the removal of the county seat, when the board of commissioners had never obtained jurisdiction by proper petition to order the submission of the question.

A board of county commissioners is not vested with exclusive discretion in the matter of declaring the result of an election for removal of the county seat, but an attempt on their part to declare a result contrary to law is sufficient to give the superior court jurisdiction to enjoin them: *Krieschell v. County Commissioners*, 12 Wash. 428.

The commissioners may go behind the returns and examine the ballots for the purpose of determining the result: *Heffner v. Board of County Commrs.*, 16 Wash. 273. Their decision cannot be reviewed by the courts: *Id.* The general act authorizing appeals from their decisions does not apply: *Lawry v. Board of County Commrs.*, 12 Wash. 446.

§ 3. NEW COUNTIES.—No new county shall be established which shall reduce any county to a population less than four thousand, nor shall a new county be formed containing a less population than two thousand.¹ There shall be no territory stricken from any county unless a majority of the voters

living in such territory shall petition therefor, and then only under such other conditions as may be prescribed by a general law applicable to the whole state. Every county which shall be enlarged or created from territory taken from any other county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken:² Provided, That in such accounting neither county shall be charged with any debt or liability then existing, incurred in the purchase of any county property or in the purchase or construction of any county buildings then in use or under construction which shall fall within and be retained by the county: Provided further, That this shall not be construed to affect the rights of creditors.

1. See Ark., XIII, 1; Cal., XI, 3; Ill., VIII, 1; Md., XIII, 1; Mo., X, 3; Neb., X, 1; Pa., XIII, 1; Tenn., X, 4; Tex., IX, 1; S. Dak., XX, 1.

2. Cal., XI, 3; Colo., XIV, 4; Ill., X, 3; Ida., XVIII, 3; Mont., XVI, 3; N. Dak., X, 168; Wy., XII, 2.

Cited in 24 Wash. 551; 47 Wash. 462; 47 Wash. 466.

As to alteration and creation of new counties, see *Farquharson v. Yeargin*, 24 Wash. 549. Under this section it cannot be presumed that the legislature has determined the prerequisite of population where the act attempting to create the new county contains provisions for taking

a census to determine the population: *State ex rel. Chehalis County v. Superior Court*, 47 Wash. 453.

An act to create a new county out of a county bounded by several districts is void for indefiniteness and uncertainty, where it provides that the petition and proceedings therefor shall be transmitted by the governor to the superior judge of "the next nearest judicial district adjoining the judicial district" in which the county in question is situated, there being nothing to determine what superior court judge or district was intended: *State ex rel. Chehalis County v. Superior Court*, 47 Wash. 453.

§ 4. COUNTY GOVERNMENT AND TOWNSHIP ORGANIZATION.

The legislature shall establish a system of county government, which shall be uniform throughout the state, and by general laws shall provide for township organization, under which any county may organize whenever a majority of the qualified electors of such county voting at a general election shall so determine; and whenever a county shall adopt township organization the assessment and collection of the revenue shall be made, and the business of such county and the local affairs of the several townships therein, shall be managed and transacted in the manner prescribed by such general law.

Cal., XI, 4; Ill., X, 5-7; Kan., IX, 2; Minn., XI, 4; Mo., IX, 8; Nev., IV, 25; N. Dak., X, 170; S. Dak., IX, 4; Wy., XII, 4.

Cited in 49 Wash. 75.

This section does not authorize township organization upon a majority of those voting upon the question: *State ex rel. Miliken v. Board of Commrs.*, 49 Wash. 70.

§ 5. ELECTION AND COMPENSATION OF COUNTY OFFICERS.

The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys, and other county, township, or precinct and district officers, as public convenience may require, and shall prescribe their duties and fix their term of office. It shall regulate the compensation of all such officers, in proportion to their duties, and for that purpose may classify the counties by population. And it shall provide for the strict accountability of such officers for all fees which may be collected by them, and for all public moneys which may be paid to them, or officially come into their possession.

See notes to Art. VI, § 8.

Cf. Colo., XIV, 6; Cal., XI, 5; Ida., XVIII, 6, 7; Mich., X, 3; Mont., XVI, 4; Neb., X, 4; Nev., XVII, 21; Ohio, X, 1; Wy., XII, 5.

Cited in 5 Wash. 461; 6 Wash. 162, 163; 7 Wash. 114; 9 Wash. 378; 9 Wash. 531; 14 Wash. 119; 16 Wash. 573; 24 Wash. 429; 24 Wash. 554; 25 Wash. 266; 28 Wash. 498; 37 Wash. 430; 46 Wash. 273; 47 Wash. 701.

See 1 Remington's Digest, pp. 694-700, §§ 9-36.

This section should be construed with § 7, and when so construed, it seems clear that the "term" referred to in § 7 is the term authorized to be provided for in this section: *Smalley v. Snell*, 6 Wash. 161, 162.

The term "fix their term of office," is clear and unambiguous, and does not mean merely that the legislature is limited to fixing the time of the commencement and ending of such term, but that it may designate the duration and extent of the term of office: *State ex rel. Hays v. Twichell*, 9 Wash. 530, 532; see *McMurray v. Hollis*, 5 Wash. 458, 461.

Limitations imposed by this section are confined only to the officers of the county, as distinguished from mere clerks or deputies: *Nelson v. Troy*, 11 Wash. 435.

A duly elected road overseer does not become disqualified to hold his office by reason of a change of the boundaries of his road district, leaving his residence outside thereof, such change being prospective as affecting such office: *State ex rel. O'Connell v. Nelson*, 7 Wash. 114.

Under this provision and the statutes of this state a county treasurer is held strictly accountable for all public funds coming into his hands, and the exercise by him of ordinary care in the selection of a deposit for such funds will not excuse him

from fully accounting for the moneys deposited therein, in case of subsequent insolvency of the banks, even if the county has not provided him with a suitable and safe place in which to keep the funds: *Fairchilds v. Hedges*, 14 Wash. 117.

As to duty of county commissioners to ascertain population of county, see *State ex rel. Smith v. Neal*, 25 Wash. 264. The power to fill offices provisionally in new counties is a necessary incident of the legislative power to create new counties: *Farquharson v. Yeargin*, 24 Wash. 549.

A law classifying counties by the number of their inhabitants and regulating the fees of officers and prescribing their duties with reference thereto is not local or class legislation: *Henry v. Thurston County*, 31 Wash. 638.

Road supervisors appointed by the county commissioners are not county officers: *State ex rel. Griffith v. Newland*, 37 Wash. 428.

The treasurer and his bondsmen are liable for loss of deposits in a bank, made with the approval of the county commissioners: *Kittitas County v. Travers*, 16 Wash. 528. Both the county and the treasurer are liable for damages for the acts of a receiver, in attempting to collect void taxes, when: *Rose v. Pierce County*, 25 Wash. 119. Treasurer not liable when: See *Hoexter v. Judson*, 21 Wash. 646.

Laws 1903 creating the office of county fruit inspector, to be appointed by the county commissioners for a term of years, violates the mandatory provisions of this section: *State ex rel. Egbert v. Blumberg*, 46 Wash. 270.

§ 6. VACANCIES IN COUNTY, ETC., OFFICES, HOW FILLED.—

The board of county commissioners in each county shall fill all vacancies occurring in any county, township, precinct, or road district office of such county by appointment, and officers thus appointed shall hold office till the next general election, and until their successors are elected and qualified.

Cf. Colo., XIV, 9; Mont., XVI, 4, 5; N. Y., Rev., X, 5.

Cited in 5 Wash. 398; 7 Wash. 115; 9 Wash. 378; 11 Wash. 437; 37 Wash. 273.

See 2 Remington's Digest, pp. 2176-2178, §§ 17-25.

The provisions of this section are applicable to justices of the peace, and the same is self-executing: *State ex rel. Moody v. Cronin*, 5 Wash. 398.

The prosecuting attorney of a county, being a county officer, a vacancy in that office should be filled by appointment of the county commissioners, and not by the

governor: *State ex rel. McMartin v. Whitney*, 9 Wash. 377.

The prosecuting attorney being a county officer, a vacancy in the office should be filled by appointment of the county commissioners and not by the governor: *State ex rel. McMartin v. Whitney*, 9 Wash. 377. This section is applicable to vacancies in the office of county commissioners, who have the exclusive right to fill such vacancy, § 327, Bal. Code, providing otherwise, being unconstitutional: *State ex rel. Pendergast v. Fulton*, 37 Wash. 271.

§ 7. TENURE OF OFFICE LIMITED TO TWO TERMS.—No county officer shall be eligible to hold his office more than two terms in succession.

See reference and notes to preceding section.

Cf. Ill., X, 8.

Cited in 6 Wash. 161; 6 Wash. 163; 12 Wash. 59.

A prosecuting attorney holding office under the provisions of Art. XXVII, § 6, of the Const., does not fill such a term as is

contemplated by this section: *Smalley v. Snell*, 6 Wash. 161.

Under this section the incumbency of the office for a part of a term under the appointment of the county commissioners will not disqualify the officer from holding the

office for the two succeeding terms: *Koontz v. Kurtzman*, 12 Wash. 59.

Term of office for two years and until a successor is elected is but one term which may be for more than two years: *State ex rel. Meredith v. Tallman*, 24 Wash. 426.

§ 8. SALARIES AND LIMITATIONS AFFECTING.—The legislature shall fix the compensation by salaries of all county officers, and of constables in cities having a population of five thousand and upwards, except that public administrators, surveyors, and coroners may or may not be salaried officers. The salary of any county, city, town, or municipal officer shall not be increased or diminished after his election or during his term of office, nor shall the term of any such officer be extended beyond the period for which he is elected or appointed.

See notes to Art. II, § 25.

Cf. Cal., XI, 9.

Cited in 4 Wash. 803; 6 Wash. 258; 9 Wash. 232; 11 Wash. 437; 14 Wash. 256; 14 Wash. 483; 13 Wash. 202; 19 Wash. 398; 21 Wash. 84; 22 Wash. 268; 24 Wash. 429; 25 Wash. 265; 35 Wash. 175, 176; 47 Wash. 375; 48 Wash. 464.

See 2 Remington's Digest, pp. 2180, 2181, §§ 41-44.

A city has no power to change the salary of an officer during his term of office, and this provision is an express limitation upon the power of the council in this respect: *Tacoma v. Lillis*, 4 Wash. 797, 803.

As to the question of whether the city treasurer was an officer who would fall under this prohibition, it is plain that he is: *Ballard v. Keane*, 13 Wash. 201, 202.

Attorney's fees paid by delinquent taxpayers to county attorneys under the Law of 1891 (p. 231, § 105) cannot be allowed as extra compensation under this section: *Spokane County v. Allen*, 9 Wash. 229.

The law requiring city councils in cities of the third class to sit as a board of equalization, for which they may receive compensation, merely imposes a special duty upon such council, and an act relieving them of that duty does not violate this provision: *Heilig v. Puyallup*, 7 Wash. 29.

A legislative provision that the county treasurer shall receive the sum of \$500 per annum for assessing and collecting city taxes does not contravene this provision. The additional salary in this case is for services outside the duties of county treasurer: *State ex rel. Seattle v. Carson*, 6 Wash. 250; nor is it in conflict with § 12 of this article, denying the legislature the right to impose taxes on municipal corporations: *Id.*, 258.

Allowance of compensation to a deputy does not violate this provision, when at the time of the principal's induction into office there was a valid statute in force authorizing the employment of additional

help when necessary: *Nelson v. Troy*, 11 Wash. 435.

The attempt to deprive a county treasurer of the compensation which the law at the time of his election gave him for duties as city tax collector, while leaving him still under obligations to perform such duties, is in conflict with this section, which prohibits the salary of an officer to be increased or diminished during his term of office: *Mudgett v. Liebes*, 14 Wash. 482, 486.

Under this section, the provision contained in § 4548, *infra*, providing that the county superintendent shall receive compensation at the rate of three dollars for each school visited, is invalid: *Cox v. Holmes*, 14 Wash. 255, 256.

Shortening the term or abolishing an office created by the legislature does not violate the provision of this section as to increasing or diminishing the salary of an officer during his term: *Bogue v. Seattle*, 19 Wash. 396. Nor does the allowance of witness fees to a policeman, although he receives a regular salary: *State v. Saillard*, 22 Wash. 267.

The prohibition against increasing or diminishing compensation of officers does not apply to officers receiving specific fees for specific services: *State ex rel. Thurston County v. Grimes*, 7 Wash. 445. A county treasurer, who is also *ex officio* treasurer of a school district of his county is not entitled to additional compensation as such: *School District v. Cole*, 4 Wash. 395. As to additional compensation of county treasurer for collecting city taxes, see *State ex rel. Olmstead v. Mudgett*, 21 Wash. 99.

Extending the term of county superintendent by deferring the beginning of the term of office of his successor does not violate this section: *State ex rel. Meredith v. Tallman*, 24 Wash. 426.

Laws 1907, changing the title of county surveyor to county engineer, and changing compensation from \$5.00 per day for time

employed to a fixed compensation per year, violates this section and § 25 of Art. II, as the two sections must be construed together: *State ex rel. Funke v. Board of Commrs.*, 48 Wash. 461.

An officer who has collected fees under authority of a statute is estopped from asserting that the statute can have no constitutional application to his office: *Spokane County v. Allen*, 9 Wash. 229.

§ 9. STATE TAXES NOT TO BE RELEASED OR COMMUTED.—No county, nor the inhabitants thereof, nor the property therein, shall be released or discharged from its or their proportionate share of taxes to be levied for state purposes, nor shall commutation for such taxes be authorized in any form whatever.

Cal., XI, 10; Colo., X, 8; Ill., IX, 6; Ida., VII, 7; Mo., X, 9; Mont., XII, 6.

Cited in 35 Wash. 38.

§ 10. INCORPORATION OF MUNICIPALITIES.—Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed.¹ Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith;² and cities or towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws.³ Any city containing a population of twenty thousand inhabitants or more shall be permitted to frame a charter for its own government consistent with and subject to the constitution and laws of this state, and for such purpose the legislative authority of such city may cause an election to be had, at which election there shall be chosen by the qualified electors of said city fifteen freeholders thereof, who shall have been residents of said city for a period of at least two years preceding their election, and qualified electors, whose duty it shall be to convene within ten days after their election, and prepare and propose a charter for such city. Such proposed charter shall be submitted to the qualified electors of said city, and if a majority of such qualified electors voting thereon ratify the same, it shall become the charter of said city, and shall become the organic law thereof, and supersede any existing charter, including amendments thereto, and all special laws inconsistent with such charter. Said proposed charter shall be published in two daily newspapers published in said city for at least thirty days prior to the day of submitting the same to the electors for their approval, as above provided. All elections in this section authorized shall only be had upon notice, which notice shall specify the object of calling such election, and shall be given for at least ten days before the day of election in all election districts of said city. Said elections may be general or special elections, and, except as herein provided, shall be governed by the law regulating and controlling general or special elections in said city. Such charter may be amended by proposals therefor submitted by the legislative authority of such city to the electors thereof at any general election, after notice of said submission published as above specified, and ratified by a majority of the qualified electors voting thereon. In submitting any such charter or amendment thereto, any alternate article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others.

See supra, Art. VIII, § 3, authority to incur and limit of indebtedness.

See notes to Art. II, § 25, and Art. IV, § 1.

1. Ark., XII, 3; Cal., XI, 6; Colo., XIV, 13; Mo., IX, 7; N. Y., VIII, 9; S. Dak., X, 1; Wy., XIII, 1.

2. Cal., XI, 6; Colo., XIV, 14; Ill., IV, 22; Ida., XII, 1.

3. Cal., XI, 6.

Cited in 1 Wash. 301; 1 Wash. 486; 2 Wash. 138; 2 Wash. 144; 2 Wash. 585; 3 Wash. 8-11; 4 Wash. 86; 4 Wash. 136; 4 Wash. 145; 4 Wash. 774, 775; 6 Wash. 146; 6 Wash. 251; 7 Wash. 231, 232; 8 Wash. 279; 8 Wash. 668; 14 Wash. 293; 14 Wash. 606; 13 Wash. 19; 16 Wash. 386; 19 Wash. 41; 25 Wash. 304; 25 Wash. 583; 26 Wash. 504; 28 Wash. 721; 35 Wash. 580; 42 Wash. 29; 48 Wash. 630; 50 Wash. 161, 162; 51 Wash. 178.

See 2 Remington's Digest, pp. 1988-1997, §§ 1-32.

All doubt as to the power of cities of this state, having a population of twenty thousand, to frame charters for their own government, is removed by the express language of this provision: *Reeves v. Anderson*, 13 Wash. 17, 21.

General laws cannot be affected by the adoption of a freeholders' charter, but they are binding upon the corporation: *Seymour v. Tacoma*, 6 Wash. 138, 146.

The prohibition against special legislation in incorporating cities and towns is prospective in its operation, and does not affect existing special charters created under the territorial regime: *Tacoma Land Co. v. Pierce Co.*, 1 Wash. 482. See Art. II, § 28, subd. 8.

The act of March 9, 1893 (p. 183), validating de facto towns, ineffectually attempting to incorporate under prior void acts, is constitutional, and not special legislation: *Pullman v. Hungate*, 8 Wash. 519; *State ex rel. Bradley v. Berry*, 13 Wash. 708; *State ex rel. Rice v. Centralia*, 8 Wash. 659.

The act of March 27, 1890 (p. 135, § 6), authorizing reincorporation of void municipal corporations, violates the constitutional inhibition against creating municipal corporations by special laws: *Town of Denver v. Spokane Falls*, 7 Wash. 226.

The act of March 27, 1890 (p. 138), authorizing cities and towns to consolidate, and to hold special elections therefor in each of the cities and towns proposed to be consolidated, does not contravene the provisions of this section: *State ex rel. Cole v. New Whatcom*, 3 Wash. 7.

The majority prescribed by this section requisite to carry a proposition authorized to be submitted to the electors is a majority of those who vote upon the proposition: *Metcalf v. Seattle*, 1 Wash. 297; and the vote necessary for the ratification of a proposed amendment to a freeholders' charter is a majority of those voting on the specific proposition, if submitted, at a general election: *State v. Denny*, 4 Wash. 135.

The act of February 26, 1890, requiring the incorporation, organization and classification of cities in proportion to population, does not violate this section, since the same authority was conferred upon municipal corporations to be thereafter organized by other legislation at the same session: *Baker v. Seattle*, 2 Wash. 576, 585.

This section must be construed to require the same publication of proposed amendments to a city charter as is required upon the adoption of the charter itself: *Wade v. Tacoma*, 4 Wash. 85.

The boundaries of a city, acting under a freeholders' charter, cannot be extended by an amendment of its charter; for an extension to be valid under the constitution it must be consummated by virtue of action under the general laws: *State ex rel. Snell v. Warner*, 4 Wash. 773, 776.

The constitution and statutes thereunder, authorizing the incorporation of cities and towns, do not confine the limits of the corporation to those of any pre-existing city or town, but the boundary may be established by the vote of the people within the limits of the proposed incorporation: *Ferguson v. Snohomish*, 8 Wash. 668.

This section authorizes cities to frame their own charters for self-government within certain limitations, hence Art. IV, § 33, freeholders' charter of Seattle, providing that a claim for damages against the city shall be presented within six months after the claim accrues and that no action should be maintained until sixty days after such presentation, is not unconstitutional, although the general law of limitations prescribes a three years' limit: *Scurry v. Seattle*, 8 Wash. 278, 279.

Cities authorized by the constitution to frame their own charters have no authority to provide therein for the creation of municipal or police courts. Such power is delegated by the constitution to the legislature, which can alone exercise it: *In re Cloherty*, 2 Wash. 137.

A city cannot adopt a charter empowering it to fix the price of gas to be furnished its inhabitants, under this section, authorizing cities of a specific population to frame charters, etc., where a general law authorizes such cities to regulate and control the use of gas, but contains no provision as to price: *Tacoma Gas Co. v. Tacoma*, 14 Wash. 288.

Where the legislature has passed a general law upon the particular subject, the power to fix rates for lighting the city must be found therein, and not under § 11 of this article: *Id.*, 293, 294.

The salary of elective officers must be provided for in the charter and cannot be redelegated by the charter framers to the legislative bodies of such cities: *Taylor v. Tacoma*, 8 Wash. 174; *Bardsley v. Sternberg*, 18 Wash. 612.

The legislature having no authority to pass laws partaking of the character of special legislation, it cannot delegate such power to a city council: *Tacoma v. Krech*, 15 Wash. 296.

The vacation of streets is a legislative function which may be delegated by the legislature to municipal corporations: *Ponischil v. Hoquiam Sash and Door Co.*, 41 Wash. 303.

The constitutional authority to frame a freeholders' charter does not authorize a city to exercise the power of eminent domain: *Tacoma v. State*, 4 Wash. 64. Nor to require registration at city elections: *Seymour v. Tacoma*, 6 Wash. 138. Nor to provide a tribunal and clothe it with authority to determine an election contest: *State ex rel. Fawcett v. Superior Court*, 14 Wash. 604. Nor to decide all questions as to qualifications and election of members of the city council in cases of contests: *State ex rel. Navin v. Weir*, 26 Wash. 501.

The proper classification of municipal corporations may be determined by a census taken for that purpose by the local authorities: *Anderson v. Whatcom County*, 15 Wash. 47; *State ex rel. Smith v. Neal*, 25 Wash. 264.

A charter of the city of the first class

may be amended by a general law which affects every city of such class: *State ex rel. Seattle v. Carson*, 6 Wash. 250.

It is the evident policy of the state constitution that charters of cities of the first class and amendments thereto shall be subject to the control of general laws: *Hyndman v. Boyd*, 42 Wash. 17; *Benton v. Seattle Electric Co.*, 50 Wash. 156. Permitting amendments to a charter to be adopted by a vote of the people is not an unwarranted delegation of legislative power: *State ex rel. Mullen v. Doherty*, 16 Wash. 382.

The adoption of charter amendments requiring the submission of the matter of granting franchises to a vote of the people is not unconstitutional as an unlawful delegation of legislative power to the people: *Hyndman v. Boyd*, 42 Wash. 17.

An ordinance fixing the minimum fine for a misdemeanor is not void, although the general law of the state fixes no minimum: *Seattle v. Pearson*, 15 Wash. 575. See, also, *Seattle v. Chin Let*, 19 Wash. 38.

This section does not permit the adoption of unreasonable charter limitations against claims and actions for damages against the city: *Hase v. Seattle*, 51 Wash. 174.

§ 11. POLICE AND SANITARY REGULATIONS.—Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

Ark., XII, 4; *Cal.*, XI, 11.

Cited in 14 Wash. 294; 16 Wash. 573; 26 Wash. 275; 28 Wash. 722.

See 1 Remington's Digest, pp. 521-525, §§ 43-59; 2 *Id.*, p. 1995, § 22; *Id.*, pp. 2058-2060, §§ 260-273.

The right of a municipal corporation to impound stock running at large, under charter powers, is a valid exercise of police power, and does not violate this section nor § 3 of Art. I: *Wilson v. Beyers*, 5 Wash. 303.

Bicycles are vehicles and their use in the streets is a proper subject for police regulation in the interests of public safety: *Simpson v. Whatcom*, 33 Wash. 392.

A municipal ordinance requiring fire escapes upon buildings of a certain description within prescribed limits is within the police power: *Seattle v. Hinckley*, 40 Wash. 468.

A legislative act supersedes an ordinance: *Tacoma Gas & Elec. Light Co. v. Tacoma*, 14 Wash. 288.

A city may regulate the speed of automobiles in the city, notwithstanding Laws 1905, page 293, requires a state license for automobiles, and prohibits cities from imposing any license on same: *Bellingham v. Cissna*, 44 Wash. 397.

As to sufficiency of compliance with charter provisions fixing license fees for retail liquor licenses, see *Seattle v. Clark*, 28 Wash. 717.

An ordinance prescribing an eight-hour day upon municipal construction work is not unconstitutional: *In re Broad*, 36 Wash. 449 (overruling *Seattle v. Smyth*, 22 Wash. 327); *Normile v. Thompson*, 37 Wash. 465. Nor is an ordinance prescribing the minimum wages to be paid for a day's labor: *Gies v. Broad*, 41 Wash. 448.

§ 12. ASSESSMENT AND COLLECTION OF TAXES IN MUNICIPALITIES.—The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

See notes to Art. VII, § 9, and § 8 of this article.

Cal., XI, 12; Neb., IX, 7.

Cited in 2 Wash. 586; 6 Wash. 255; 6 Wash. 258; 6 Wash. 369; 13 Wash. 53; 15 Wash. 317; 22 Wash. 574; 26 Wash. 276; 28 Wash. 45; 35 Wash. 584; 37 Wash. 16; 42 Wash. 28; 44 Wash. 354; 51 Wash. 17.

See 2 Remington's Digest, p. 1997, § 32; Id., pp. 2105-2108, §§ 430-442.

There is no vested right, either in municipal corporations of third or fourth class, or citizens thereof, to have property assessed in any particular way; the legislature may change the mode of assessment at any time: *Heilig v. Puyallup*, 7 Wash. 29.

The provisions of this section are not violated by the enactment (Laws 1893, p. 301) providing for the establishment and improvement of highways in counties, etc., as the improvement is for a county purpose, and an assessment therefor is not a tax within the meaning of the constitution: *Seanor v. County Commissioners*, 13 Wash. 48, 61, 62.

The act of March 9, 1893 (p. 231), authorizing the issuance and collection of bonds upon the property benefited by local improvements, is constitutional and applicable to cities of every class: *Germond v. Tacoma*, 6 Wash. 365.

Laws 1903, page 393, requiring the municipal authorities of a city to submit to a vote of the people charter amendments, etc., thereby compelling the city to incur the expense of such election, does not violate the provisions of this section: *Hindman v. Boyd*, 42 Wash. 17. Laws

1893, page 167, providing for the assessment and collection of taxes in cities of the first class does not violate the provisions of this section against the imposition by the legislature of taxes upon municipal corporations: *State ex rel. Seattle v. Carson*, 6 Wash. 250; *Germond v. Tacoma*, 6 Wash. 369; *State ex rel. Seattle v. Abrahams*, 6 Wash. 372. See, also, *Pierce County ex rel. Maloney v. Spike*, 19 Wash. 652.

The act of February 26, 1890, § 5, empowering certain cities and towns to extend their credit, etc., does not violate the provisions of this section prohibiting the legislature from imposing involuntary debts upon any city, etc.: *Baker v. Seattle*, 2 Wash. 576. Under this section and Laws 1899, page 290, § 6, cities were not granted power to impose penalties and interest on unpaid taxes: *New Whatcom v. Roeder*, 22 Wash. 570.

This section only authorizes a general law for the collection of taxes by the corporate authorities of a county for general county purposes: *State ex rel. Latimer v. Henry*, 28 Wash. 38.

Under this section and Const., Art. VII, § 9, the legislature may authorize the taxation, by cities, of persons, as well as property, within their limits: *State v. Ide*, 35 Wash. 576.

A county having acted upon a petition for the establishment of a county road cannot question the constitutionality of the act authorizing it: *Seanor v. Board of County Commissioners*, 13 Wash. 48.

§ 13. PRIVATE PROPERTY, WHEN MAY BE TAKEN FOR PUBLIC DEBT.—Private property shall not be taken or sold for the payment of the corporate debt of any public or municipal corporation, except in the mode provided by law for the levy and collection of taxes.

Cal., XI, 15; Colo., X, 14; Mo., X, 13; Mont., XII, 8; Neb., IX, 7.

Cited in 4 Wash. 154.

See *Seattle & Lake W. Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503.

§ 14. PRIVATE USE OF PUBLIC FUNDS PROHIBITED.—The making of profit out of county, city, town, or other public money, or using the same for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law.

Ark., XVI, 3; Cal., XI, 17; Colo., X, 13; Ida., VII, 10; Mo., X, 17; Mont., XII, 14; Pa., IX, 14; S. Dak., XI, 11; Wy., XV, 8.

Cited in 12 Wash. 295; 18 Wash. 624.

The enactment of § 2812, *infra*, is in perfect harmony with this provision, and applies to public officers, such as city treas-

urer: *State v. Krug*, 12 Wash. 288; see *State v. Boggs*, 16 Wash. 146.

Depositing funds of a city in a bank, subject to repayment on demand, is neither a loan nor an investment of the funds: *Bardsley v. Sternberg*, 18 Wash. 612.

§ 15. DEPOSIT OF PUBLIC FUNDS.—All moneys, assessments, and taxes belonging to or collected for the use of any county, city, town, or other public or municipal corporation, coming into the hands of any officer thereof, shall immediately be deposited with the treasurer, or other legal depository,

to the credit of such city, town, or other corporation respectively, for the benefit of the funds to which they belong.

Cal., XI, 16.

Cited in 4 Wash. 154; 35 Wash. 515.

Section 8100, *infra*, providing for the excavation of public waterways and for liens, does not violate this section; as

the claim for liens for the work is not a debt of any such corporation: *Seattle etc. Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503.

ARTICLE XII.

CORPORATIONS OTHER THAN MUNICIPAL.

§ 1. CORPORATIONS, HOW FORMED.—Corporations may be formed under general laws, but shall not be created by special acts.¹ All laws relating to corporations may be altered, amended, or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law.

1. Cal. XII, 1; Ill., XI, 1; Ind., XI, 13; Ia., VIII, 1; Minn., X, 2; Miss., VII, 178; N. Y., Rev., VIII, 1; Neb., XIII, 1; Nev., VIII, 1; N. C., VIII, 1; Ohio, XIII, 1; Or., XI, 2; S. C., XII, 1; Tex., XII, 1-2; W. Va., XI, 1; Wis., XI, 1.

And see Ala., XIV, 1; Ark., XII, 6;

Colo., XV, 2, 3; Del., I, 17; Ida., XI, 2, 3; Amend. Kan., XII, 1; Me., IV, 14, Amend.; Mich., XV, 1; Mo., XII, 1; Mont., XV, 2, 3; N. Dak., VII, 131; N. Y., VIII, 1; Ohio, XIII, 2; Pa., XVI, 10; S. Dak., XVII, 1; Wy., X, 1.

Cited in 19 Wash. 498; 51 Wash. 390.

§ 2. EXISTING CHARTERS.—All existing charters, franchises, special or exclusive privileges, under which an actual and bona fide organization shall not have taken place, and business been commenced in good faith, at the time of the adoption of this constitution, shall thereafter have no validity.

Ala., XIV, 2; Ark., XII, 1; Cal., XII, 6; Colo., XV, 1; Ill., XI, 2; Ida., XI, 1; Ky., 91; Miss., 180; Mo., XII, 1; Mont., XV, 1; Neb., XIII, 6; N. Dak., VII, 131; Pa., XVI, 1; S. Dak., XVII, 2; Wy., X, 3; W. Va., XI, 3.

§ 3. EXISTING CHARTERS NOT TO BE EXTENDED NOR FORFEITURE REMITTED.—The legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise or charter of any corporation now existing, or, which shall hereafter exist under the laws of this state.

Ala., XIV, 3, 10; Ark., XVII, 8; Cal., XII, 7; Ga., IV, 2, (3); La., 234; Miss., 179; Mo., XII, 2, 3; Mont., XV, 2; N. Dak., VII, 133; Pa., XVI, 2; S. Dak., XVII, 3; Va., X, 21.

§ 4. LIABILITY OF STOCKHOLDERS.—Each stockholder in all incorporated companies, except corporations organized for banking or insurance purposes, shall be liable for the debts of the corporation to the amount of his unpaid stock, and no more, and one or more stockholders may be joined as parties defendant in suits to recover upon this liability.

Cf. Ala., XIV, 8; Mo., XII, 9; Minn., X, 3; Neb., XII, 4; Or., XI, 3; W. Va., XI, 2.

§ 5. TERM "CORPORATION," DEFINED—RIGHT TO SUE AND BE SUED.—The term "corporations," as used in this article, shall be construed to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or partnerships, and all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons.

Cf. Ala., XIV, 12, 13; Ida., XI, 16; Kan., XII, 6; Ky., 208; La., 240; Mich., XV, 11; Minn., X, 1; Mo., XII, 11; Mont., XV, 18; Miss., 199; Neb., XI, 3; Nev., VIII, 5; N. C., VIII, 3; N. Y., Rev., VIII, 3; N. Dak., VII, 144; Pa., XVI, 13; S. Dak., XVII, 19.

§ 6. LIMITATIONS UPON ISSUANCE OF STOCK.—Corporations shall not issue stock, except to bona fide subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock, without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously given in such manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void.

Ala., XIV, 6; Ark., XII, 8; Cal., XII, 11; Colo., XV, 9; Ill., XI, 13; Ida., XI, 9; Ky., 193; La., 238, 239; Miss., 196; Mo., XII, 8; Mont., XV, 10; Neb., XI, 5; N. Dak., VII, 138; Pa., XVI, 7; S. Dak., VII, 8; Tex., XII, 6.

§ 7. FOREIGN CORPORATIONS.—No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state.

Ark., XII, 11; Cal., XII, 15; Ida., XI, 10; Ky., 202; Mont., XV, 11; N. Dak., VII, 136; S. Dak., XVII, 6; Wy., X, 5.

Cited in 18 Wash. 454; 35 Wash. 343; 46 Wash. 493; 47 Wash. 119; 47 Wash. 121; 43 Wash. 375; 51 Wash. 621.

Laws of 1901, page 356, regulating new corporations to be thereafter authorized

to do business, in this state, and making them a class unto themselves, does not violate this section, where the law applies equally to all foreign and domestic corporations thereafter to be authorized to transact business: *State v. Fraternal Knights & Ladies*, 35 Wash. 338.

§ 8. ALIENATION OF FRANCHISE NOT TO RELEASE LIABILITIES.—No corporation shall lease or alienate any franchise, so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges.

Cal., XII, 10; Ida., XI, 15; Ky., 203; Mont., XV, 17.

Cited in 8 Wash. 286, 287.

This section implies the right of a corporation to dispose of its franchise, but not

so as to relieve it or property held thereunder from the liabilities herein imposed: *Klosterman v. Mason County etc. Ry. Co.*, 8 Wash. 281.

§ 9. STATE NOT TO LOAN ITS CREDIT OR SUBSCRIBE FOR STOCK.—The state shall not in any manner loan its credit, nor shall it subscribe to or be interested in the stock of any company, association or corporation.

See *supra*, Art. VIII, § 5, and references.

Ala., XIV, 20; Ark., XII, 7; Ga., VII, 5; Ida., VIII, 3; N. Y., Rev., VIII, 9; Or., XI, 6.

Cited in 35 Wash. 513.

§ 10. EMINENT DOMAIN AFFECTING.—The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals.

Ala., I, 24; Ark., XII, 9, and XVII, 9; Cal., XII, 8; Colo., XV, 8; Fla., XVI, 29; Ga., IV, 2 (2); Ill., XI, 14; Ida., XI, 8; Kan., XII, 4; Ky., 195; Mo., XII, 4; Minn., X, 4; Miss., 190; Mont., XV, 9; Neb., XI, 6; N. Dak., VII, 134; Ohio, XIII, 5; Or., XI, 4; Pa., XVI, 3; S. Dak., XVII, 4; W. Va., XI, 12; Wy., X, 9.

Cited in 32 Wash. 595.

See 1 Remington's Digest, p. 1031, § 25.

Property held by one corporation simply as a proprietor may be taken by another corporation for a public use: Samish River Boom Co. v. Union Boom Co., 32 Wash. 586. One railroad may condemn property of another not held for a public use: Seattle & M. R. Co. v. Bellingham Bay & E. R. Co., 29 Wash. 491.

§ 11. PROHIBITION AGAINST ISSUANCE OF MONEY AND LIABILITY OF STOCKHOLDERS IN BANKS.—No corporation, association, or individual shall issue or put in circulation as money anything but the lawful money of the United States.¹ Each stockholder of any banking or insurance corporation or joint stock association shall be individually and personally liable equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.

1, Cf. Ala., XIV, 14; Ark., XII, 10; Cal., XII, 5; Ill., XI, 6; Ind., XI, 1; Mo., XII, 25; Nev., VIII, 6; Or., XI, 1; S. Dak., XVIII, 3; Wis., XI, 4.

Cited in 13 Wash. 678; 19 Wash. 235; 21 Wash. 225; 21 Wash. 613; 24 Wash. 381; 36 Wash. 266.

See 1 Remington's Digest, p. 336, §§ 1-3.

Stockholders' liability: Ind., XI, 6; Ill., XI, 6; Ia., VIII, 9; Minn., IX, 13; Mich., XV, 3; Md., III, 39; N. Y., Rev., VIII, 7; Neb., XIII, 7; S. C., XII, 6; W. Va., XI, 6.

The double liability imposed by this section is a secondary, and not a primary, lia-

bility, the stockholders occupying the position of sureties: Wilson v. Book, 13 Wash. 676; Watterson v. Masterson, 15 Wash. 511. But this rule has no application to the limitation of actions, and does not require that the primary assets be exhausted and applied before recourse be had against the stockholder: Bennett v. Thorne, 36 Wash. 253.

The superadded liability of the stockholder is personal and does not follow the stock: Shuey v. Holmes, 21 Wash. 223; Shuey v. Adair, 24 Wash. 378.

§ 12. RECEIVING DEPOSITS BY BANK AFTER INSOLVENCY.—

Any president, director, manager, cashier, or other officer of any banking institution who shall receive or assent to the reception of deposits after he shall have knowledge of the fact that such banking institution is insolvent or in failing circumstances, shall be individually responsible for such deposits so received.

Ky., 204; La., 241; Mo., XII, 27.

Cited in 35 Wash. 151.

This provision does not preclude the

legislature from making officers of a bank criminally liable for the same act: State v. Oleson, 35 Wash. 149.

§ 13. COMMON CARRIERS, REGULATION OF.—All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control. Any association or corporation organized for the purpose, under the laws of this state, shall have the right to connect at the state line with railroads of other states. Every railroad company shall have the right with its road, whether the same is now constructed or may hereafter be constructed, to intersect, cross, or connect with any other railroad, and when such railroads are of the same or similar gauge they shall, at all crossings and at all points where a railroad shall begin or terminate at or near any other railroad, form proper connections so that the cars of any such railroad companies may be speedily transferred from one railroad to another. All railroad companies shall receive and transport each the other's passengers, tonnage, and cars, without delay or discrimination.

Ala., XIV, 21; Ark., XVII, 1; Cal., XII, 17; Colo., XV, 4; Ida., XI, 5; Ill., XI, 12;

Ky., 216; La., 243 and 244; Mo., XII, 13, 14; Miss., 184, 195; Mont., XV, 5; Neb.,

XI, 4; N. Dak., VII, 142 and 143; Pa., XVII, 1; S. Dak., XVII, 15, 16; Tex. X, 1, 2; W. Va., XI, 9; Wy., X, 1, 2.

Cited in 31 Wash. 466; 36 Wash. 661.

A street railway in the hands of a construction company is a common carrier, when: *Cogswell v. West St. etc. R. Co.*, 5 Wash. 46. Courts will take judicial notice that a railway company is a common carrier: *Boyle v. Great Northern R. Co.*, 13 Wash. 383. A street railway company is a common carrier: *State ex rel. Grinsfelder v. Spokane St. R. Co.*, 19 Wash. 518. Irrigation companies are public carriers of water: *Prescott Irrigation Co. v. Flathers*, 20 Wash. 454. Owner of an office building is, in the operation of a passenger elevator: *Edwards v. Burke*, 36 Wash. 107.

RAILROAD CROSSINGS.—The right of one railroad to cross another would not justify such a crossing and recrossing of parallel roads as would amount to a longitudinal taking of property already devoted to a public use: *Seattle & M. R. Co. v. State*, 7 Wash. 150. The petitioning railroad must accommodate itself to the first: *Id.* Railroad tracks constructed lengthwise upon a public street cannot be claimed to constitute part of the railroad company's yard so that another company could not cross the same: *Id.*

To justify the condemnation by one railroad for a crossing of the terminal grounds of another, great necessity therefor must be shown: *State ex rel. Spokane Falls & N. R. Co. v. Superior Court*, 40 Wash. 389.

§ 14. PROHIBITION AGAINST COMBINATIONS BY CARRIERS.

No railroad company or other common carrier shall combine or make any contract with the owners of any vessel that leaves port or makes port in this state, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying.

Cal., XII, 20.

Cited in 51 Wash. 349.

Joint construction by two competing lines, of an independent line opening up

new territory, does not violate this section, when: *State ex rel. Cascade R. Co. v. Superior Court*, 51 Wash. 346.

§ 15. PROHIBITION AGAINST DISCRIMINATING CHARGES.—

No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state. Persons and property transported over any railroad, or by any other transportation company, or individual, shall be delivered at any station, landing, or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing. Excursion and commutation tickets may be issued at special rates.

See *infra*, § 21.

Ala., XIV, 22; Ark., XVII, 6; Cal., XII, 21; Colo., XV, 6; Fla., XVI, 30; Ga., IV, 2 (1); Ill., XI, 15; Ida., XI, 6; Mo., XII, 12; Mont., XV, 7; Neb., XI, 7; Pa., XVII, 3, 7; S. Dak., XVII, 17; Tex., X, 2.

Cited in 32 Wash. 225.

This section and § 22 are not self-executing, but are limited in their operation to such interpretation as have been given them by legislative enactment: *Northwestern Warehouse Co. v. Oregon R. & Nav. Co.*, 32 Wash. 218.

§ 16. PROHIBITION AGAINST CONSOLIDATION OF COMPETING LINES.—No railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a competing line.

See note to § 14, *supra*.

Ark., XVII, 4; Colo., XV, 5; Ill., XI, 11; Ky., 201; Mo., XIV, 17; Mont., XV, 6; Neb., XI, 3; N. Dak., VII, 141; Pa., XVII,

4; S. Dak., XVII, 14; Tex., X, 5; W. Va., XI, 11; Wy., X, 8.

Cited in 51 Wash. 349.

§ 17. ROLLING STOCK, PERSONALTY FOR PURPOSES OF TAXATION.—The rolling stock and other movable property belonging to any railroad company or corporation in this state shall be considered personal property, and shall be liable to taxation and to execution and sale in the same manner as the personal property of individuals, and such property shall not be exempted from execution and sale.

Ark., XVII, 11; Ill., XI, 10; Ky., 212; Miss., 185; Mo., XII, 16; Neb., XI, 2; S. Dak., XVII, 13; Tex., X, 4; W. Va., XI, 8.

Cited in 14 Wash. 361.

§ 18. MAXIMUM RATES FOR TRANSPORTATION.—The legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and to prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads and other common carriers in the state, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established, and its powers and duties fully defined by law.

Cf. Cal., XII, 22; Ga., IV, 2 (1); Ill., XI, 12; Neb., XI, 4.

The constitutional provision requiring the legislature to establish reasonable maximum transportation rates, does not prevent the delegation of such power to a railroad commission, since it further provides that the legislature may establish a railroad and transportation commission and define its powers; hence it does not

prevent the establishment of a regulative commission with power to fix maximum rates in conflict with the maximum rate laws, and Laws 1907, providing such a commission, impliedly repeals former maximum rate laws of the state, upon the taking effect of conflicting rates established by the commission: *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 33.

§ 19. TELEGRAPH AND TELEPHONE COMPANIES.—Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other's messages without delay or discrimination, and all of such companies are hereby declared to be common carriers and subject to legislative control. Railroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights-of-way of such railroads and railroad companies, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company any facilities, privileges, or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section.

See *supra*, Art. I, § 16, eminent domain.

Cf. Ala., XIV, 11; Colo., XV, 13; Ida., XI, 13; Ky., 199; Mont., XV, 14; Pa., XVI, 12; S. Dak., XVII, 11; Wy., X, 7.
Cited in 24 Wash. 57.

This section is not self-executing: *State ex rel. Spokane etc. Tel. Co. v. Spokane*, 24 Wash. 53. City may refuse a franchise: *Id.*

§ 20. PROHIBITION AGAINST FREE TRANSPORTATION FOR PUBLIC OFFICERS.—No railroad or other transportation company shall grant free passes, or sell tickets or passes at a discount, other than as sold to the public generally, to any member of the legislature, or to any person holding

any public office within this state. The legislature shall pass laws to carry this provision into effect.

See *supra*, Art. II, § 39, and references.

Cf. Ala., XIV, 23; Ark., XVII, 7; Fla., XVI, 31; Ky., 197; Miss., 188; Mo., XII, 24; N. Y., Rev., XIII, 5; Pa., XVII, 8.

Cited in 10 Wash. 312; 45 Wash. 584.

A public officer traveling upon a free pass issued by a transportation company is estopped from setting up in a certain

action for damages, arising from the negligence of the company, that the pass issued to him was void under the constitution, and that the condition attached to its acceptance and use were, consequently, inoperative: *Muldoon v. Seattle City Ry. Co.*, 10 Wash. 311.

§ 21. EXPRESS COMPANIES.—Railroad companies, now or hereafter organized or doing business in this state shall allow all express companies organized or doing business in this state transportation over all lines of railroad owned or operated by such railroad companies upon equal terms with any other express company; and no railroad corporation organized or doing business in this state shall allow any express corporation or company any facilities, privileges, or rates for transportation of men or materials or property carried by them, or for doing the business of such express companies, not allowed to all express companies.

See *supra*, § 15.

§ 22. MONOPOLIES AND TRUSTS.—Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees, or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise.

See note to § 14, *supra*.

Cf. Ark., II, 19; Ill., XI, 15; Ida., XI, 18; Ky., 198; Md., D. R., 41; Miss., 198; Mont., XV, 20; N. C., I, 31; N. Dak., VII, 146; Tenn., I, 22; Tex., I, 26.

Cited in 23 Wash. 20; 32 Wash. 225; 35 Wash. 515; 51 Wash. 349.

The granting of a street railway franchise that permits of the acquisition or consolidation of existing competing lines is not in violation of this section: *Wood v. Seattle*, 23 Wash. 1.

Monopoly in warehouse business not shown, when: *Northwest Warehouse Co. v. Oregon R. & N. Co.*, 32 Wash. 218.

Section 8100, *infra*, providing for excavation of public waterways, etc., does not violate this section prohibiting monopolies: *Seattle & Lake Wash. Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503. As to boom company locating its site: See *Nicomen Boom Co. v. North Shore etc. Co.*, 40 Wash. 315.

ARTICLE XIII.

STATE INSTITUTIONS.

§ 1. EDUCATIONAL, REFORMATORY AND PENAL INSTITUTIONS.—Educational, reformatory, and penal institutions, those for the benefit of blind, deaf, dumb, or otherwise defective youth, for the insane or idiotic, and such other institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be provided by law. The regents, trustees, or commissioners of all such institutions existing

at the time of the adoption of this constitution, and of such as shall thereafter be established by law, shall be appointed by the governor, by and with the advice and consent of the senate; and upon all nominations made by the governor, the question shall be taken by ayes and noes, and entered upon the journal.

Cf. Colo., VIII, 1; Ida., X, 1; Mont., X, 1; N. Dak. XIX, 215, 216; S. Dak., XIV, 1; Wy., VII, 1.

Cited in 9 Wash. 197.

Under this section and § 4361, *infra*, only members of the board of regents of such state institutions are eligible to offices

thereunder or qualified to hold them: *State v. Smith*, 9 Wash. 195, 197.

The governor in removing an appointive officer holding for an indefinite term has not been constituted an inferior court or tribunal, and his decision cannot be reviewed by the courts: *State ex rel. McReavy v. Burke*, 8 Wash. 412.

ARTICLE XIV.

SEAT OF GOVERNMENT.

§ 1. STATE CAPITAL, LOCATION OF.—The legislature shall have no power to change or to locate the seat of government of this state; but the question of the permanent location of the seat of government of the state shall be submitted to the qualified electors of the territory, at the election to be held for the adoption of this constitution. A majority of all the votes cast at said election, upon said question, shall be necessary to determine the permanent location of the seat of government for the state; and no place shall ever be the seat of government which shall not receive a majority of the votes cast on that matter. In case there shall be no choice of location at said first election, the legislature shall, at its first regular session after the adoption of this constitution, provide for submitting to the qualified electors of the state, at the next succeeding general election thereafter, the question of choice of location between the three places for which the highest number of votes shall have been cast at the said first election. Said legislature shall provide further, that in case there shall be no choice of location at said second election, the question of choice between the two places for which the highest number of votes shall have been cast shall be submitted in like manner to the qualified electors of the state at the next ensuing general election: Provided, That until the seat of government shall have been permanently located as herein provided the temporary location shall remain at the city of Olympia.

Colo., VIII, 2; Ida., X, 2; Mont., X, 2; S. Dak., XX, 1; Wy., VII, 23.

Cited in 25 Wash. 583; 49 Wash. 74.

§ 2. CHANGE OF STATE CAPITAL.—When the seat of government shall have been located as herein provided, the location thereof shall not thereafter be changed except by a vote of two-thirds of all the qualified electors of the state voting on that question, at a general election, at which the question of location of the seat of government shall have been submitted by the legislature.

Colo., VIII, 3; Ida., X, 2; Mont., X, 3; Wy., VII, 23.

Cited in 49 Wash. 74.

§ 3. RESTRICTIONS ON APPROPRIATIONS FOR CAPITOL BUILDINGS.—The legislature shall make no appropriations or expenditures for capitol buildings or grounds, except to keep the territorial capitol buildings and grounds in repair, and for making all necessary additions thereto, until

the seat of government shall have been permanently located, and the public buildings are erected at the permanent capital in pursuance of law.

Colo., VIII, 4; Mont., X, 4.

ARTICLE XV.

HARBORS AND TIDE WATERS.

§ 1. HARBOR LINE COMMISSION AND RESTRAINT ON DISPOSITION OF CERTAIN TIDE LANDS.—The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays, and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof upon either side. The state shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

See *infra*, Art. XVII, tide lands.

Cf. Cal., XV, 2.

Cited in 1 Wash. 301; 2 Wash. 260; 4 Wash. 9; 7 Wash. 120, 152; 13 Wash. 65; 19 Wash. 46; 22 Wash. 100.

See 2 Remington's Digest, pp. 2404-2410, §§ 84-101.

"Tide lands" are "state" lands in a certain sense—that is, they belong to the state; but in all the nomenclature of our constitution and statutes the latter term does not include the former: *Seattle & M. Ry. Co. v. State*, 7 Wash. 150, 152.

Tide lands belong to the state, with full power of disposition thereof, restricted only by constitutions, state and national; and no individual can claim any easement in or impose any servitude upon them without legislative consent: *Eisenbach v. Hatfield*, 2 Wash. 236.

Under this provision, the board of harbor line commissioners is authorized to establish harbor lines in front of towns, as well as cities, as the word "cities" here used includes towns: *State v. Harbor Line Commrs.*, 4 Wash. 6; and the act of March 31, 1895 (Laws of 1895, p. 406), authorizing the disestablishment of harbor lines in front of towns under certain conditions is unconstitutional, as being in conflict with this article, which contemplates that such lines, when once established, shall forever remain so: *Wilson v. State Land*

Commrs., 13 Wash. 65; see *Stimson Mill Co. v. Harbor Line Commrs.*, 4 Wash. 6.

Under the provisions of this article, a riparian proprietor, within one mile of the corporate limits of any city, has no right to extend wharves in front of his land below high-water mark, except by permission of the state: *Eisenbach v. Hatfield*, *supra*.

The riparian proprietor's rights to future accretions, not yet in existence, give him no vested right, as there can be no present vested right in that which may never exist: *Id.*

The building by the state or its grantees of wharves upon shores of navigable waters is neither a taking nor a damaging of private property for public use: *Id.*

The act of 1854, authorizing bank owners to build wharves in front of their premises, was but a license, which the constitution and subsequent laws have abrogated: *Id.*

Under this section the term "commerce" must be construed as modified by the term "navigation"; and the curing and canning of fish, maintaining wholesale and retail fish markets, etc., are not "conveniences of navigation and commerce": *State ex rel. Denny v. Bridges*, 19 Wash. 44.

As to the validity of grant of tide lands to the United States, see *State ex rel. Bussell v. Callvert*, 33 Wash. 380.

§ 2. LEASING AND MAINTENANCE OF WHARVES, DOCKS, ETC.—The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks, and other structures, upon the areas mentioned in section one of this article, but no lease shall be made for any

term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks, and other structures.

Cited in 1 Wash. 301; 13 Wash. 65; 22 Wash. 101.

See 2 Remington's Digest, p. 2406, § 91.

As to construction of the clause regarding leasing for wharves, docks, etc., see State ex rel. Denny v. Bridges, 19 Wash. 44. The only right of the lessee is to make improvements for the purposes of navigation and commerce and receive remuneration

therefor under state regulations: State ex rel. Trimble v. Bridges, 22 Wash. 98. The leasing of harbor line areas to the highest bidder by the harbor line commission is a purely executive or administrative act, and will not be controlled by writ of prohibition: State ex rel. White v. State Board of Land Commrs., 23 Wash. 700.

§ 3. EXTENSION OF STREETS OVER TIDE LANDS.—Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided.

Cf. Cal., XV, 1.

Cited in 4 Wash. 9, 10; 6 Wash. 333, 334; 6 Wash. 387; 7 Wash. 156; 10 Wash. 462; 11 Wash. 231; 13 Wash. 65; 17 Wash. 658; 19 Wash. 429.

See 2 Remington's Digest, p. 240, § 88.

The municipal corporations here referred to are only those having power to lay out streets: State v. Harbor Line Commrs., 4 Wash. 6, 10.

It would seem that the right to extend streets must end with the low tide line, for the easement or grant is only over "tide lands": State v. Forrest, 11 Wash. 227, 232.

The space between the harbor reserve and high tide line must be considered as "intervening tide lands," irrespective of location of low tide: State v. Forrest, 11 Wash. 227, 231.

To hold that this provision is self-executing might be very embarrassing when the matter of the disposal of the inner tide lands comes up (that matter being committed entirely to the legislature), since the state's officers can have no official knowledge of streets as laid out by a city: Seattle & M. Ry. Co. v. State, 7 Wash. 150, 156.

Under the constitution and laws of the state, cities of the first class have, as against private parties, the absolute right to extend their streets over and across tide lands lying within their corporate limits, subject only to the superior right of navigation in the waters covering such lands. The rights of the city in this respect are paramount to any rights of private parties: Columbia etc. Ry. Co. v. Seattle, 6 Wash. 332; Seattle v. Columbia etc. Ry. Co., 6 Wash. 379.

The fact that certain tide lands afford a passageway over which logs can be floated to a sawmill, and thus are convenient to the operation of the mill, gives no right of purchase, in view of the fact that, under this section, an adjoining municipal corporation has authority to extend its streets over such lands and cut them off from all connection with the mill: Globe Mill Co. v. Bellingham Bay Imp. Co., 10 Wash. 458; cited in State v. Forrest, 11 Wash. 227, 233.

And a city cannot run such street extension across tide lands at an angle instead of a direct course: Ilwaco v. Ilwaco R. & Nav. Co., 17 Wash. 652. And the right is not a continuing one, when: See State ex rel. Gatzert etc. Land Co. v. Bridges, 19 Wash. 428. The state land commissioners appointed under the act of March 26, 1895, have no authority to review the action of local boards of tide land appraisers in the location of streets upon tide lands, which acts had been subsequently confirmed by the legislature: Seattle v. Forrest, 14 Wash. 423.

Prior to 1895, commissioners could not lay out streets across tide lands: Id.; Ilwaco v. Ilwaco R. & N. Co., 17 Wash. 652.

As to effect of laying out streets over tide lands by the tide land appraisers, see West Seattle v. West Seattle Land Co., 38 Wash. 359.

The legislature has the power to vacate streets platted across the tide lands of the state, when: Henry v. Seattle, 42 Wash. 420.

ARTICLE XVI.

SCHOOL AND GRANTED LANDS.

§ 1. DISPOSITION OF.—All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interests disposed of, to be ascertained in such manner as may be provided

by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

Cf. Colo., IX, 10; Ida., IX, 8; N. Dak., IX, 163, 164.

Cited in 7 Wash. 152; 51 Wash. 55, 56.

Under this and the next section, title to state lands cannot be secured by adverse

possession, and an act providing that limitations shall not run against the state violates this section: O'Brien v. Wilson, 51 Wash. 52.

§ 2. MANNER AND TERMS OF SALE.—None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder; and the value thereof, less the improvements, shall, before any sale, be appraised by a board of appraisers, to be provided by law, the terms of payment also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land. In estimating the value of such lands for disposal, the value of improvements thereon shall be excluded: Provided, That the sale of all school and university land heretofore made by the commissioners of any county or the university commissioners, when the purchase price has been paid in good faith, may be confirmed by the legislature.

See references to § 1.

See note to previous section.

Cited in 7 Wash. 217; 51 Wash. 55, 56.

The provisions of the enabling act, that lands granted for the support of the public schools upon condition that such lands shall be sold only at public auction and for not less than ten dollars per acre, must be

construed as modified by the state constitution, providing for the confirmation of sales of such lands theretofore made under the authority of territorial laws: Romine v. State, 7 Wash. 215.

§ 3. LIMITATIONS ON SALES.—No more than one-fourth of the land granted to the state for educational purposes shall be sold prior to January first, eighteen hundred and ninety-five, and not more than one-half prior to January first, nineteen hundred and five: Provided, That nothing herein shall be so construed as to prevent the state from selling the timber or stone off of any of the state lands in such manner and on such terms as may be prescribed by law: And provided further, That no sale of timber lands shall be valid unless the full value of such lands is paid or secured to the state.

§ 4. HOW MUCH MAY BE OFFERED IN CERTAIN CASES—PLATTING OF.—No more than one hundred and sixty acres of any granted lands of the state shall be offered for sale in one parcel, and all lands within the limits of any incorporated city, or within two miles of the boundary of any incorporated city, where the valuation of such lands shall be found by appraisement to exceed one hundred dollars per acre shall, before the same be sold, be platted into lots and blocks of not more than five acres in a block, and not more than one block shall be offered for sale in one parcel.

§ 5. INVESTMENT OF PERMANENT SCHOOL FUND.—None of the permanent school fund shall ever be loaned to private persons or corporations, but it may be invested in national, state, county, or municipal bonds.

This section is amended. See 1st amendment, *infra*.

See Art. IX, §§ 3 and 5, and references.

Cited in 7 Wash. 271, 272; 21 Wash. 208; 21 Wash. 392; 40 Wash. 100.

Under the provisions of this section the moneys in the permanent school fund may be invested in school district bonds, school districts being municipal corporations within the purview of the constitution: *State v. Grimes*, 7 Wash. 270; *Board of Directors v. Peterson*, 4 Wash. 147; *Maxon v. School Dist.*, 5 Wash. 142.

Warrants are not bonds, and hence Laws 1899, page 53, authorizing the investment

of permanent school fund in state warrants, violates the provisions of this section: *State ex rel. Hellar v. Young*, 21 Wash. 391. Such funds are expressly authorized to be invested in state bonds: *State ex rel. Winston v. Rogers*, 21 Wash. 206. But may not be invested in bonds issued to defray the cost of construction of waterworks in a city, payable out of the revenue of such waterworks system: *State ex rel. Port Townsend v. Clausen*, 40 Wash. 95.

ARTICLE XVII.

TIDE LANDS.

§ 1. DECLARATION OF STATE OWNERSHIP.—The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

See *supra*, Art. XV, harbors and tide waters.

Cited in 2 Wash. 245; 2 Wash. 259; 2 Wash. 265; 2 Wash. 279; 5 Wash. 159; 7 Wash. 152; 11 Wash. 233; 18 Wash. 499; 24 Wash. 644; 40 Wash. 373; 40 Wash. 418, 419; 49 Wash. 68; 49 Wash. 131.

See 1 *Remington's Digest*, p. 525, § 60; 2 *Id.*, pp. 2124-2127, §§ 21-32; *Id.*, pp. 2404-2410, §§ 84-102.

The rights of the state in tide lands is subject to the paramount right of the United States to regulate commerce and navigation; consequently, the United States, by its proper officers, is the only party that can interfere in cases of state legislation being opposed to that of Congress upon the subject of navigation and harbor lines; and, until the contrary appears, all such legislation must be presumed to be in the interest of trade and navigation: *Harbor Line Commrs. v. State*, 2 Wash. 531.

As the rule is a fixed one, that "high-water mark" is the limit of government grants, the fact that a portion of the tide flat is uncovered at low tide, and, in consequence, not covered by navigable water, will not render such tide flat subject to entry under what is known as the Valentine Scrip Act: *Baer v. Moran Bros. Co.*, 2 Wash. 608.

A riparian owner of land, by reason of such ownership, can assert no valuable right below the line of ordinary high tide, as against the state. The provision of this section, that no person shall be debarred from asserting his claim to vested rights in the courts of this state, applies only to some special rights held by a riparian owner by way of improvement made under express or implied license from the repre-

sentative of the sovereign power, and not to a vested right incident to riparian ownership: *Harbor Line Commrs. v. State*, 2 Wash. 530.

Tide lands in the state of Washington belong to the state, which has full power to dispose of them subject only to the restrictions imposed by the constitutions of the state and of the United States: *Eisenbach v. Hatfield*, 2 Wash. 236; *Board of Harbor Line Commrs. v. State*, 2 Wash. 530; *State ex rel. Stimson Mill Co. v. Harbor Line Commrs.*, 4 Wash. 6; *State ex rel. Columbia etc. R. Co. v. Harbor Line Commrs.*, 4 Wash. 816; *Morse v. O'Connell*, 7 Wash. 117; *Allen v. Forrest*, 8 Wash. 700; *Sullivan v. Callvert*, 27 Wash. 600.

Lands lying below the line of ordinary high-water mark in a fresh-water lake belong to the state: *McCue v. Bellingham Bay etc. Co.*, 5 Wash. 156.

The assertion in this section as to ownership embraces a claim of title extending below the low tide line: *State ex rel. McKenzie v. Forrest*, 11 Wash. 227.

This section should not be construed as affecting the rights of riparian proprietors upon non-navigable waters, though their source is in navigable waters: *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493.

A small lake having no navigable inlet or outlet, upon which a small steamer is run during the camping season, is navigable within the meaning of this section: *Madson v. Spokane Valley Land etc. Co.*, 40 Wash. 414. See, also, *Kalez v. Spokane Valley etc. Co.*, 42 Wash. 43.

The navigability of waters must not depend upon artificial means: *East Hoquiam Boom & Log Co. v. Neeson*, 20 Wash. 142.

An unmeandered fresh water river not a navigable stream, when: *Griffith v. Holman*, 23 Wash. 347.

A channel in a slough, forming an arm of Puget Sound, is a navigable stream in a legal sense, though not navigable at low tide: *Dawson v. McMillen*, 34 Wash. 269.

"Navigable streams," as used in this section, has reference only to such streams as are navigable for general commercial purposes, and not to those which are public highways merely for the floating of logs and timber products: *Watkins v. Dorris*, 24 Wash. 636.

The title relinquished by the general government to the state to all tide and shore lands is applicable only to such lands as lie between the meander line and low-water mark: *Washougal etc. Trans. Co. v. Dalles etc. Nav. Co.*, 27 Wash. 490.

The United States had power to grant to a railroad corporation, for some purposes, at least, lands below high-water mark of tide waters: *Kneeland v. Korter*, 40 Wash. 359.

A meandered slough is not navigable to the extent of requiring the consent of the United States to its obstruction, when: See *State ex rel. Matson v. Superior Court*, 42 Wash. 491.

Tide lands belonging to the state cannot be taken under the eminent domain act: *Seattle & M. R. Co. v. State*, 7 Wash. 150.

The right of a riparian owner to future accretions to his land is not a vested right: *Eisenback v. Hatfield*, 2 Wash. 236.

Where an applicant for tide lands has complied with all the preliminary requirements of the existing law at the time of his application, which would entitle him to a contract of sale, he has acquired a vested right in such lands, of which he cannot be deprived by a subsequent repeal of the law under which his application was made: *State ex rel. Billings v. Bridges*, 22 Wash. 64.

Abutters on tide lands have no vested right therein by reason of their preference right to purchase the same: *Seattle etc. Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503.

§ 2. DISCLAIMER OF CERTAIN LANDS.—The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: Provided, The same is not impeached for fraud.

Cited in 2 Wash. 245; 2 Wash. 259; 2 Wash. 279; 2 Wash. 615; 4 Wash. 469; 11 Wash. 233; 14 Wash. 3; 19 Wash. 302; 27 Wash. 497; 32 Wash. 613; 40 Wash. 362, 364, 365, 371, 374; 42 Wash. 49.

See 2 *Remington's Digest*, p. 2405, § 86.

There was no occasion for mentioning swamp and overflowed lands in this section, since they were expressly withheld from the state by § 17 of the enabling act: *Baer v. Moran Bros. Co.*, 2 Wash. 608, 615.

The disclaimer in this section, while not in terms confirmatory of titles so acquired, is substantially a grant to the patentees of the interests of the state in such lands: *Scurry v. Jones*, 4 Wash. 468. The disclaimer is as broad as the claim of title in § 1: *Id*; *State ex rel. McKenzie v. Forrest*, 11 Wash. 227.

Under this section, unless impeached for fraud, the state can assert no title to patented tide lands, although lying below

the line of ordinary high tide: *Cogswell v. Forrest*, 14 Wash. 1.

As to littoral rights of grantee in the abutting tide lands under conveyance from patentee under patent covering upland and tide land, see *Denny v. Northern Pac. R. Co.*, 19 Wash. 298.

Under the enabling act, § 4, and this section, the state has no authority to sell tide lands within the limits of an Indian reservation and patented to individual members of the tribe prior to statehood: *Jones v. Callvert*, 32 Wash. 610.

Presumption as to disclaimer in this section where the meander line of the government survey was run years before the adoption of the constitution: See *Kneeland v. Korter*, 40 Wash. 359. The disclaimer applies to lands granted to a railroad corporation prior to the admission of the state, although patent therefor did not issue until thereafter, when: *Kneeland v. Korter*, 40 Wash. 359.

ARTICLE XVIII.

STATE SEAL.

§ 1. SEAL OF THE STATE.—The seal of the state of Washington shall be a seal encircled with the words, "The seal of the state of Washington," with the vignette of General George Washington as the central figure, and beneath the vignette the figures "1889."

See *supra*, Art. III, § 18, and references.

ARTICLE XIX.

EXEMPTIONS.

§ 1. EXEMPTIONS — HOMESTEADS, ETC.—The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families.

Cf. Ala., X; Ark., IX; Cal., XVII, 1; Colo., XVIII, 1; Fla., X, Ga., IX; Ill., IV, 32; Kan., XV, 9; Mich., XVI; Mont., XIX, 4; N. Dak., XVII, 208; Nev., IV, 30; N. C., X; S. Dak., XXI, 4; Tenn., XI, 11; Tex., XVI, 51; Va., XI; W. Va., VI, 48; Wy., XIX, 1.

Cited in 20 Wash. 7; 14 Wash. 520; 43 Wash. 182.

The provision that the legislature shall by law protect a certain portion of the homestead from forced sale, does not apply when the homestead has been voluntarily encumbered: *Or. Mortgage Co. v. Hersner*, 14 Wash. 515; *Stone v. So Relle*, 14 Wash. 704.

ARTICLE XX.

PUBLIC HEALTH AND VITAL STATISTICS.

§ 1. BOARD OF HEALTH AND BUREAU OF VITAL STATISTICS.—There shall be established by law a state board of health and a bureau of vital statistics in connection therewith, with such powers as the legislature may direct.

Cal., XX, 14; Tex., XVI, 32.

See 1 Remington's Digest, pp. 522, 523, §§ 44-50.

Where it is ascertainable from an act that its object was the public health and its provisions are appropriate and adapted to that end, it cannot be defeated as an arbitrary exercise of the legislative will under the guise of the police power: *State v. Buchanan*, 29 Wash. 602.

Restricting the right to own, run, or manage a dental office is not a proper exercise of the police power, since technical knowledge or skill is not essential to the proper exercise of such right and is not required for the well-being of the public, and the acts in question do not injuriously affect the health, good order, or safety of society: *State v. Brown*, 37 Wash. 97.

An act regulating the practice of medicine and restricting it to persons duly licensed is a valid exercise of the police power: *Fox v. Territory*, 2 W. T. 297; *State v. Carey*, 4 Wash. 424.

This power to thus restrict occupations affecting public health and comfort extends to the practice of dentistry: *State ex rel. Smith v. Board of Examiners*, 31 Wash. 492; *In re Thompson*, 36 Wash. 377; *State v. Brown*, 37 Wash. 106; *State v. Sexton*, 37 Wash. 110. Also, to the trade of barbers: *State v. Sharpless*, 31 Wash. 191. But the police power does not extend to the licensing of blacksmiths: *In re Aubrey*, 36 Wash. 308. Nor to plumbers: *State ex rel. Richey v. Smith*, 42 Wash. 237.

§ 2. REGULATIONS CONCERNING MEDICINE, SURGERY AND PHARMACY.—The legislature shall enact laws to regulate the practice of medicine and surgery, and the sale of drugs and medicines.

See notes to previous section.

ARTICLE XXI.

WATER AND WATER RIGHTS.

§ 1. PUBLIC USE OF WATER.—The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use.

Cf. Cal., XIV, 1; Colo., XVI, 5; Ida., XV, 1; Mont. II, 15; N. Dak., XVII, 210; Wy., IX, 1.

Cited in 20 Wash. 458; 39 Wash. 668.

This section is in conflict with the due process clause in the federal constitution to the extent of taking private property for uses essentially private: *State ex rel.*

Tacoma Industrial Company v. White River Power Co., 39 Wash. 648.

The condemnation of land for an irrigation ditch constitutes a public use: Prescott Irrigation Co. v. Flathers, 20 Wash. 154.

The state can make any use of the waters or body of a navigable lake and confer the rights of irrigation therein: Kalez v. Spokane Valley etc. Co., 42 Wash. 43.

ARTICLE XXII.

LEGISLATIVE APPORTIONMENTS.

§ 1. SENATORIAL APPORTIONMENT.—Until otherwise provided by law, the state shall be divided into twenty-four senatorial districts, and said districts shall be constituted and numbered as follows: The counties of Stevens and Spokane shall constitute the first district, and be entitled to one senator; the county of Spokane shall constitute the second district, and be entitled to three senators; the county of Lincoln shall constitute the third district, and be entitled to one senator; the counties of Okanogan, Lincoln, Adams, and Franklin shall constitute the fourth district, and be entitled to one senator; the county of Whitman shall constitute the fifth district, and be entitled to three senators; the counties of Garfield and Asotin shall constitute the sixth district, and be entitled to one senator; the county of Columbia shall constitute the seventh district, and be entitled to one senator; the county of Walla Walla shall constitute the eighth district, and be entitled to two senators; the counties of Yakima and Douglas shall constitute the ninth district, and be entitled to one senator; the county of Kittitas shall constitute the tenth district, and be entitled to one senator; the counties of Klickitat and Skamania shall constitute the eleventh district, and be entitled to one senator; the county of Clarke shall constitute the twelfth district, and be entitled to one senator; the county of Cowlitz shall constitute the thirteenth district, and be entitled to one senator; the county of Lewis shall constitute the fourteenth district, and be entitled to one senator; the counties of Pacific and Wahkiakum shall constitute the fifteenth district, and be entitled to one senator; the county of Thurston shall constitute the sixteenth district, and be entitled to one senator; the county of Chehalis shall constitute the seventeenth district, and be entitled to one senator; the county of Pierce shall constitute the eighteenth district, and be entitled to three senators; the county of King shall constitute the nineteenth district, and be entitled to five senators; the counties of Mason and Kitsap shall constitute the twentieth district, and be entitled to one senator; the counties of Jefferson, Clallam, and San Juan shall constitute the twenty-first district, and be entitled to one senator; the county of Snohomish shall constitute the twenty-second district, and shall be entitled to one senator; the counties of Skagit and Island shall constitute the twenty-third district, and be entitled to one senator; the county of Whatcom shall constitute the twenty-fourth district, and be entitled to one senator.

§ 2. APPORTIONMENT OF REPRESENTATIVES.—Until otherwise provided by law, the representatives shall be divided among the several counties of the state in the following manner: The county of Adams shall have one representative; the county of Asotin shall have one representative; the county of Chehalis shall have two representatives; the county of Clarke shall have three representatives; the county of Clallam shall have one representative; the county of Columbia shall have two representatives; the county of Cowlitz shall have one representative; the county of Douglas shall have one

to call a convention to revise or amend this constitution, they shall recommend to the electors to vote at the next general election for or against a convention; and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session provide by law for calling the same; and such convention shall consist of a number of members, not less than that of the most numerous branch of the legislature.

Cal., XVIII, 2.

Cited in 1 Wash. 301; 49 Wash. 75.

§ 3. SUBMISSION TO THE PEOPLE.—Any constitution adopted by such convention shall have no validity until it has been submitted to and adopted by the people.

See reference to § 1.

ARTICLE XXIV.

BOUNDARIES.

§ 1. STATE BOUNDARIES.—The boundaries of the state of Washington shall be as follows: Beginning at a point in the Pacific ocean one marine league due west of and opposite the middle of the mouth of the north ship channel of the Columbia river, thence running easterly to and up the middle channel of said river and where it is divided by islands up the middle of the widest channel thereof to where the forty-sixth parallel of north latitude crosses said river, near the mouth of the Walla Walla River; thence east on said forty-sixth parallel of latitude to the middle of the main channel of the Shoshone or Snake river; thence follow down the middle of the main channel of Snake river to a point opposite the mouth of the Kooskooskia or Clear Water river; thence due north to the forty-ninth parallel of north latitude; thence west along said forty-ninth parallel of north latitude to the middle of the channel which separates Vancouver's island from the continent, that is to say to a point in longitude one hundred and twenty-three degrees, nineteen minutes, and fifteen seconds west; thence following the boundary line between the United States and British possessions through the channel which separates Vancouver's Island from the continent to the termination of the boundary line between the United States and British possessions at a point in the Pacific ocean equidistant between Bonnilla point, on Vancouver's island, and Tatoosh island lighthouse; thence running in a southerly course and parallel with the coast line, keeping one marine league off shore, to place of beginning.

ARTICLE XXV.

JURISDICTION.

§ 1. AUTHORITY OF THE UNITED STATES.—The consent of the state of Washington is hereby given to the exercise by the congress of the United States of exclusive legislation in all cases whatsoever over such tract or parcels of land as are now held or reserved by the government of the United States for the purpose of erecting or maintaining thereon forts, magazines, arsenals, dock yards, light houses, and other needful buildings, in accordance with the provisions of the seventeenth paragraph of the eighth section of the first article of the constitution of the United States: Provided, That a sufficient description by metes and bounds, and an accurate plat or map of each such tract or parcel of land be filed in the proper office of record in the county in which the same is situated, together with copies of the orders, deeds, patents,

representative; the county of Franklin shall have one representative; the county of Garfield shall have one representative; the county of Island shall have one representative; the county of Jefferson shall have two representatives; the county of King shall have eight representatives; the county of Klickitat shall have two representatives; the county of Kittitas shall have two representatives; the county of Kitsap shall have one representative; the county of Lewis shall have two representatives; the county of Lincoln shall have two representatives; the county of Mason shall have one representative; the county of Okanogan shall have one representative; the county of Pacific shall have one representative; the county of Pierce shall have six representatives; the county of San Juan shall have one representative; the county of Skamania shall have one representative; the county of Snohomish shall have two representatives; the county of Skagit shall have two representatives; the county of Spokane shall have six representatives; the county of Stevens shall have one representative; the county of Thurston shall have two representatives; the county of Walla Walla shall have three representatives; the county of Wahkiakum shall have one representative; the county of Whatcom shall have two representatives; the county of Whitman shall have five representatives; the county of Yakima shall have one representative.

ARTICLE XXIII.

AMENDMENTS.

§ 1. HOW MADE.—Any amendment or amendments to this constitution may be proposed in either branch of the legislature; and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes thereon, and be submitted to the qualified electors of the state for their approval, at the next general election; and if the people approve and ratify such amendment or amendments, by a majority of the electors voting thereon, the same shall become part of this constitution, and proclamation thereof shall be made by the governor: Provided, That if more than one amendment be submitted, they shall be submitted in such a manner that the people may vote for or against such [each] amendment separately. The legislature shall also cause the amendments that are to be submitted to the people to be published for at least three months next preceding the election, in some weekly newspaper, in every county where a newspaper is published throughout the state.

Cf. Ala., XVII, 1; Ark., XIX, 22; Cal., XVIII, 1; Colo., XIX, 2; Fla., XVIII, 1; Ida., XX, 3; Ill., XIV, 2; Ind., XVI, 1; Ia., X, 1; Kan., XIV, 1; La., IX, 147; Mass., Amend. IX; Mich., XX, 1; Mo., XI, 2; Md., XIV, 1; Minn., XIV, 1; Mont., XIX, 9; Nev., XVI, 1; N. J., IX, 1; N. Y., Rev., XIV, 1; Neb., XV, 1; N. Dak., XV, 202; Ohio, XVI, 1; Or., XVII, 1; Pa., X, 1; R. I., XIII, 1; S. C., XVI, 1; S. Dak., XXIII, 1; Tenn., XI, 3; Tex., XVII, 1; Va., XII, 1; W. Va., XII, 2; Wis., XII, 1; Wy., XX, 3.

Cited in 1 Wash. 301; 25 Wash. 583; 49 Wash. 74.

The majority required for an amendment to the constitution under this and the next section is three-fifths of those voting on the question submitted: *Metcalf v. Seattle*, 1 Wash. 297.

The above remark was made in construing other sections of the constitution, and not this section, and in *Strain v. Young*, 25 Wash. 383, it is implied that the language of this section is susceptible to another construction.

§ 2. CONSTITUTIONAL CONVENTIONS.—Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary

or other evidences in writing of the title of the United States: And provided, That all civil process issued from the courts of this state, and such criminal process as may issue under the authority of this state, against any person charged with crime in cases arising outside of such reservations, may be served and executed thereon in the same mode and manner and by the same officers as if the consent herein given had not been made.

Cited in 40 Wash. 246.

ARTICLE XXVI.

COMPACT WITH THE UNITED STATES.

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:—

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof, and that no taxes shall be imposed by the state on lands or property therein belonging to or which may be hereafter purchased by the United States or reserved for use: Provided, That nothing in this ordinance shall preclude the state from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

Third. The debts and liabilities of the territory of Washington, and payment of the same, are hereby assumed by this state.

Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control, which shall be open to all the children of said state.

Cited in 26 Wash. 672; 32 Wash. 613; 38 Wash. 129.

Public lands of the general government may be made part of an Indian reserva-

tion by an executive proclamation by the President of the United States: Jones v. Callvert, 32 Wash. 610.

ARTICLE XXVII.

SCHEDULE.

In order that no inconvenience may arise by reason of a change from a territorial to a state government, it is hereby declared and ordained as follows:—

§ 1. EXISTING RIGHTS, ACTIONS AND CONTRACTS SAVED.—No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by a change in the form of government, but all shall continue as if no such change had taken place; and all process which may have been issued under the authority of the territory of Washington previous to its admission into the Union shall be as valid as if issued in the name of the state.

Cf. Colo., S. 2; Ida., S. 3, 4; Mont., S. 2, 7, 10; N. Dak., S. 1, 3, 4; S. Dak., S. 1, 2, 3; Wy., S. 4, 5.

§ 2. LAWS IN FORCE CONTINUED.—All laws now in force in the territory of Washington which are not repugnant to this constitution shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: Provided, That this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company, or any municipal or private corporation.

See notes to § 6.

Colo., S. 1; Ida., S. 1, 2; Mont., S. 1; N. Dak., S. 2; S. Dak., S. 1; Wy., S. 1, 3.

Cited in 2 Wash. 258; 4 Wash. 26; 8 Wash. 472; 11 Wash. 233; 13 Wash. 362; 14 Wash. 310; 22 Wash. 132; 22 Wash. 548; 28 Wash. 498; 43 Wash. 182; 47 Wash. 206; 51 Wash. 56.

Where the highest judicial authority of the territory has decided a law invalid because its object was not clearly expressed in the title, the above section does not continue it as a law "then in force": State v. Halbert, 14 Wash. 306; Id., 703; State v. Smith, 15 Wash. 698.

This section cannot be construed as reenacting a statute, but merely as continuing in force all valid laws which were

then in existence: State v. Ellis, 22 Wash. 129.

The constitution and laws have abrogated the act of the territorial legislature of 1884 authorizing certain owners to build wharves in front of their premises: Eisenbach v. Hatfield, 2 Wash. 236.

Session Laws 1869, page 408, and Bal. Code, §§ 155-164, regarding the payment of interest on warrants, were carried forward and made a part of the statutes by virtue of this section: State ex rel. Capital Nat. Bank v. Young, 22 Wash. 547.

As to the duties of the attorney general, under territorial laws, kept in force by this section, see State ex rel. Atty. Gen. v. Seattle Gas Co., 28 Wash. 488.

§ 3. DEBTS, FINES, ETC., TO INURE TO THE STATE.—All debts, fines, penalties, and forfeitures which have accrued or may hereafter accrue to the territory of Washington shall inure to the state of Washington.

§ 4. RECOGNIZANCES.—All recognizances heretofore taken or which may be taken before the change from a territorial to a state government shall remain valid, and shall pass to and may be prosecuted in the name of the state, and all bonds executed to the territory of Washington, or to any county or municipal corporation, or to any officer or court in his or its official capacity, shall pass to the state authorities and their successors in office, for the uses therein expressed, and may be sued for and recovered accordingly; and all the estate, real, personal, and mixed, and all judgments, decrees, bonds, specialties, choses in action, and claims or debts, of whatever description belonging to the territory of Washington shall inure to and vest in the state of Washington,

and may be sued for and recovered in the same manner and to the same extent by the state of Washington as the same could have been by the territory of Washington.

Cf. Colo., S. 3, 22; Ida., S. 4; Mont., S. 11; N. Dak., S. 4, 5; Wy., S. 2, 5.

§ 5. CRIMINAL PROSECUTIONS AND PENAL ACTIONS.—All criminal prosecutions and penal actions which may have arisen, or which may arise, before the change from a territorial to a state government, and which shall then be pending, shall be prosecuted to judgment and execution in the name of the state. All offenses committed against the laws of the territory of Washington, before the change from a territorial to state government, and which shall not be prosecuted before such change, may be prosecuted in the name and by the authority of the state of Washington, with like effect as though such change had not taken place; and all penalties incurred shall remain the same as if this constitution had not been adopted. All actions at law and suits in equity which may be pending in any of the courts of the territory of Washington at the time of a change from a territorial to a state government shall be continued and transferred to the court of the state having jurisdiction of the subject matter thereof.

Cited in 2 Wash. 3; 6 Wash. 159.

Under the provisions of the enabling act and constitution for the transfer of causes pending in the territorial supreme court to the state supreme court, the state supreme court acquired all the powers of the territorial court under the territorial statutes to remand criminal cases to the successors of the territorial district court, for the execution of its judgments: Way v. Woolery, 6 Wash. 157.

The removal of a cause from a justice of the peace to the superior court under the form of an appeal, the action not having been brought to judgment prior to the admission of the state, and being beyond the constitutional limit of jurisdiction in justice's court, was held to be a compliance with this section: Moore v. Perrott, 2 Wash. 1.

§ 6. RETENTION OF TERRITORIAL OFFICERS.—All officers now holding their office under the authority of the United States, or of the territory of Washington, shall continue to hold and exercise their respective offices until they shall be superseded by the authority of the state.

See notes to Art. XI, § 7.

Cited in 6 Wash. 161, 163; 8 Wash. 472; 28 Wash. 16; 28 Wash. 498.

As all laws were continued in force and all officers continued in office by this section and § 2, supra, of the schedule, the county auditor was likewise continued in

office: Garneau v. Port Blakeley M. Co., 8 Wash. 467.

The time of holding an office, under the provisions of this section, is not a "term" within the contemplation of Art. XI, § 7, supra: Smalley v. Snell, 6 Wash. 161.

§ 7. CONSTITUTIONAL OFFICERS, WHEN ELECTED.—All officers provided for in this constitution, including a county clerk for each county, when no other time is fixed for their election, shall be elected at the election to be held for the adoption of this constitution on the first Tuesday of October, eighteen hundred and eighty-nine.

§ 8. CHANGE OF COURTS — TRANSFER OF CAUSES.—Whenever the judge of the superior court of any county, elected or appointed under the provisions of this constitution, shall have qualified, the several causes then pending in the district court of the territory, except such causes as would have been within the exclusive jurisdiction of the United States district court, had such court existed at the time of the commencement of such causes within such

county, and the records, papers, and proceedings of said district court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the superior court of such county. And where the same judge is elected for two or more counties, it shall be the duty of the clerk of the district court having custody of such papers and records to transmit to the clerk of such county or counties other than that in which such records are kept the original papers in all cases pending in such district court and belonging to the jurisdiction of such county or counties, together with transcript of so much of the records of said district court as relate to the same; and until the district courts of the territory shall be superseded in manner aforesaid, the said district courts and the judges thereof shall continue with the same jurisdiction and powers, to be exercised in the same judicial districts respectively, as heretofore constituted under the laws of the territory. Whenever a quorum of the judges of the supreme court of the state shall have been elected and qualified, the causes then pending in the supreme court of the territory, except such causes as would have been within the exclusive jurisdiction of the United States circuit court had such court existed at the time of the commencement of such causes, and the papers, records, and proceedings of said court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the supreme court of the state, and until so superseded the supreme court of the territory and the judges thereof shall continue with like powers and jurisdiction as if this constitution had not been adopted.

Colo., S. 5; Ida., S. 16; Mont., S. 14, 15; N. Dak., S. 6; Wy., S. 15.

§ 9. SEALS OF COURTS AND MUNICIPALITIES.—Until otherwise provided by law, the seal now in use in the supreme court of the territory shall be the seal of the supreme court of the state. The seal of the superior courts of the several counties of the state shall be, until otherwise provided by law, the vignette of General George Washington, with the words "Seal of the superior court of — county" surrounding the vignette. The seal of municipalities and of all county officers of the territory shall be the seals of such municipalities and county officers, respectively, under the state, until otherwise provided by law.

Colo., S. 17; Ida., S. 17; Mont., S. 6; N. Dak., S. 7; Wy., S. 16.

§ 10. PROBATE COURT, TRANSFER OF.—When the state is admitted into the Union, and the superior courts in their respective counties organized, the books, records, papers, and proceedings of the probate court in each county, and all causes and matters of administration pending therein shall, upon the expiration of the term of office of the probate judges, on the second Monday in January, eighteen hundred and ninety-one, pass into the jurisdiction and possession of the superior court of the same county created by this constitution, and the said court shall proceed to final judgment or decree, order, or other determination in the several matters and causes as the territorial probate court might have done if this constitution had not been adopted. And until the expiration of the term of office of the probate judges, such probate judges shall perform the duties now imposed upon them by the laws of the territory. The superior courts shall have appellate and revisory jurisdiction over the decisions of the probate courts as now provided by law until such latter courts expire by limitation.

Colo., S. 8; Ida., S. 18; N. Dak., S. 8; would have jurisdiction to review a judgment of the old probate court for apparent error or fraud: *Ball v. Clothier*, 34 Wash. 299.
 Wy., S. 17.
 Cited in 34 Wash. 308.
 Under this section the superior court

§ 11. DUTIES OF FIRST LEGISLATURE.—The legislature, at its first session, shall provide for the election of all officers whose election is not provided for elsewhere in this constitution, and fix the time for the commencement and duration of their term.

§ 12. ELECTION CONTESTS FOR SUPERIOR JUDGES, HOW DECIDED.—In case of a contest of election between candidates at the first general election under this constitution for judges of the superior courts, the evidence shall be taken in the manner prescribed by the territorial laws, and the testimony so taken shall be certified to the secretary of state, and said officer, together with the governor and treasurer of state, shall review the evidence and determine who is entitled to the certificate of election.

Colo., S. 13.

§ 13. REPRESENTATION IN CONGRESS.—One representative in the congress of the United States shall be elected from the state at large at the first election provided for in this constitution, and thereafter at such times and places and in such manner as may be prescribed by law. When a new apportionment shall be made by congress, the legislature shall divide the state into congressional districts, in accordance with such apportionment. The vote cast for representative in congress at the first election shall be canvassed and the result determined in the manner provided for by the laws of the territory for the canvass of the vote for delegate in congress.

Colo., S. 16; Ida., S. 9, 10; N. Dak., S. 18; S. Dak., S. 5, 7; Wy., S. 11.

§ 14. DURATION OF TERM OF CERTAIN OFFICERS.—All district, county, and precinct officers who may be in office at the time of the adoption of this constitution, and the county clerk of each county elected at the first election, shall hold their respective offices until the second Monday of January, A. D. eighteen hundred and ninety-one, and until such time as their successors may be elected and qualified, in accordance with the provisions of this constitution; and the official bonds of all such officers shall continue in full force and effect as though this constitution had not been adopted, and such officers shall continue to receive the compensation now provided until the same be changed by law.

See notes to Art., VI, § 8.

See § 16 and notes, this article.

Colo., S. 10; Ida., S. 13; Mont., S. 17; N. Dak., S. 10; Wy., S. 12, 19.

Cited in 5 Wash. 459, 460.

Under Art. VI, § 8, of the Const., and under this section, the term of office of county officers is for two years, commencing on the second Monday of January next succeeding their election; and the act of February 4, 1886, entitled "an act to prescribe the tenure of office, etc.," has been

abrogated by such constitutional provisions: *McMurray v. Hollis*, 5 Wash. 458.

By virtue of this section the office of district attorney ceased to exist on the first Monday in January, 1891, and the office of county attorney being a new office created by the constitution, the former officer could not succeed or hold over in the latter: *In re Humason*, 46 Fed. Rep. 392.

§ 15. ELECTION ON ADOPTION OF CONSTITUTION, HOW TO BE CONDUCTED.—The election held at the time of the adoption of this

constitution shall be held and conducted in all respects according to the laws of the territory; and the votes cast at said election for all officers (where no other provisions are made in this constitution), and for the adoption of this constitution, and the several separate articles, and the location of the state capital, shall be canvassed and returned in the several counties in the manner provided by territorial laws, and shall be returned to the secretary of the territory in the manner provided by the Enabling Act.

Colo., S. 14; Ida., S. 9, 10, 11; N. Dak., S. 13; S. Dak., S. 5, 6, 7; Wy., S. 7, 9, 10, 11.

§ 16. WHEN CONSTITUTION TO TAKE EFFECT.—The provisions of this constitution shall be in force from the day on which the president of the United States shall issue his proclamation declaring the state of Washington admitted into the Union, and the terms of all officers elected at the first election under the provisions of this constitution shall commence on the Monday next succeeding the issue of said proclamation, unless otherwise provided herein.

Colo., S. 12; Ida., S. 7; N. Dak., S. 11.
Cited in 2 Wash. 3.

The provisions of the constitution were in force from November 11, 1889, when the proclamation of the president of the

United States was issued admitting the state of Washington into the Union, consequently the terms of all officers thereunder began on Monday, Nov. 18, 1889; Moore v. Perrott, 2 Wash. 1, 3.

§ 17. SEPARATE ARTICLES.—The following separate articles shall be submitted to the people for adoption or rejection at the election for the adoption of this constitution:—

Separate article No. 1. “All persons, male and female, of the age of twenty-one years or over, possessing the qualifications provided by this constitution, shall be entitled to vote at all elections.”

Separate article No. 2. “It shall not be lawful for any individual, company, or corporation, within the limits of this state, to manufacture, or cause to be manufactured, or to sell, or offer for sale, or in any manner dispose of any alcoholic, malt, or spirituous liquors, except for medicinal, sacramental, or scientific purposes.”

If a majority of the ballots cast at said election on said separate articles be in favor of the adoption of either of said separate articles, then such separate article so receiving a majority shall become a part of this constitution, and shall govern and control any provision of the constitution in conflict therewith.

§ 18. BALLOT.—The form of ballot to be used in voting for or against this constitution, or for or against the separate articles, or for the permanent location of the seat of government, shall be,—

1. For the constitution, —.
- Against the constitution, —.
2. For woman suffrage article, —.
- Against woman suffrage article, —.
3. For prohibition article, —.
- Against prohibition article, —.

[The result of the election was against both woman suffrage and prohibition.]

4. For the permanent location of the seat of government. [Name of place voted for.]

§ 19. APPROPRIATION.—The legislature is hereby authorized to appropriate from the state treasury sufficient money to pay any of the expenses of this convention not provided for by the Enabling Act of congress.

CERTIFICATE.

We, the undersigned, members of the convention to form a constitution for the state of Washington, which is to be submitted to the people for their adoption or rejection, do hereby declare this to be the constitution formed by us, and in testimony thereof, do hereunto set our hands, this the twenty-second day of August, Anno Domini one thousand eight hundred and eighty-nine.

JOHN P. HOYT, President.
J. J. BROWNE.
N. G. BLALOCK.
JOHN F. GOWEY.
FRANK M. DALLAM.
JAMES Z. MOORE.
E. H. SULLIVAN.
GEORGE TURNER.
AUSTIN MIRES.
M. M. GODMAN.
GWIN HICKS.
WM. F. PROSSER.
LOUIS SOHNS.
A. A. LINDSLEY.
J. J. WEISENBURGER.
P. C. SULLIVAN.
R. S. MORE.
THOMAS T. MINOR.
J. J. TRAVIS.
ARNOLD J. WEST.
CHARLES T. FAY.
CHARLES P. COEY.
ROB'T F. STURDEVANT.
JOHN A. SHOUDY.
ALLEN WEIR.
W. B. GRAY.
TRUSTEN P. DYER.
GEO. H. JONES.
B. L. SHARPSTEIN.
H. M. LILLIS.
J. F. VAN NAME.
ALBERT SCHOOLEY.
H. C. WILSON.
T. M. REED.
S. H. MANLY.
RICHARD JEFFS.
FRANCIS HENRY.

GEORGE COMEGYS.
OLIVER H. JOY.
DAVID E. DURIE.
D. BUCHANAN.
JOHN R. KINNEAR.
GEORGE W. TIBBETTS.
H. W. FAIRWEATHER.
THOMAS C. GRIFFITTS.
C. H. WARNER.
J. P. T. McCROSKEY.
S. G. COSGROVE.
THOS. HAYTON.
SAM'L H. BERRY.
D. J. CROWLEY.
J. T. McDONALD.
JOHN M. REED.
EDWARD ELDRIDGE.
GEORGE H. STEVENSON.
SILVIUS A. DICKEY.
HENRY WINSOR.
THEODORE L. STILES.
JAMES A. BURK.
JOHN McREAVY.
R. O. DUNBAR.
MORGAN MORGANS.
JAS. POWER.
B. B. GLASCOCK.
O. A. BOWEN.
HARRISON CLOTHIER.
MATT. J. McELROY.
J. T. ESHELMAN.
ROBERT JAMIESON.
HIRAM E. ALLEN.
H. F. SUKSDORF.

Attest:

JNO. I. BOOGE, Chief Clerk.

[The signatures of seventy-one members are appended to the constitution. The four whose signatures are not attached are James Hungate of Whitman County, Lewis Neace of Walla Walla County, J. C. Kellogg of Island County, and W. L. Newton of King County.]

CONSTITUTIONAL AMENDMENTS.

AMENDMENT 1.

Art. 16. Sec. 5. Investment of School Fund.—None of the permanent school fund of this state shall ever be loaned to private persons or corporations, but it may be invested in national, state, county, municipal, or school district bonds.

Adopted November, 1894.

AMENDMENT 2.

Art. 6. Sec. 1. Qualifications of Voters.—All male persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward, or precinct thirty days immediately preceding the election at which they offer to vote; they shall be able to read and speak the English language: Provided, That Indians not taxed shall never be allowed the elective franchise. And further provided, That this amendment shall not affect the right of franchise of any person who is now a qualified elector of this state. The Legislature shall enact laws defining the manner of ascertaining the qualifications of voters as to their ability to read and speak the English language, and providing for punishment of persons voting or registering in violation of the provisions of this section.

Approved November, 1896.

AMENDMENT 3.

Art. 7, Sec. 2, was amended by adding the following proviso: “And provided further, That the Legislature shall have power, by appropriate legislation, to exempt personal property to the amount of \$300 for each head of a family liable to assessment and taxation under the provisions of the laws of this state of which the individual is the actual bona fide owner.”

Approved November, 1900.

AMENDMENT 4.

Art. 1. Sec. 11. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or be disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or support of any religious establishment. Provided, however, That this article shall not be so construed as to forbid the employment by the state of a chaplain for the state penitentiary, and for such of the state reformatories as in the discretion of the Legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

Approved November, 1904.

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BY EUGENE G. KREIDER.

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OF THE

STATE OF WASHINGTON

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CHAPTER I.

THE SUPREME COURT.

Judges of: See "State Officers," § 9040 et seq., *infra*.

Clerk, reporter, etc.: See "State Officers," § 9057 et seq., *infra*.

§ 1. (4650.) Jurisdiction.

The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property, when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or before the supreme court, or before any superior court of the state, or any judge thereof. [L. '90, p. 322, § 6; 2 H. C., § 1; Const., Art. IV, § 4.]

See notes to Const., Art. IV, § 4.

Cited in 22 Wash. 362; 32 Wash. 53; 37 Wash. 511; 41 Wash. 152; 51 Wash. 310. p. 86, § 27; Hansen v. Nilson, 17 Wash. 606; Thomas v. Lincoln County, 41 Wash. 150.

When is the legality of a tax, assessment or fine involved: See 1 Remington's Digest,

§ 2. (4651.) Is a Court of Record—General Powers.

The supreme court shall be a court of record, and shall be vested with all power and authority necessary to carry into complete execution all its judgments, decrees, and determinations in all matters within its jurisdiction, according to the rules and principles of the common law, and the constitution and laws of this state. [L. '90, p. 323, § 10; 2 H. C., § 2; Const., Art. IV, § 11.]

Cited in 6 Wash. 159.

§ 3. (4652.) Court House and Rooms—Furnishing.

If proper rooms in which to hold the court, and for the accommodation of the officers thereof, are not provided by the state, together with attendants, fur-

niture, fuel, lights, record books and stationery, suitable and sufficient for the transaction of business, the court, or any three justices thereof, may direct the clerk of the supreme court to provide the same; and the expense thereof, certified by any three justices to be correct, shall be paid out of the state treasury, out of any funds therein not otherwise appropriated. Such moneys shall be subject to the order of the clerk of the supreme court, and be by him disbursed on proper vouchers, and accounted for by him in annual settlements with the state auditor. [L. '90, p. 322, § 4; 2 H. C., § 3; Const., Art. IV, § 2.]

The first part of this section is omitted, as it is covered by the next section.

§ 4. (4652.*) Is Always Open—Sessions.

The supreme court shall always be open for the transaction of business except on nonjudicial days. It shall hold regular sessions for the hearing of causes en banc, and in each of its departments, at the capital of the state [on the second Mondays of January, May, and October of each year]. Special sessions at the same place may be held at such other times as may be prescribed by the judges of such court. [L. '09, p. 36, § 7.]

The bracketed words substituted from the previous section for, "at the respective times now provided by law for holding terms of the supreme court."

See *infra*, §§ 61-63, legal holidays.

See *infra*, § 64, business authorized to be transacted on nonjudicial days.

Cited in 1 Wash. 268; 2 Wash. 369; 44 Wash. 148.

Under the provision of the constitution requiring the supreme court to be always open for the transaction of business, except on nonjudicial days, there are no terms in the sense in which they were formerly held,

but only a division of its sittings into sessions: *Skagit Ry. Co. v. Cole*, 1 Wash. 330.

This section and the rules of court clearly provide the dates for the beginning of each session: *Jones & Co. v. Spokane Valley L. & Water Co.*, 44 Wash. 146.

§ 5. (4653.) Effect of Adjournments.

Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time. [L. '90, p. 323, § 7; 2 H. C., § 4.]

This, and the preceding section, with §§ 18, 26, *infra*, abolish terms of courts, and is a departure in this respect from the system in force under the territorial organization.

§ 6. (4656.) Style of Process.

Its process shall run in the name of the "state of Washington," bear test in the name of the chief justice, be signed by the clerk of the court, dated when issued, sealed with the seal of the court, and made returnable according to law, or such rule or orders as may be prescribed by the court. [L. '90, p. 323, § 11; 2 H. C., § 7.]

See *infra*, § 32, process of superior courts.

§ 7. (4657.) The Seal.

The seal of the supreme court shall be the vignette of General George Washington, with the words "Seal of the Supreme Court, State of Washington," surrounding the vignette. [L. '90, p. 324, § 17; 2 H. C., § 8; Const., Art. XXVII, § 9.]

§ 8. Two Departments—Assignment of Judges—Quorum.

There shall be two departments of the supreme court, denominated respectively department one and department two. The chief justice shall assign four

of the associate judges to each department and such assignment may be changed by him from time to time: Provided, That the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the chief justice. The chief justice may sit in either department and shall preside when so sitting, but the judges assigned to each department shall select one of their number as presiding judge. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions in relation to the court en banc. The presence of three judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of three judges shall be necessary to pronounce a decision in each department: Provided, that if three do not concur, the cause shall be reheard in the same department or transmitted to the other department, or to the court en banc. [L. '09, p. 34, § 3. For former laws relating to quorum, see L. '90, p. 322, § 5; 2 H. C., § 5; Bal. Code, § 4654; L. '05, p. 14, § 2. See, also, Const., Art. IV, § 2.]

§ 9. Apportionment of Business—Order for Hearings en Banc.

The chief justice shall from time to time apportion the business to the departments, and may, in his discretion, before a decision is pronounced, order any cause pending before the court to be heard and determined by the court en banc. When a cause has been allotted to one of the departments and a decision pronounced therein, the chief justice, together with any two associate judges, may order such cause to be heard and decided by the court en banc. Any four judges may, either before or after decision by a department, order a cause to be heard en banc. [L. '09, p. 34, § 4.]

§ 10. Decisions of Department—Finality—Rehearings.

The decision of a department, except in cases otherwise ordered as hereinafter provided, shall not become final until thirty days after the filing thereof, during which period a petition for rehearing, or for a hearing en banc, may be filed, the filing of either of which, except as hereinafter otherwise provided, shall have the effect of suspending such decision until the same shall have been disposed of. If no such petition be filed the decision of a department shall become final thirty days from the date of its filing, unless during such thirty-day period an order for a hearing en banc shall have been made: Provided, that if for any cause the chief justice or a majority of the department rendering any decision shall be of the opinion that such decision should go into effect prior to thirty days after its filing, it shall go into effect, and a judgment issue thereon, any time after its filing and prior to such thirty-day period, upon being in writing approved by the chief justice and any two associate judges who took no part in rendering such decision. The effect of granting a petition for a rehearing, or of ordering a cause once decided by department to be heard en banc, shall be to vacate and set aside the decision. Whenever a decision shall become final, as herein provided, a judgment shall issue thereon. [L. '09, p. 35, § 4.]

§ 11. Hearings en Banc—Quorum—Finality of Decision.

The chief justice, or any four judges, may convene the court en banc at any time, and the chief justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business,

and a concurrence of five judges present at the argument shall be necessary to pronounce a decision in the court en banc: Provided, that if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court en banc shall be final except in cases in which no previous decision has been rendered in one of the departments, and in such cases the decision of the court en banc shall become final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges: Provided, that if for any cause five judges shall be of the opinion that such decision should go into effect prior to thirty days after its filing, it shall go into effect any time after its filing and prior to such thirty-day period upon being in writing approved by six judges of such court. Whenever a decision shall become final as herein provided, a judgment shall issue thereon. [L. '09, p. 35, § 5.]

§ 12. Acting Chief Justice.

In cases of the absence of the chief justice, or his inability to act, the judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall perform the duties and exercise the powers of the chief justice during such absence or inability to act. In case there shall be two or more judges having in like manner the same short term, the other judges of the supreme court shall determine which of them shall perform the duties and exercise the powers of the chief justice during such absence or inability to act. [L. '09, p. 36, § 6.]

§ 13. Rules of Practice and Form of Process.

The supreme court may from time to time institute such rules of practice and prescribe such forms of process to be used in such court and in the court en banc and each of its departments, and for the keeping of the dockets, records and proceedings, and for the regulation of such court, including the court en banc and in departments, as may be deemed most conducive to the due administration of justice. [L. '09, p. 36, § 8. Cf. L. '90, p. 323, § 12; 2 H. C., § 6; Bal. Code, § 4655.]

See notes to § 52, *infra*. Rules adopted: See 51 Wash. xxxiii.

Rules of superior courts: See *infra*, § 36.

§ 14. (4658.) Effect of Judgment.

The judgments and decrees of the supreme court shall be final and conclusive upon all the parties properly before the court. [L. '90, p. 323, § 8; 2 H. C., § 9.]

A judgment of the supreme court in an equity cause cannot be modified by the superior court: *State v. Superior Court*, 7 Wash. 234.

Upon a retrial, after reversal or remand on appeal, the trial court is bound by the decision on appeal as the law of the case: *Taylor v. Gale*, 24 Wash. 336; *Payette v. Ferrier*, 31 Wash. 43; *Crooker v. Pacific*

Lounge etc. Co., 34 Wash. 191; *Clark v. Eltinge*, 34 Wash. 323.

However, upon reversing an order of the superior court, made without notice, a writ of prohibition will not be issued to enjoin the lower court from making further orders without notice, as it will be assumed that the rule of decision will be observed: *In re Sullivan's Estate*, 36 Wash. 278.

The decision of the supreme court upon the first appeal of a cause is conclusive upon the second appeal as the law of the case: *Tibbals v. Mt. Olympus Water Co.*, 16 Wash. 480; *Taake v. Seattle*, 18 Wash. 178; *Smith v. Seattle*, 20 Wash. 613; *State*

v. Boyce, 25 Wash. 422; *State ex rel. Holgate v. Superior Court*, 19 Wash. 114; *Miller v. Lake Irr. Co.*, 33 Wash. 132; *State ex rel. American etc. Mtg. Co. v. Tanner*, 45 Wash. 348.

CHAPTER II.

SUPERIOR COURTS.

Judges of: See "State Officers," § 9050 et seq., *infra*.

§ 15. (4663.) Original Jurisdiction of Superior Courts.

The superior courts shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage, and for such special cases and proceedings as are not otherwise provided for; and shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court, and shall have the power of naturalization, and to issue papers therefor. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued on legal holidays and nonjudicial days. [L. '90, p. 342, § 5; 2 H. C., § 10; Const., Art. IV, § 6.]

See *infra*, § 1278, jurisdiction in probate.

See *supra*, § 1, notes.

See *infra*, § 16, naturalization.

Cited in 32 Wash. 53; 43 Wash. 228.

Jurisdiction in general: See 1 Remington's Digest, p. 720, §§ 1-13. Superior courts are courts of general jurisdiction: See 1 Remington's Digest, p. 728, § 44.

The word "court" means something more than judge; judges change, but the court continues: *Gunderson v. Cochrane*, 3 Wash. 476, 478; *Shepard v. Gove*, 26 Wash. 452; *State ex rel. Romano v. Yakey*, 43 Wash. 15.

The superior courts have concurrent jurisdiction with justices of the peace where the sum sued for is less than one hundred dollars: *State v. Hunter*, 3 Wash. 92. And concurrent jurisdiction with municipal courts in cities of the first class over misdemeanors committed within such cities: *State v. Considine*, 16 Wash. 358.

The jurisdiction of the superior court in the issuance of injunctions against state officers is not excluded by art. IV, § 4, of the Const.: *Jones v. Reed*, 3 Wash. 57, 60-62. The superior court has jurisdiction to

entertain quo warranto to determine who is entitled to the office of councilman of a city: See *Blake v. Morris*, 14 Wash. 262; *State ex rel. Hyland v. Peter*, 21 Wash. 243.

Admitting, but not deciding, that the writ *coram nobis* might issue from a superior court of this state to inquire into certain alleged misstatements by the prosecuting witness upon the trial of a criminal cause, the petition therefor would not be sufficient when based upon the claim that the testimony of such witness "was not in accordance with the facts but was fraudulent and untrue": *State v. Superior Court*, 15 Wash. 339. See, also, *State v. Armstrong*, 41 Wash. 601. It is not a valid objection to the jurisdiction of the superior court that the judge was not a resident of the county, the constitution not requiring a local judge in each county: *American Bonding Co. v. Dufur*, 49 Wash. 632.

A state court has no jurisdiction to determine the equities of claimants to public

lands by enjoining the prosecution of a claim before the land department or requiring a relinquishment of a claim, when the title is still in the United States and

the land office has not determined the right to a patent: *Columbia Canal Co. v. Benham*, 47 Wash. 249.

§ 16. (4704.) Naturalization of Aliens.

The superior courts of the several counties shall have jurisdiction, and it shall be their duty to hear applications and proofs by aliens to become citizens of the United States, and to grant certificates of citizenship to such applicants, in accordance with section 2165 of the Revised Statutes of the United States. [L. '86, p. 113, § 1; Const., Art. IV, § 6.]

A judgment of the superior court naturalizing a person ineligible to citizenship is void on its face and may be attacked or

disregarded at any time: *Yamashita, In re*, 30 Wash. 234.

§ 17. (4664.) Appellate Jurisdiction.

The superior courts shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. [L. '90, p. 343, § 6; 2 H. C., § 12; Const., Art. IV, § 6.]

See *infra*, § 1910, notes, appeals from justices' courts.

§ 18. (4665.) Are Courts of Record—Always Open—Sessions.

The superior courts are courts of record, and shall be always open, except on nonjudicial days. They shall hold their sessions at the county seats of the several counties, respectively. They shall hold regular and special sessions in the several counties of this state at such times as may be prescribed by the judge or judges thereof. [L. '90, p. 343, § 7; 2 H. C., § 13. Cf. L. '91, p. 89, § 1; 2 H. C., § 41; Bal. Code, § 4708; Const., Art. IV, §§ 6, 11.]

Bal. Code, § 4708, as to the place of holding court, is included in this section.

See *infra*, §§ 61-65, legal holidays.

See note § 5, *supra*.

The court is always deemed open for purposes connected with a cause submitted to a jury: *Edwards v. Territory*, 1 W. T. 195. See, also, *State v. Straub*, 16 Wash. 111;

Krutz v. Batts, 18 Wash. 460; *Coyle v. Seattle Electric Co.*, 31 Wash. 181; *Kalb v. German Sav. & Loan Soc.*, 25 Wash. 349; *Peterson v. Dillon*, 27 Wash. 78.

§ 26. (4666.) Effect of Adjournments.

Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time. [L. '90, p. 343, § 8; 2 H. C., § 14.]

See note to § 18, *supra*.

§ 27. (4667.) Judge of Another County to Sit—Designation by Governor.

Whenever a judge of the superior court of any county in this state, or a majority of such judges in any county in which there is more than one judge of said court, shall request the governor of the state to direct a judge of the superior court of any other county to hold a session of the superior court of any such county as is first herein above mentioned, the governor shall thereupon request and direct a judge of the superior court of some other county, making such selection as the governor shall deem to be most consistent with the state of judicial business in other counties, to hold a session of the superior court in the county the judge shall have requested the governor as aforesaid. Such request and direction by the governor shall be made in writing, and shall specify the county in which he directs the superior judge to whom the same is addressed to

hold such session of the superior court, and the period during which he is to hold such session. Thereupon it shall be the duty of the superior judge so requested, and he is hereby empowered, to hold a session of the superior court of the county specified by the governor, at the seat of judicial business thereof, during the period specified by the governor, and in such quarters as the county commissioners of said county may provide for the holding of such session. [L. '90, p. 343, § 10; 2 H. C., § 15; L. '93, p. 67, § 1; Const., Art. IV, § 7.]

See *infra*, § 29, extent of powers of visiting judge.

Cited in 12 Wash. 172.

§ 28. (4668.) Sessions Held at Request of Another Judge.

Whenever a like request shall be addressed by the judge, or by a majority of the judges (if there be more than one) of the superior court of any county to the superior judge of any other county, he is hereby empowered, if he deem it consistent with the state of judicial business in the county or counties whereof he is a superior judge (and in such case it shall be his duty to comply with such request), to hold a session of the superior court of the county the judge or judges whereof shall have made such request, at the seat of judicial business of such county, in such quarters as shall be provided for such session by the board of county commissioners, and during such period as shall have been specified in the request, or such shorter period as he may deem necessary by the state of judicial business in the county or counties whereof he is a superior judge. [L. '90, p. 343, § 10; 2 H. C., § 15; L. '93, p. 68, § 2; Const., Art. IV, § 7.]

Cited in 12 Wash. 172.

Where judges are allowed by statute to exchange courts on request, a judge who has tried a cause in another district than his own may certify and settle a statement of facts after returning to his own district: *King Co. v. Hill*, 1 Wash. 63.

There being no constitutional or statutory provision in this state requiring the fact to be spread of record, when any visit-

ing judge has been called to hold court in another county, the presumption must obtain, in the absence of an affirmative showing to the contrary, that such visiting judge properly acquired jurisdiction to discharge the duties of judge of the court to which he has been called: *State v. Holmes*, 12 Wash. 170; *State v. Superior Court*, 3 Wash. 696.

§ 29. (4669.) Number of Sessions at Same Time—Effect of Acts of Visiting Judge.

In any county where there shall be more than one superior judge, or in which a superior judge of another county may be holding a session of the superior court, as in this chapter provided, there may be as many sessions of the superior court at the same time as there are judges thereof, or assigned to duty therein by the governor, or responding to a request made as provided in the last preceding section. In such cases the business of the court shall be so distributed and assigned by law, or in the absence of legislation therefor, by such rules and orders of the court as shall best promote and secure the convenient and expeditious transaction thereof. Judgments, decrees, orders and proceedings of any session of the superior court held by one or more of the judges of said court, or by any judge of the superior court of another county pursuant to the provisions of this chapter, shall be equally effectual as if all the judges of such court presided at such session. [L. '90, p. 341, § 2; 2 H. C., § 16; L. '93, p. 68, § 3.]

Power of judge to act outside his county, see *infra*, §§ 41, 42, 59.

"Chapter" in this section, refers to §§ 27-30.

Cited in 25 Wash. 146.

Under the rules of allotment of causes in the superior court of King county an order transferring an equity cause from the equity department to the civil jury department for the sole purpose of having the question of title in partition tried by a jury is unauthorized: *State v. Lichtenberg*, 4 Wash. 553, 556.

The court has power to direct a jury trial of issue of fact in an equity cause: *Dearborn Fd. Co. v. Augustine*, 5 Wash. 67, 70; see *Hill v. Young*, 7 Wash. 33.

Mandamus will not lie to compel two of the three judges of the superior court of a county to perform certain acts, for the reason that, if it take all of them to do the act, all are necessary parties, while if one could do the act, the one whose duty it was to act should be proceeded against alone: *State v. Superior Court*, 4 Wash. 327.

A visiting judge has all the powers of a resident judge: See 2 Remington's Digest, p. 1570, § 14; *Demaris v. Barker*, 33 Wash. 200; *Fisher v. Puget Sound Brick etc. Co.*, 34 Wash. 578; *Hindman v. Boyd*, 42 Wash. 17.

§ 30. (4670.) Expenses of Judge Called to Another County.

Any judge of the superior court of any county in this state who shall hold a session of the superior court of any other county, in pursuance of the provisions of this chapter, shall be entitled to receive from the county in which he shall hold such sessions the amount of his actual traveling expenses from his residence to the place where he shall hold such sessions, and on his return to his residence, and of the actual traveling expenses of his sojourn at the place where he shall hold such sessions during the continuance thereof. The county clerk of such county shall, upon the presentation to him by such judge of a statement of such expenses, verified by his affidavit, issue to such judge a certificate that he is entitled to the amount thereof; and upon presentation of such certificate to the auditor of such county he shall draw a warrant on the general fund of such county for the amount in favor of such judge. [L. '93, p. 69, § 4; Const., Art. IV, § 14.]

This section supersedes § 2965, 1 Hill's Code.

§ 32. (4671.) Jurisdiction—Process—Venue.

The process of the superior courts shall extend to all parts of the state: Provided, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions is situated. [L. '90, p. 343, § 9; 2 H. C., § 17; Const., Art. IV, § 6.]

See Const., Art. IV, § 27, style of process.

See *infra*, § 204, and notes, venue of actions.

Process extends to reservations: See Const., Art. XXV, § 1.

§ 35. (4672.) Process, to Whom Directed.

Unless otherwise provided by statute, all process issuing out of the [superior] court shall be directed to the sheriff of the county in which it is to be served, and be by him executed according to law. [L. '91, p. 84, § 5; 2 H. C., § 795.]

See *infra*, § 2080, criminal process directed to sheriff, where.

§ 36. (4673.) Judges to Establish Uniform Rules.

The judges of the superior courts shall, from time to time, establish uniform rules for the government of the superior courts. [L. '90, p. 344, § 13; 2 H. C., § 18; Const., Art. IV, § 24.]

See *supra*, § 13, rules of supreme court.

See *infra*, § 52, notes, as to rules.

Power to make rules, effect, etc.: See 1 Remington's Digest, p. 725, §§ 29-32.

The court has no power to establish rules which would have the effect to extend the

statutory period within which amendments may be proposed to a statement of facts: *Warburton v. Ralph*, 9 Wash. 537, 542.

But the court has the right, for good reasons, to suspend its own rule requiring

twenty-four hours' notice to a party to file an original paper in his possession: *Washington Bank of Walla Walla v. Horn*, 24 Wash. 299.

§ 38. (4674.) Seal.

The seals of the superior courts of the several counties of the state shall be, until otherwise provided by law, the vignette of General George Washington, with the words, "Seal of the Superior Court of — County, State of Washington," surrounding the vignette. [L. '90, p. 345, § 17; 2 H. C., § 19; Const., Art. XXVII, § 9.]

See *supra*, § 7, seal of supreme court.
Cited in 20 Wash. 96.

§ 39. (4675.) Limit of Time for Decision.

Every case submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof: Provided, That if within said period of ninety days a rehearing shall have been ordered, then the period within which he is to decide shall commence at the time the cause is submitted upon such rehearing, and upon willful failure of any judge so to do, he shall be deemed to have forfeited his office. [L. '90, p. 344, § 12; 2 H. C., § 20; Const., Art. IV, § 20.]

Cited in 21 Wash. 630.

The failure of a judge to decide a case within ninety days from its submission does not render the judgment void for want of

jurisdiction: *Demaris v. Barker*, 33 Wash. 200. See, also, *Moylan v. Moylan*, 49 Wash. 341.

§ 40. (4676.) Judges Pro Tempore—Appointment—Oath—Compensation.

A case in the superior court of any county may be tried by a judge pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case; and his action in the trial of such cause shall have the same effect as if he were the judge of such court. A judge pro tempore shall, before entering upon his duties in any cause, take and subscribe the following oath or affirmation:—

I do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States and the constitution of the state of Washington, and that I will faithfully discharge the duties of the office of judge pro tempore in the cause wherein — is plaintiff and — defendant, according to the best of my ability.

He shall receive a compensation of ten dollars for each day engaged in said trial, to be paid in the same manner as the salary of the superior judge. [L. '90, p. 343, § 11; 2 H. C., § 21; Const., Art. IV, § 7.]

Cited in 3 Wash. 693; 25 Wash. 603.

If the attorneys in an action agree upon a judge pro tem., and such agreement is approved by the regular judge and entered upon the journal, and the judge pro tem. properly sworn to try the case, the presumption from the journal entries is that a written stipulation was entered into as required by this section: *State v. Sachs*, 3 Wash. 691.

When defendant appears and tries his case before a judge pro tem. he is estopped from thereafter questioning the legality of his appointment: *Id.*

If a cause has been transferred to a judge pro tem. for trial, he retains jurisdiction of it to the end, and an order of the regular judge vacating the judgment of the judge pro tem. is void: *Id.*

And a judge pro tempore may be so appointed to hear and determine whatever remains to be done in a case, even after verdict, such as the determination of a motion for new trial, and the entry of judgment upon verdict theretofore entered: *Nelson v. Seattle Traction Co.*, 25 Wash. 602.

§ 41: Powers of Judge in Other Counties of His District.

Any judge of the superior court of the state of Washington shall have power, in any county within his district: (1) To sign all necessary orders and papers in probate matters pending in any other county in his district; (2) to issue restraining orders, and to sign the necessary orders of continuance in actions or proceedings pending in any other county in his district; (3) to decide and rule upon all motions, demurrers, issues of fact or other matters that may have been submitted to him in any other county. All such rulings and decisions shall be in writing and shall be filed immediately with the clerk of the proper county: Provided, that nothing herein contained shall authorize the judge to hear any matter outside of the county wherein the cause or proceeding is pending, except by consent of the parties. [L. '01, p. 76, § 1.]

§ 42. Decisions and Rulings Out of His Own District.

Any judge of the superior court of the state of Washington who shall have heard any cause, either upon motion, demurrer, issue of fact, or other matter in any county out of his district, may decide, rule upon, and determine the same in any county in this state, which decision, ruling and determination shall be in writing and shall be filed immediately with the clerk of the county where such cause is pending. [L. '01, p. 77, § 2.]

CHAPTER III.**JUSTICES' COURTS.**

See "Justices of the Peace and Constables," § 6513 et seq., *infra*.
Justice Code: See *infra*, §§ 1755-1924.

§ 43. (4680.) General Powers of Justices of the Peace.

Every justice of the peace elected in any precinct in this state is hereby authorized to hold a court for the trial of all actions in the next section enumerated, to hear, try, and determine the same according to law; and for that purpose, where no special provision is otherwise made by law, such court shall be vested with all the necessary powers which are possessed by courts of record in this state; and all laws of a general nature shall apply to such justice's court, as far as the same may be applicable, and not inconsistent with the provisions of this chapter. [L. '54, p. 226, § 22; Cd. '81, § 1709; 2 H. C., § 22; Const., Art. IV, § 10.]

See *infra*, § 1770, and notes, jurisdiction of justices.

See *infra*, § 1891, jurisdiction in contempt cases.

See *infra*, § 52, powers respecting judicial proceedings.

See *infra*, § 1755, civil actions and proceedings in justices' courts.

Cited in 11 Wash. 14; 20 Wash. 96; 20 Wash. 164.

§ 44. (4681.) Jurisdiction in Civil Actions and Proceedings.

Every justice of the peace shall have jurisdiction and cognizance of the following civil actions and proceedings:—

1. Of an action arising on contract for the recovery of money only in which the sum claimed is less than one hundred dollars;

2. Of an action for damages for injuries to the person, or for taking or detaining personal property, or for injuring personal property, or for an injury to real property when no issue raised by the answer involves the plaintiff's title to or possession of the same, when the amount of damages claimed

is less than one hundred dollars; also of actions to recover the possession of personal property, when the value of such property, as alleged in the complaint, is less than one hundred dollars;

3. Of an action for a penalty less than one hundred dollars;

4. Of an action upon a bond conditioned for the payment of money, when the amount claimed is less than one hundred dollars, though the penalty of the bond exceed that sum, the judgment to be given for the sum actually due, not exceeding the amount claimed in the complaint;

5. Of an action on an undertaking or surety bond taken by him or his predecessor in office, when the amount claimed is less than one hundred dollars;

6. Of an action for damages for fraud in the sale, purchase, or exchange of personal property, when the damages claimed are less than one hundred dollars;

7. To take and enter judgment on confession of a defendant, when the amount of the judgment confessed is less than one hundred dollars;

8. To issue writs of attachment upon goods, chattels, moneys, and effects, when the amount is less than one hundred dollars;

9. Of all other actions and proceedings of which jurisdiction is specially confessed [conferred] by statute, when the amount involved is less than one hundred dollars, and the title to or right of possession of or to a lien upon real property is not involved. [L. '54, p. 226, § 23; L. '55, p. 11; L. '73, p. 333, § 17; L. '77, p. 199, § 1; Cd. '81, § 1710; L. '83, p. 44, § 1, subd. 4; L. '91, p. 137, § 1; 2 H. C., § 23; Const., Art. IV, § 10.]

See *infra*, § 6515, jurisdiction prohibited over certain claims.

See *supra*, § 15, and notes, concurrent jurisdiction with the superior court.

See *infra*, § 1755, civil actions and proceedings in justices' courts.

Cited in 20 Wash. 96.

The amount claimed and not the amount recovered is the test by which justices' jurisdiction is determined: *Ebey v. Engle*, 1 W. T. 72; but this case was overruled in *Bagley v. Carpenter*, 2 W. T. 19, 22.

Under the constitution justices of the peace have no jurisdiction in cases in which the demand or value of property in controversy is one hundred dollars or more: *Moore v. Perrott*, 2 Wash. 1, 3.

A justice of the peace has no jurisdiction of an action for the recovery of a sum due and interest thereon, when the total amount of the claim exceeds one hundred dollars, by the addition of the interest thereon: *State v. Superior Court*, 9 Wash. 369.

If the justice has no jurisdiction of the

subject matter of an action the superior court can acquire no jurisdiction thereof by an appeal: *Id.*

The judicial acts of a justice of the peace and his power over a judgment entered by him are exhausted upon the moment the judgment is rendered, and all his acts thenceforward relating thereto are only ministerial: *McCoy v. Bell*, 1 Wash. 504, 511.

A justice of the peace does not acquire jurisdiction of the subject matter of an action, when the complaint fails to allege that the property in controversy is within the same county as the justice court: *Woodbury v. Henningsen*, 11 Wash. 12. See, also, *Walters v. Field*, 29 Wash. 558; *Larson v. Allan Line Steamship Co.*, 37 Wash. 555.

§ 45. (4682.) Restrictions on Civil Jurisdiction.

The jurisdiction conferred by the last section shall not, however, extend to the following civil actions:—

1. In which the title to real property shall come in question;

2. Nor to an action for the foreclosure of a mortgage, or enforcement of a lien on real estate;

3. Nor to an action for false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction;

4. Nor to any action against an executor or administrator as such. [L. '54, p. 227, § 24; Cd. 81, § 1711; 2 H. C., § 24; Const., Art. IV, §§ 6, 10.]

The words "forcible entry and detainer" omitted from this section, as superior courts have exclusive jurisdiction in forcible entry and detainer: See *infra*, §§ 810-837.

§ 46. (4683.*) Jurisdiction in Criminal Cases—Cities of First and Other Classes.

Justices of the peace shall have jurisdiction concurrent with the superior courts of all misdemeanors and gross misdemeanors committed in or which may be tried in their respective counties: Provided, that justices of the peace in cities of the first class shall in no event impose greater punishment than a fine of five hundred dollars, or imprisonment in the county jail for six months; and justices of the peace other than those elected in cities of the first class shall in no event impose greater punishment than a fine of one hundred dollars, or imprisonment in the county jail for thirty days. [L. '09, p. 377, §1. Cf. L. '60, p. 279, § 171; L. '73, p. 181, § 184; L. '75, p. 51, § 1; Cd. 81, § 1886; 2 H. C., § 25; L. '01, p. 34, § 1; Const., Art. IV, §§ 6, 10.]

This act of 1909 amended Bal. Code, § 4683, without reference to the previous amendment in 1901.

See infra, § 1925, practice and trial in criminal actions in justices' courts.

See infra, § 2747, exclusive original jurisdiction in offense of provoking assault, etc.

See infra, §§ 2771, 2772, exclusive original jurisdiction in offense of reckless shooting, etc.

See infra, § 2767, jurisdiction of Sunday riots, fighting, etc.

See infra, § 2825, jurisdiction of trespassing hunters.

See infra, § 5342, jurisdiction of killing seagulls.

See infra, §§ 5201, 5205, jurisdiction of offenses against fisheries, etc.

See infra, § 2989, jurisdiction of offense of wearing G. A. R. button.

Cited in 13 Wash. 513; 23 Wash. 579; 25 Wash. 624; 36 Wash. 454; 40 Wash. 405; 43 Wash. 123.

Under this section a justice of the peace has jurisdiction of the misdemeanor of violating the eight-hour day law, pun-

ishable by a fine of from \$25 to \$200, where the fine imposed did not exceed \$100: State v. Davis, 43 Wash. 116. See, also, State ex rel. Belt v. Kennan, 25 Wash. 621; In re Casey, 27 Wash. 686.

§ 47. (4684.) Territorial Jurisdiction of Justices—Residence.

The jurisdiction of justices of the peace elected in pursuance of the provisions of this act shall be coextensive with the limits of the county in which they are elected or appointed, and no other or greater, but every justice of the peace shall continue to reside in the precinct for which he was elected or appointed, during his continuance in office. [L. '54, p. 224, § 9; Cd. '81, § 1702; 1 H. C., § 314; see 2 H. C., § 27.]

See infra, § 1755, civil actions and proceedings in justices' courts.

See infra, §§ 1756, 1757, when limited to precinct in civil actions.

Cited in 11 Wash. 14; 23 Wash. 579.

Under this section one charged with an offense cognizable by a justice of the

peace may be prosecuted before any justice in the county: State ex rel. Calderwood v. Schomber, 23 Wash. 573.

§ 48. (4685.) Office, Where Held—Process.

Every justice of the peace shall keep his office in the precinct for which he may be elected, and not elsewhere; but he may issue process in any place in his county. [L. '54, p. 226, § 20; Cd. '81, § 1707; 2 H. C., § 28.]

See last section.

Cited in 1 Wash. 387, 388; 2 Wash. 288; 14 Wash. 308; 21 Wash. 396.

§ 49. (4686.) Not to Office with an Attorney, Except.

No justice of the peace shall hold his office in the same room with a practicing attorney, unless such attorney shall be his law partner; and in that case, such partner shall not be permitted to appear or practice as an attorney in any case tried before such justice of the peace. [L. '54, p. 226, § 21; Cd. '81, §§ 1708, 3294; 2 H. C., § 29.]

See infra, § 55, in what cases justice may act as attorney.

Section 3294, Code of 1881, omitted from Hill's Code; it provides: "The law partner of any probate judge or justice of the peace in this territory shall not practice as attorney or counselor in the court over which such judge or justice presides." The extent to which this section is in force is uncertain.

CHAPTER IV.

MAGISTRATES.

§ 50. (4690.) Definition of Magistrate.

A magistrate is an officer having power to issue a warrant for the arrest of a person charged with the commission of a crime. [L. '91, p. 91, § 1; 2 H. C., § 30.]

§ 51. (4691.) Who are Magistrates.

The following persons are magistrates:—

1. The justices of the supreme court;
2. The superior judges, and justices of the peace;
3. All municipal officers authorized to exercise the powers and perform the duties of a justice of the peace. [L. '91, p. 91, § 2; 2 H. C., § 31.]

See *infra*, § 1949 et seq., examination of persons before.

See *infra*, § 1936 et seq., power to preserve the peace.

See *infra*, § 1946, power to require recognizance for certain offenses committed in presence of.

See *infra*, § 2237, issuance of search-warrants by.

CHAPTER V.

POWERS AND GENERAL PROVISIONS.

§ 52. (4695.) Powers of Courts Respecting Conduct of Judicial Proceedings.

Every court of justice has power,—

1. To preserve and enforce order in its immediate presence;
2. To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority;
3. To provide for the orderly conduct of proceedings before it or its officers;
4. To compel obedience to its judgments, decrees, orders, and process, and to the orders of a judge out of court, in an action, suit, or proceeding pending therein;
5. To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto;
6. To compel the attendance of persons to testify in an action, suit, or proceeding therein, in the cases and manner provided by this code;
7. To administer oaths in an action, suit, or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers or the performance of its duties. [L. '91, p. 91, § 1; 2 H. C., § 32.]

See *infra*, §§ 1215-1224, manner of compelling the attendance of witnesses.

See *infra*, § 57, powers of "judicial officers."

See *infra*, § 1264, who may administer oaths.

See *infra*, § 1946, power of magistrates to order recognizances for certain offenses committed in his presence.

Cited in 15 Wash. 578.

§ 53. (4696.) Court may Punish for Contempt.

For the effectual exercise of the powers specified in the last section, the court may punish for contempt in the cases and the manner provided by law. [L. '91, p. 92, § 2; 2 H. C., § 33.]

See *infra*, § 1049 et seq., and notes, relating to contempts in general.
See *infra*, § 58, punishment of contempts by "judicial officer."

§ 54. (4697.) Judicial Officer Defined—When Disqualified.

A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he is a member in any of the following cases:—

1. In an action, suit or proceeding to which he is a party, or in which he is directly interested;

2. When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;

3. When he is related to either party by consanguinity or affinity within the third degree. The degree shall be ascertained and computed by ascending from the judge to the common ancestor and descending to the party, counting a degree for each person in both lines, including the judge and party and excluding the common ancestor;

4. When he has been attorney in the action, suit or proceeding in question for either party; but this section does not apply to an application to change the place of trial, or the regulation of the order of business in court. In the cases specified in subdivisions three and four, the disqualification may be waived by the parties, and except in the supreme court shall be deemed to be waived unless an application for a change of the place of trial be made as provided by law. [Cf. L. '91, p. 92, § 3; 2 H. C., § 34; L. '95, p. 63, § 1.]

Cited in 18 Wash. 393.

When a judge is disqualified by pecuniary interest, relationship, or bias: See 2 Remington's Digest, p. 1572, §§ 22, 23, 25; *Barnett v. Ashmore*, 5 Wash. 163; *State ex rel. Barnard v. Board of Education*, 19 Wash. 8; *State v. Strodemier*, 40 Wash. 608.

Where an order made by a judge on the trial of a cause disposes of all the issues, his successor has jurisdiction to sign the necessary judgment to be entered therein, as such act is a purely formal matter not involving the exercise of any discretion, and does not fall under the prohibition of subdivision 2 of this section: *Hazard v. McAndrews*, 18 Wash. 392.

§ 55. (4698.) When may Act as Attorney.

Any judicial officer may act as an attorney in any action, suit, or proceeding to which he is a party or in which he is directly interested. A justice of the peace, otherwise authorized by law, may act as an attorney in any court other than the one of which he is judge, except in an action, suit, or proceeding removed therefrom to another court for review; but no judicial officer shall act as attorney in any court, except as in this section allowed. [L. '91, p. 92, § 4; 2 H. C., § 35; see Cd. '81, § 3293.]

See *infra*, this title, chapter X, attorneys, in general.
See *supra*, § 49, partners of justices.

§ 56. (4699.) Judge as Distinguished from a Court.

A judge may exercise, out of court, all the powers expressly conferred upon a judge as contradistinguished from a court, and not otherwise. [L. '91, p. 92, § 5; 2 H. C., § 36.]

Cited in 43 Wash. 22; 44 Wash. 617.

The word "court" sometimes signifies more than the judge who tries the cause: *Gunderson v. Cochrane*, 3 Wash. 476; *Shepard v. Gove*, 26 Wash. 452; *State ex rel. Romano v. Yakey*, 43 Wash. 15.

Powers of judge at chambers, or out of court: See 2 Remington's Digest, p. 1570, § 15; *Ainsworth v. Territory*, 3 W. T. 270; *Murne v. Schwabacher*, 2 W. T. 130; *Kalb v. German Sav. & L. Soc.*, 25 Wash. 349.

§ 57. (4700.) Powers of Judicial Officers.

Every judicial officer has power,—

1. To preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of a duty imposed upon him by this code or other statute;

2. To compel obedience to his lawful orders, as provided in this code;

3. To compel the attendance of persons to testify in a proceeding pending before him in the cases and manner provided in this code;

4. To administer oaths to persons, in a proceeding pending before him, and in all other cases where it may be necessary, in the exercise of his powers and the performance of his duties. [L. '91, p. 92, § 6; 2 H. C., § 37.]

See supra, § 52, and notes, powers of courts.

§ 58. (4701.) Judicial Officer may Punish for Contempt.

For the effectual exercise of the powers specified in the last preceding section, a judicial officer may punish for contempt, in the cases and manner provided by law. [L. '91, p. 93, § 7; 2 H. C., § 38.]

See supra, § 53, punishment of contempt by "court."

See infra, § 1049 et seq., and notes, relating to contempts in general.

§ 59. (4702.) Judges may Exercise Certain Powers, Where.

The judges of the supreme and superior courts have power in any part of the state to take and certify,—

1. The proof and acknowledgment of a conveyance of real property, or any other written instrument authorized or required to be proved or acknowledged;

2. The acknowledgment of satisfaction of a judgment in any court;

3. An affidavit or deposition to be used in any court of justice or other tribunal of this state;

4. To exercise any other power and perform any other duty conferred or imposed upon them by statute. [L. '91, p. 93, § 8; 2 H. C., § 30.]

See infra, § 1264, who may administer oaths.

No power outside county where cause is pending: See supra, § 41.

Cited in 21 Wash. 203.

Where a judge from another county is called in for the trial of a cause, such visiting judge is not required to return to the county where the trial was held,

in order to settle and certify a statement of facts on appeal, but may perform such duty in any other county, under this section: *State ex rel. Malouf v. McDonald*, 21 Wash. 201.

§ 60. (4703.) When Inferior Judicial Officers may Act.

Every other judicial officer may, within the county, city, district, or precinct in which he is chosen,—

1. Exercise the powers mentioned in subdivisions one, two, and three of the last preceding section;

2. Exercise any other power and perform any other duty conferred or imposed upon him by other statute. [L. '91, p. 93, § 9; 2 H. C., § 40.]

§ 61. (4709.) Legal Holidays.

The following days are legal holidays, namely: Sunday; the first day of January, commonly called New Year's day; the fourth day of July; the twenty-second day of February; the twenty-fifth day of December, commonly called Christmas day; and any day designated by public proclamation of the chief executive of the state as a legal holiday, or as a day of thanksgiving; the day known and observed as Memorial or Decoration Day; and the day on which a general election is held throughout the state. [Cf. L. '88, p. 107, § 1; L. '91, p. 80, § 1; 2 H. C., § 42.]

Labor Day: See *infra*, § 62.

Lincoln's Birthday: See *infra*, § 63.

See *infra*, §§ 150, 252, and notes, computation of time.

See *supra*, § 3, when supreme court should be open.

See *supra*, § 18, when superior court should be open.

Cited in 14 Wash. 311; 49 Wash. 2, 3, 6.

See 1 Remington's Digest, p. 1369, §§ 1-3.

Holidays have only the sanctity attached to them by statute: *State v. Lewis*, 31 Wash. 515.

A contract to perform certain services each day during the term of contract does not include Sundays, and services performed on Sundays cannot be offset against shortages on other days: *Go Fun v. Fidalgo Island Can. Co.*, 37 Wash. 238.

The defendant having admitted the due and legal service of a summons and complaint on a legal holiday cannot thereafter question the legality of such service: *McClellan v. Gaston*, 18 Wash. 472.

Proceedings under a judgment will not

be restrained on the ground that the judgment was entered on a holiday, where it merely appears from the complaint that on a holiday the judge heard the arguments, announced his decision, and directed a judgment to be entered; since it will be presumed that the judgment was properly entered at a subsequent date: *Stewart v. State Board of Medical Examiners*, 48 Wash. 655.

A final judgment entered on a judicial day is not void by reason of the fact that prior proceedings were had in the case upon a legal holiday proclaimed by the governor, where no objection was made at the time to such prior proceedings: *State ex rel. Walter v. Superior Court*, 49 Wash. 1.

§ 62. (4710.) Labor Day.

The first Monday of September of each year is hereby declared to be a legal holiday in the state of Washington, to be known as Labor Day. [L. '91, p. 39, § 1; 2 H. C., § 43.]

See last section and notes.

§ 63. (4711.) Lincoln's Birthday.

The twelfth day of February of each year, the same being the anniversary of the birth of Abraham Lincoln, be and it is hereby declared to be a legal holiday in the state of Washington. [L. '95, p. 6, § 1.]

See *supra*, § 61, and notes, legal holiday.

§ 64. (4712.) No Courts on Legal Holidays, Except, etc.

No court shall be open, nor shall any judicial business be transacted, on a legal holiday, except,—

1. To give, upon their request, instructions to a jury when deliberating of their verdict;

2. To receive the verdict of a jury;

3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature;

4. For hearing an application for writs of habeas corpus, injunction, prohibition, and attachment. [L. '91, p. 80, § 2; 2 H. C., § 44; see Cd. '81, § 1267; Const., Art. IV, § 6.]

Cited in 49 Wash. 3, 6.

The authorization for issuance of writs on legal holidays and nonjudicial days, given by Art. IV, § 6, of the Const., does not in express terms embrace attachment writs.

A verdict may be received on Sunday: *State v. Straub*, 16 Wash. 111. The court may discharge a jury in a criminal case on a holiday: *State v. Lewis*, 31 Wash. 515.

§ 65. (4713.) **Sitting Deemed Adjourned Over Legal Holiday.**

If any legal holiday happen to be a day appointed for the sitting of a court, or to which it is adjourned, such sitting shall be deemed appointed for or adjourned to the next day which is not a legal holiday. [L. '91, p. 81, § 3; 2 H. C., § 45.]

Cited in 35 Wash. 129.

§ 66. (4714.) **Proceedings may be Adjourned from Time to Time.**

A court or judicial officer has power to adjourn any proceeding before it or him, from time to time, as may be necessary, unless otherwise expressly provided by law. [L. '91, p. 93, § 10; 2 H. C., § 46.]

See supra, § 5, effect of adjournment of supreme court.

See supra, § 26, effect of adjournment of superior court.

§ 67. (4715.) **Proceedings not to Fail for Want of Judge or Court.**

No proceeding in a court of justice, in any action, suit, or proceeding pending therein, is affected by a vacancy in the office of any or all of the judges, or by the failure of a session of the court. [L. '91, p. 89, § 2; 2 H. C., § 47.]

Cited in 1 Wash. 338, 340; 9 Wash. 220.

§ 68. (4716.) **Court may Provide Rooms, etc.**

If the proper authority neglects to provide any supreme or superior court with rooms, furniture, fuel, lights, and stationery, suitable and sufficient for the transaction of its business, and for the jury attending upon it, if there be one, the court may order the sheriff to do so, at the place within the county designated by law for holding such court; and the expense incurred by the sheriff in carrying such order into effect, when ascertained and ordered to be paid by the court, is a charge upon the county. [L. '91, p. 93, § 11; 2 H. C., § 48.]

Furnishing supreme court room: See supra, § 3.

See notes to § 719.

Cited in 3 Wash. 400; 4 Wash. 713; 5 Wash. 165; 14 Wash. 311.

Where the court in pursuance of this section has ordered the sheriff to hire rooms suitable for the court and its officers and has directed the auditor to

issue a warrant in payment therefor, the proper remedy of the county commissioners to prevent such expenditure is injunction and not prohibition: *State v. Hunter*, 4 Wash. 712; *Barnett v. Ashmore*, 5 Wash. 163.

§ 69. (4717.) **Proceeding When Mode not Prescribed.**

When jurisdiction is, by the constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code. [L. '91, p. 94, § 12; 2 H. C., § 49.]

Cited in 4 Wash. 33; 10 Wash. 575; 16 Wash. 129.

This section is little, if anything, more than a re-enactment of the common law:

State v. Superior Court, 4 Wash. 30, 33, 34.

The superior courts may, under it, take cognizance of appeals from the state board of equalization and appeal, in tide land

contests, although the law may fail to prescribe a method of procedure in such cases: Hays v. Merchants Bank Port Townsend, 10 Wash. 573, 575.

CHAPTER VI.

COUNTY CLERKS—CLERK OF SUPERIOR COURT.

§ 70. (4718.) Bond of Clerk—Conditions—When Filed, etc.

Every county clerk, before he enters on the duties of his office, shall enter into bond, payable to the state of Washington, with good and sufficient sureties, as provided by law for other county officers, the amount to be fixed and the bond to be approved by the judge or a majority of the judges presiding over the court of which he is clerk. The bond shall be conditioned that he will faithfully perform the duties of his office, and account for and pay over all moneys which may come into his hands by virtue of his office, and that he, his executors or administrators will deliver to his successor, safe and undefaced, all books, records, papers, seals, apparatus and furniture belonging to his office, and cause said bond to be filed in the office of the county treasurer of his said county, after it has been recorded in a book kept for that purpose by the county auditor. [L. '95, p. 95, § 1.]

See *infra*, § 4032 et seq., salary of deputies, etc.

Abolition of office, compensation and fees, and deputies: See 1 Remington's Digest, p. 494, §§ 1-3.

§ 71. (4719.) Amount of Bond.

The bond of said county clerk shall in no case be in a penal sum less than double the amount of money which said judge or judges, or a majority of them, may, by order of said court entered on the records of said court, fix upon as liable to come into his hands as clerk; and it shall be the duty of the judge or judges of the court of which he is clerk to require that said bond be sufficient, and in a penal sum double the amount of moneys liable to come into the hands of said clerk. [L. '95, p. 96, § 2.]

§ 72. (4720.) New Bond, When may be Required—Penalty for Failure to File.

When the judge or judges of any court, or a majority of them, shall believe that the clerk of said court has not a good and sufficient bond on file, or that said bond is not large enough in amount, as herein required, the said judge or judges shall enter an order requiring him, within such time as may be specified in said order, to execute and present to said judge or judges a good and sufficient bond, as hereinbefore described, in such sum as may be fixed by said order; and in case of his failure to make and file said bond within ten days from the expiration of the date fixed by said order for the making of the same, it shall be the duty of the judge or judges of said court to declare the office of said county clerk vacant. [L. '95, p. 96, § 3.]

§ 73. (4721.) Office—Where Kept—When to be Open.

The office of the clerk of the superior court shall be kept at the county seat of the county of which he is clerk. Each clerk of a superior court shall keep his office open for the transaction of business on every judicial day,

from eight to twelve in the forenoon, and from one to five in the afternoon. [Cf. Cd. '81, § 2125; L. '91, p. 98, §§ 1, 2; 2 H. C., §§ 71, 72.]

See Const., Art. IV, § 26, county clerk ex officio clerk of superior court.

See infra, § 4032, a county officer.

See supra, §§ 61-64, judicial and nonjudicial days.

See infra, § 3863, closed on Saturday afternoons, when.

§ 75. (4722.) What Books to be Kept by County Clerk.

1. He shall, at the expense of the county, provide and keep a book, in which he shall enter all appearances and the time of filing all pleadings in any cause pending in said court;

2. He shall also keep a docket, in which he shall enter, before every session, the titles of all causes pending before said court at such session, in the order in which they were commenced, beginning with criminal cases, noting in separate columns the names of the attorneys, the character of the action, the pleadings upon which it stands at the commencement of the session, leaving a margin opposite each case for the court to enter a short minute of the orders of the session. One copy of this docket he shall furnish for the use of the court, and another for the use of the members of the bar;

3. He shall also provide and keep at each session a minute book, in which he shall enter the names of witnesses and jurors, with time of attendance, distance of travel, and whatever else is necessary to enable him to make out a complete cost bill;

4. He shall also provide and keep a well bound book, to be called the order book or journal, in which he shall record the daily proceedings of the court, and enter all verdicts, orders, judgments, and decisions thereof, from which every morning shall be read in open court the proceedings of the previous day, which shall be signed by the judge; but the court shall have full control of all entries in said journal at any time during the same term [session] in which they were made;

5. He shall also provide and keep well bound books, one for an execution docket, one for a book of levies, and one for a final record, in which he shall make a full and perfect record of all criminal cases in which a final judgment is rendered, and all civil cases in which by any order or final judgment the title to real estate, or any interest therein, is any way affected, and such other final judgments, orders, or decisions as either party may require, and may pay him for recording;

6. He shall also provide and keep such other books as are prescribed by law and required in the discharge of the duties of his office. [Cf. L. '54, p. 366, § 6; L. '63, p. 317, § 6; Cd. '81, § 2179; 1 H. C., § 173.]

See infra, § 444, execution docket.

See infra, § 646, records to be kept in proceedings supplemental to execution, etc.

Cited in 26 Wash. 227; 29 Wash. 442; 42 Wash. 79.

§ 76. (4723.) Custody and Delivery of Books, etc.

He shall be responsible for the safe custody and delivery to his successor of all books and papers belonging to his office. [L. '54, p. 367, § 8; Cd. '81, § 2181; 1 H. C., § 175.]

§ 77. (4724.) Powers and Duties of Clerks of Supreme and Superior Courts.

The clerk of the supreme court, and each clerk of a superior court, has power to take and certify the proof and acknowledgment of a conveyance of

real property or any other written instrument, authorized or required to be proved or acknowledged, and to administer oaths in every case when authorized by law; and it is the duty of the clerk of the supreme court, and of each county clerk for each of the courts for which he is clerk,—

1. To keep the seal of the court, and affix it in all cases where he is required by law;

2. To record the proceedings of the court;

3. To keep the records, files and other books and papers appertaining to the court;

4. To file all papers delivered to him for that purpose, in any action or proceeding in the court;

5. To attend the court of which he is clerk, to administer oaths, and receive the verdict of a jury in any action or proceeding therein, in the presence and under the direction of the court;

6. To keep the journal of the proceedings of the court, and, under the direction of the court, to enter its orders, judgments, and decrees;

7. To authenticate, by certificate or transcript, as may be required, the records, files, or proceedings of the court, or any other paper appertaining thereto, and filed with him;

8. To exercise the powers and perform the duties conferred and imposed upon him elsewhere by statute;

9. In the performance of his duties, to conform to the direction of the court. [Cf. L. 58, p. 29, § 1; Cd. '81, § 2184; L. '91, p. 98, § 3; 2 H. C., § 73.]

See Const., Art. IV, § 22, selection and compensation of clerk of supreme court.

See infra, §§ 9057-9059, appointment, etc., of clerk of supreme court.

See § 497, schedule of fees, and provisions relating to collection, taxing, etc.

See infra, § 474 et seq., costs and disbursements in civil actions.

§ 78. (4725.) Deputies, Appointment and Powers of.

The clerk of the supreme court, and each clerk of a superior court, may have one or more deputies, to be appointed by such clerk in writing, and to continue during his pleasure. Such deputies have the power to perform any act or duty relating to the clerk's office that their respective principals have, and their respective principals are responsible for their conduct. [L. '91, p. 98, § 4; 2 H. C., § 74.]

See infra, § 4032, employment of necessary help.

When the verification to an information is made by the prosecuting attorney before the deputy clerk, it is proper that the jurat should be signed by such officer in his own name, and it is unnecessary that he sign, in such case, in the name of his

principal by himself as deputy: *State v. Devine*, 6 Wash. 587. See, also, *State v. Rosener*, 8 Wash. 42; *State v. White*, 12 Wash. 417.

A deputy county clerk is not a county officer: *Nelson v. Troy*, 11 Wash. 435.

§ 81. (4726.) Clerks not to Practice Law.

Each clerk of a court is prohibited during his continuance in office from acting, or having a partner who acts, as an attorney of the court of which he is clerk. [Cf. L. '54, p. 367, § 10; Cd. '81, § 2183; 1 H. C., § 177; L. '91, p. 99, § 5; 2 H. C., § 75.]

See infra, § 127, restrictions upon clerks practicing law.

CHAPTER VII.

REFEREES AND COURT COMMISSIONERS.

§ 82. (4727.) Definition and Powers of.

A referee is a person appointed by the court or a judicial officer, with power,—

1. To try an issue of law or of fact in a civil action or proceeding, and report thereon;

2. To ascertain any other fact in a civil action or proceeding, when necessary for the information of the court, and report the fact, or to take and report the evidence in an action;

3. To execute an order, judgment, or decree, or to exercise any other power or perform any other duty expressly authorized by law. [L. '91, p. 41, § 1; 2 H. C., § 67.]

See *infra*, § 369 et seq., trial by referees.

§ 83. (4728.*) Appointment, Qualifications, etc., of Court Commissioners.

There may be appointed in each county, by the judge of the superior court having jurisdiction therein, a court commissioner for said county. Such commissioner shall be a citizen of the United States and an elector of the county in which he may be appointed, and shall reside at the county seat of such county, and shall hold his office during the pleasure of the judge appointing him. [L. '95, p. 164, § 1; L. '09, p. 418, § 1; Const., Art. IV, § 23.]

Cited in 44 Wash. 616, 617.
Constitution, Art. IV, § 23, providing that the superior judge may appoint one or more court commissioners with certain powers, cannot be limited by an act of the

legislature to superior courts in counties having a resident judge, but applies to superior courts in all counties: *Howard v. Hanson*, 49 Wash. 314.

§ 85. (4729.*) Powers of Commissioner—Fees.

Such court commissioner shall have power, authority and jurisdiction, concurrent with the superior court and the judge thereof, in the following particulars:

a. To hear and determine all matters in probate, to make and issue all proper orders therein, and to issue citations in all cases where same are authorized by the probate statutes of this state.

b. To grant and enter defaults and after ten days from the entry thereof, to enter judgment thereon.

c. To issue temporary restraining orders and temporary injunctions, and to fix and approve bonds thereon.

d. To act as referee in all matters and actions referred to him by the superior court as such, with all the powers now conferred upon referees by law.

e. To hear and determine all proceedings supplemental to execution, with all the powers conferred upon the judge of the superior court in such matters.

f. To hear and determine all petitions for the adoption of children, for the dissolution of incorporations, and to change the name of any person.

g. To hear and determine all applications for the commitment of any person to the hospital for the insane, with all the powers of the superior court in such matters: Provided, That in cases where a jury is demanded, same shall be referred to the superior court for trial.

h. To hear and determine all complaints for the commitment of minors to the state reform or industrial school, with all powers conferred upon the superior court in such matters.

i. To grant adjournments, administer oaths, preserve order, compel attendance of witnesses, and to punish for contempts in the refusal to obey or the neglect of his lawful orders made in any matter before him as fully as the judge of the superior court.

j. To take acknowledgments and proofs of deeds, mortgages and all other instruments requiring acknowledgment under the laws of this state, and to take affidavits and depositions in all cases.

k. To provide an official seal, upon which shall be engraved the words "Court Commissioner," and the name of the county for which he may be appointed, and to authenticate his official acts therewith in all cases where same is necessary.

l. To charge and collect, for his own use, the same fees for the official performance of official acts mentioned in subsections "d" and "j" herein as are provided by law for referees and notaries public. [L. '09, p. 419, § 2. Cf. L. '95, pp. 164, 165, §§ 2, 3; Const., Art. IV, § 23.]

See *infra*, § 8302, fees of notary.

Cited in 27 Wash. 83; 49 Wash. 319.

Under Const., Art. IV, § 23, and the above section a court commissioner has power to try causes in which a jury is not required, and to enter judgment, which stands as the final judgment of the court when no proceedings are instituted for its review in the court below: *Peterson v. Dillon*, 27 Wash. 78.

A judgment entered by a court commissioner is reviewable by the superior court: *Id.*

Court commissioners are authorized to take evidence under an order of reference in supplemental proceedings and report thereon to the court, by virtue of this section, and Const., Art. IV, § 23, conferring upon court commissioners the power to perform "such other business in the administration of justice as may be prescribed by law": *Howard v. Hanson*, 49 Wash. 314.

§ 86. Revision by Superior Court.

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, his orders and judgments shall be and become the orders and judgments of the superior court, and from same an appeal may be taken to the supreme court in all cases where an appeal will lie from like orders and judgments entered by the judge. [L. '09, p. 420, § 3.]

§ 87. Salary.

Each court commissioner appointed hereunder shall be allowed a salary, in addition to the fees herein provided for, in such sum as the board of county commissioners may designate, said salary to be paid at the time and in the manner as the salary of other county officials. [L. '09, p. 420, § 4.]

The title to this act made no reference to salaries of commissioners, and was as follows, "An act providing for the appointment of court commissioners and fixing their powers, duties and jurisdiction, and repealing all laws in conflict herewith."

All "other" salaried county officers to be elected: Const., Art. XI, § 5.

§ 88. Oath.

Court commissioners appointed hereunder shall, before entering upon the duties of such office, take and subscribe an oath to support the constitution of the United States, the constitution of the state of Washington, and to perform the duties of such office fairly and impartially and to the best of his ability. [L. '09, p. 420, § 5.]

CHAPTER VIII.**JURORS.**

Fees of: See "Counties," § 4084 et seq., *infra*.

Jury trials, challenges, etc.: See *infra*, § 322 et seq.

§ 89. (4730.) Jury, Definition of.

A jury is a body of men temporarily selected from the qualified inhabitants of a particular district, and invested with power,—

1. To present or indict a person for a public offense;
2. To try a question of fact. [L. '91, p. 86, § 1; 2 H. C., § 50.]

Cited in 12 Wash. 55; 30 Wash. 142.

§ 90. (4731.) Different Kinds of Juries.

There shall be three kinds of juries:—

1. A grand jury;
2. A petit jury;
3. A jury of inquest. [L. 91, p. 86, § 2; 2 H. C., § 51.]

§ 91. (4732.) Grand Jury, Defined.

A grand jury is a body of men, not less than twelve nor more than seventeen in number, impaneled and sworn to inquire of public offenses committed or triable within the county. [L. '91, p. 86, § 3; 2 H. C., § 52.]

Cited in 5 Wash. 500.

Functions, qualifications, selection, etc.:
See 1 Remington's Digest, pp. 1335, 1336,
§§ 1-8.

isting independent of any control by the
county, its duties and powers being spe-
cially defined by statute: *Mather v. King*
County, 39 Wash. 693.

The grand jury is a distinct entity ex-

§ 92. (4733.) Petit Jury, Defined.

A petit jury is a body of men, twelve in number in the superior court, and six in number in the courts of justices of the peace, drawn in the superior court by lot from the jurors in attendance upon the court at a particular session, and sworn to try and determine a question of fact; but in a justice's court the jury is drawn according to the mode specially provided for such court. [L. '91, p. 87, § 4; 2 H. C., § 53.]

See *infra*, § 316, waiver of jury.

See *infra*, § 1851, selection of in justices' courts.

Cited in 12 Wash. 55.

§ 93. (4734.) Jury of Inquest, Defined.

A jury of inquest is a body of men, six in number, summoned from the qualified inhabitants of a particular district, before the coroner, or other ministerial officer, to inquire of particular facts. [L. '91, p. 87, § 5; 2 H. C., § 54.]

§ 94. (4735.*) Qualifications of Jurors.

No person shall be competent to serve as a juror in the superior courts of the state unless he be,

- (1) An elector and taxpayer of the state of Washington.
- (2) A resident of the county in which he is called for service for more than one year preceding such time.
- (3) Over twenty-one years of age.
- (4) In full possession of his faculties and of sound mind.
- (5) Able to read and write the English language. [L. '09, p. 131, § 1.]

See next section for references to former laws.

There was no repealing clause to this act, and certain portions of the former laws do not seem to be inconsistent therewith: See *infra*, §§ 95, 97, 100, 105.

See *infra*, §§ 111, 328, as to previous service within one year.

See Const., Art. VI, qualifications of electors.

See *infra*, § 324 et seq., challenges.

Cited in 29 Wash. 453.

Qualifications in general: See 2 Remington's Digest, p. 165, §§ 27-30.

The word "homo" in the phrase "liber legalis et homo," defining the qualifications of jurors at the common law, at the time of the adoption of the federal constitution, was not employed in the narrow sense of designating men in contradistinction of women for jury service: *Hays v.*

Ty., 2 W. T., 286, 289. See contra *Harland v. Territory*, where it was held that women were not qualified to sit as jurors: *Harland v. Territory*, 3 W. T. 131.

Whether a juror must be a householder: See 2 Remington's Digest, p. 1651, § 29; *Redford v. Spokane St. R. Co.*, 15 Wash. 419; *State v. Holedger*, 15 Wash. 443; *State v. Lattin*, 19 Wash. 57; *McKnight v. Seattle*, 39 Wash. 516.

§ 95. Felon not Competent.

A person who has been convicted of a felony is not competent to act as juror. [L. '99, p. 35, § 1; L. '91, p. 87, § 6; 2 H. C., § 55; see L. '88, p. 117, § 1.]

Superseded by the preceding section, except as to subdivision 6, which is retained.

§ 97. (4736.) Who are Exempt—Effect of Disqualification on Verdict.

Civil officers of the United States, civil and judicial officers of the state, attorneys at law, ministers of the gospel or priests, school teachers, practicing physicians, locomotive engineers, active members of the fire department of any city or village, all persons who have served twice as a juror within two years, and all persons over sixty years of age, shall not be compelled to serve as jurors; and in preparing jury lists the county commissioners shall omit the names of such persons; but no act of a grand or petit jury shall be invalid by reason of such person or persons aforesaid, qualified in other respects, serving thereon; nor shall any disqualification of any member of a grand or petit jury affect the indictment or verdict, unless the juror for that specific cause was challenged or excepted to before the finding of the indictment or rendition of the verdict, and the challenge or exception overruled, and error specifically assigned upon the overruling of such challenge or exception. [L. '88, p. 117, § 2; L. '91, p. 87, § 7; 2 H. C., § 56.]

The extent to which this is superseded by the next section, if at all, may be disputed.

See *infra*, § 111, as to previous service within one year.

See *infra*, § 7332, militia and employers exempt from jury duty, when.

See *infra*, § 9320, telegraph employees exempt.

See *infra*, § 332, exemption a personal privilege.

Cited in 31 Wash. 78.

The provision in this section that judicial officers shall not be compelled to serve as jurors is merely a privilege granted such officers, and is no ground

of challenge for cause: *State v. Lewis*, 31 Wash. 75.

Waiver of challenge: See 2 Remington's Digest, p. 1657, § 53; *State v. Clark*, 34 Wash. 485; *Heasley v. Nichols*, 38 Wash. 485.

§ 98. Same—Exemption not Ground for Challenge.

Officers of the United States and of the state, attorneys at law, school teachers, practicing physicians, active members of the fire or police department of any municipality, and all persons over sixty years of age, shall not be compelled to serve as jurors, and in preparing jury lists the names of such persons shall, if it be known that they are entitled to be excused from jury service, be omitted from the jury list: Provided, however, that the right of any such person to be excused from jury service shall not be cause for challenge as to his competency if he desires to serve. [L. '09, p. 131, § 2.]

There being no repealing clause to the act of 1909, the previous section is retained.

§ 99. Who may be Excused.

A person summoned as a juror may be excused from acting as such on account of any of the reasons stated in section 98, when his own health requires, on account of death in his family, or if [of] illness in his family of such character that he is required to be in attendance thereupon, or when his business interests would be seriously prejudiced by such service. No person, however, shall be excused from service as a juror on account of business reasons unless his service as such would lead to the waste or destruction of his property, and unless it shall appear that after having been summoned as a juror he had made every reasonable effort to permit of his serving as a juror without causing waste or destruction to his property. When excused for any of the foregoing reasons, the name of the juror so excused shall be placed upon the jury list from which jurors are drawn to serve at the next succeeding jury term, and he shall be summoned with the other jurors to serve at such term. Any person applying to be excused from jury service for any of the causes herein specified, shall be placed upon oath (or affirmation) to testify truly in all respects as to the cause for such excuse, and that he will answer truly any question put to him by the judge with respect thereto. [L. '09, p. 134, § 7.]

See next section.

§ 100. (4737.) Public Interest as an Excuse.

A person may be excused from acting as a juror when, for any reason. . . . interests of the public will be materially injured by his attendance; but no person shall be excused on account of the causes in this section mentioned, unless it appear that after he was summoned he could not, by reasonable precaution, have provided against them. [L. '91, p. 87, § 7; 2 H. C., § 57.]

The above portions of § 7 of the act of 1891 are retained: See notes to § 94.

§ 101. Jury Districts—Lists Prepared by Clerk—Annual Revision.

Upon the taking effect of this act, the judge or judges of the superior court of each county in the state shall divide the county into not less than three nor more than six jury districts, following the lines of voting precincts, and arranging the districts in such manner that the population in each district shall be equal, so nearly as may be. The fixing of the boundaries of the district shall be evidenced by an order made by the court and entered upon its records. During the month of July of each year, the county clerk of each county in the state shall make up a jury list containing the names of all the qualified jurors in the county so far as he may be able to ascertain the

same from the latest tax rolls and poll books of the county, or from any other official sources of information, and shall ascertain, so far as possible, the voting precinct and place of residence of each juror, and if these cannot be ascertained, the school district in which he resides. He shall provide boxes sufficient in number to correspond with the number of jury districts fixed by the court, and numbered to correspond therewith, and having written the names of the jurors in each district upon slips of paper, which shall be similar in size, quality of paper, and writing, he shall deposit such slips in the jury box of the proper district. The jury list shall be revised from year to year, new lists being made up each year, adding thereto the names of new residents, and omitting therefrom the names of persons who may have removed from the county, or who have served as jurors within five years theretofore (unless they shall be necessary to make up a sufficient list), and the names of the new list shall be deposited in the boxes for service for that year, as hereinbefore provided. [L. '09, p. 132, § 3. Cf. L. '77, pp. 233, 234, §§ 2, 4; Cd. '81, §§ 2080, 2082; L. '83, p. 33, § 1; L. '88, p. 115, §§ 1, 2; L. '90, p. 325, § 1 et seq.; 2 H. C., §§ 58, 59 et seq.; L. '95, p. 139, §§ 1, 2; L. '01, p. 32, § 1; L. '01, p. 204, §§ 1, 3; L. '03, p. 359, § 1; L. '05, p. 271, § 3; L. '07, p. 102, § 1, superseded.]

Former laws cited in 12 Wash. 291, 298; 14 Wash. 408; 15 Wash. 421, 447; 16 Wash. 118; 19 Wash. 89.

For construction of former laws with reference to the selection of jurors by jury

commissioners, etc.: See 2 Remington's Digest, pp. 1651, 1652, §§ 31-38.

Defects in drawing, and challenges to the array: See 2 Remington's Digest, p. 1657, § 55; State v. Bokien, 14 Wash. 403; State v. Straub, 16 Wash. 111.

§ 102. Jury Terms.

Jury terms shall commence on the first Monday in each month, unless postponed to a later date by order of the judge or judges of the superior court, but it shall not be necessary to call a jury for any month in any county unless the judge or judges of the superior court of that county shall consider that there is sufficient business to be submitted to a jury to require that one be called. [L. '09, p. 133, § 4.]

See, also, next section.

§ 103. Jury, How Drawn.

When the judge or judges of the superior court of any county shall deem that the public business requires a jury term to be held, he or they shall require the county clerk to draw a jury to serve for the ensuing month. The county clerk on the second Saturday of the calendar month preceding the month on which the jury is to be called to serve, shall be blindfolded and in the presence of the judge or judges of the superior court, shall draw from the jury boxes such number of names as the judge or judges may have ordered to be summoned as jurors for the ensuing month. The names shall be drawn in equal number from each jury box, and before the drawing is made the box shall be shaken up so that the slips bearing names thereon may be thoroughly mixed, and the drawing of the slips shall depend purely upon chance. The names of persons so drawn to serve as jurors shall be struck from the jury list by the county clerk, and they shall not be called to serve as jurors for five years thereafter, unless their services shall be necessary because there are not sufficient competent jurors to be found within the county who have not served within that time. [L. '09, p. 133, § 4.]

Former laws cited in 15 Wash. 449; 17 Wash. 550.

Under §§ 59 and 61, 2 Hill's Code, prescribing the method of drawing a jury from the certified list, a deputy sheriff

cannot act in place of the sheriff: State v. Payne, 6 Wash. 563, 566. See, also, State v. Cushing, 17 Wash. 554; State v. Lattin, 19 Wash. 57.

§ 104. Grand Jury, How Drawn.

Whenever the judge or judges of the superior court of any county in the state shall desire to summon a grand jury, the names of persons to serve as grand jurors shall be drawn from the jury list as hereinbefore provided: Provided, however, that the names of the persons who so serve as grand jurors shall not be stricken from the jury list, and such service shall not excuse them from service upon the petit jury as though they had not been summoned on the grand jury. [L. '09, p. 133, § 5.]

§ 105. Drawing in Certain Counties in Absence of Judge.

When, pursuant to any statute of this state, there is elected but one judge of the superior court in and for two or more counties, the superior court of any such county may by an order made and entered of record direct that until such order be altered or revoked, the drawing from such box of the names of persons to serve as jurors in that court shall take place in the court room in such county and not in open court and without the presence of the judge; and while such order remains in force the drawing shall be made accordingly; but the names of the persons drawn shall nevertheless be entered upon the journal of such court, together with the clerk's certificate prescribed in section 4 of this act, and the judge of the superior court for any such county may, while he is within or without such county, make in writing and sign the order prescribed in said section 4 for drawing persons to serve as jurors; but he shall then forward such order to the clerk of such court in time to reach such clerk on or before 10 o'clock A. M. of the last Saturday in the current month; and such drawing shall then take place at said hour on said Saturday. If at the time when the said judge would otherwise make said order, it appears to the judge of said court that no jury will be needed in the ensuing month, the judge may omit said order, and no jury need be drawn for such ensuing month. [L. '05, p. 275, § 14.]

It is doubtful if this section is in force. There being no repealing clause to the act of 1909, it would seem that this section, which relates to counties of the first fifteen classes, might not be superseded. "Section 4," mentioned, relates to the order "on the second Saturday of each calendar month" corresponding to § 103, *supra*, in the present practice.

§ 106. (4744.) Irregularities do not Invalidate.

The failure on the part of any officer to perform the duties required within the time, or other irregularity in said drawing, shall in no way invalidate the selecting, summoning or drawing of said jurors. [Cf. L. '88, p. 116, § 4; L. '90, p. 332, § 2; 2 H. C., § 62.]

Cited in 12 Wash. 291.

This section shows the intention of the legislature to be that the regulations for

the drawing of jurors is not mandatory: State v. King, 12 Wash. 290.

§ 107. (4745.) Proceedings When Venire Set Aside.

If for any cause the court shall see fit to set aside the venire for grand or petit jurors, returned as above provided, an open venire may thereupon issue to the sheriff, who shall thereupon complete the panel by such open

venire as speedily as possible. [Cf. L. '90, p. 332, § 3; L. '91, p. 88, § 8; 2 H. C., § 63.]

Cited in 12 Wash. 295; 17 Wash. 550; 20 Wash. 558.

§ 108. (4747.) Sheriff to Summon Jurors.

When a venire is delivered to the sheriff, he shall without delay proceed to summon the jurors as therein directed, and shall immediately thereafter make and file in the court a return of his doings thereon. [L. '91, p. 88, § 10; 2 H. C., § 65.]

The fact that the sheriff does not make a return of his acts in summoning a special venire of jurors until after the commencement of a trial is not ground for a challenge: *State v. Payne*, 6 Wash. 563, 568.

§ 109. Additional Drawing—Open Venire.

If, for any reason, the jurors drawn for service upon the petit jury for any month shall not be sufficient to dispose of the pending jury business, the judge or judges of the superior court may draw from the jury list such additional names as they may consider necessary, and the persons whose names are so drawn shall thereupon be summoned to serve as jurors forthwith. By stipulation or agreement made in open court as a part of the record the parties to any action may agree that an open venire may issue to make up the jury in that action, and upon order of the court approving of such stipulation and directing the number of jurors to be drawn, the clerk shall issue an open venire and the sheriff shall fill the same by summoning from the bystanders, or elsewhere, a sufficient number of persons to fill the open venire. [L. '09, p. 134, § 6. Cf. L. '90, p. 331, § 1; 2 H. C., § 60; L. '95, p. 140, § 3; L. '90, p. 102, § 7; L. '01, p. 208, § 11; L. '05, p. 274, § 11.]

See, also, next section.

See *supra*, § 94, as to other disqualifications.

See *infra*, § 111, previous service within one year.

A statute requiring persons impaneled as jurors to be householders, but making no such requirement of those summoned upon an open venire to complete the panel, is not unconstitutional as a violation of Art. I, § 12, of the Const., which provides that "no law shall be passed granting to any citizen, class of citizens . . . privileges or immunities which, upon the same terms, shall not equally belong to all citizens": *Redford v. Spokane St. Ry. Co.*, 15 Wash. 419; nor is the same in violation of Art. I, § 21, of the Const.: *State v. Hol-edger*, 15 Wash. 443.

It is a mere irregularity and not prejudicial error for a court to order a venire for additional jurors before the regular panel is exhausted: *Blanton v. State*, 1 Wash. 265, 271.

Where the panel of petit jurors has been discharged, the court was authorized, under § 8, p. 401, Laws of 1863, to summon a jury to try a criminal cause: *Thompson v. Territory*, 1 W. T. 548, 553.

See, also, *Cushing v. State*, 17 Wash. 544; *State v. Lattin*, 19 Wash. 57; *State v. Mayo*, 42 Wash. 540.

§ 110. (4746.) Venire to Fill Incomplete Panel.

If for any cause a sufficient number of grand or petit jurors are not returned by the sheriff in the manner first herein contemplated, or if a sufficient number of grand or petit jurors are not in attendance, the court may order the panel filled by summoning a sufficient number by an open venire issued and directed to the sheriff. [Cf. L. '90, p. 332, § 4; L. '91, p. 88, § 9; 2 H. C., § 64.]

This section is in force as to grand jurors, at least: See previous section and notes. See *infra*, § 323, manner of impaneling jury.

§ 111. (4748.) Juror not to be Summoned Twice in One Year.

No person shall be summoned as a petit juror in any superior court, upon an open venire, more than once in one year. [L. '91, p. 88, § 11; 2 H. C., § 66.]

For balance of this section, see *infra*, § 328.

See *supra*, § 94, qualifications of jurors.

See *supra*, § 97, who are exempt.

See *infra*, § 326, challenge for cause.

See *supra*, § 103, previous service within five years.

See *infra*, § 332, exemption a personal privilege.

Cited in 24 Wash. 257.

This section was intended to cut off what is known as professional jurors: See 1 Thomp. Tr., § 58.

This section does not render one incompetent to serve as a juror, in the absence of a challenge: *State v. Hall*, 24 Wash. 255.

CHAPTER IX.

ATTORNEY GENERAL AND PROSECUTING ATTORNEYS.

Duties of attorney general: See "State Officers," § 9035 et seq., *infra*.

Duties of prosecutors: See "Counties," § 3958 et seq., *infra*.

§ 112. (4753.) Powers and Duties of Attorney General.

The powers and duties of the attorney general, in relation to actions and proceedings in the courts, shall be,—

1. To appear for and represent the state before the supreme court in all cases in which the state is interested;

2. To institute and prosecute all actions and proceedings for or for the use of the state, which may be necessary in the execution of the duties of any state officer;

3. To defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States;

4. To consult and advise the several prosecuting attorneys in matters relating to the duties of their office, and when, in his judgment, the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution. [L. '91, p. 95, § 2; 2 H. C., § 84.]

The office of attorney general is created by the constitution: Art. III, § 1.

Cited in 3 Wash. 66; 21 Wash. 454; 28 Wash. 497.

Powers, compensation, etc.: See 1 Remington's Digest, p. 328; *Ritchie v. State*,

42 Wash. 653; *State ex rel. Stratton v. Maynard*, 35 Wash. 168; *State ex rel. Attorney General v. Seattle Gas etc. Co.*, 28 Wash. 488.

§ 113. (4754.) Prosecuting Attorneys Defined.

Prosecuting attorneys are attorneys authorized by law to appear for and represent the state and the counties thereof in actions and proceedings before the courts and judicial officers. [L. '91, p. 95, § 3; 2 H. C., § 85.]

Cited in 18 Wash. 224; 21 Wash. 61; 28 Wash. 500.

See 1 Remington's Digest, p. 951.

Under the constitution and statutes the office of county attorney is identical with that of prosecuting attorney: *Spokane Co. v. Allen*, 9 Wash. 229.

One who, while elected as a county attorney, assumes the duties of the office of prosecuting attorney, and as such collects delinquent taxes, is estopped to deny that

he was in reality filling the office of prosecuting attorney, when action is instituted against him by the county to recover the sums collected by him under such law: *Id.*

The prosecuting attorney of a county being a county officer, under the constitution and laws of this state, a vacancy in the office should be filled by appointment of the county commissioners and not by the governor: *State v. Whitney*, 9 Wash. 377. See *Swanson v. Nagle*, 32 Wash.

169; *State v. Heaton*, 21 Wash. 59. Under this section the county attorney has power to bring an action to compel the auditor to draw a warrant to settle a judgment duly entered against the county: *State ex rel. Porter v. Headlee*, 18 Wash. 220.

But a county attorney has no authority to institute action in name of county against county commissioners to restrain them from bonding certain warrant indebtedness of county: *Spokane County v. Bracht*, 23 Wash. 102.

§ 114. (4755.) Appointment by the Court.

When from illness or other cause the prosecuting attorney is temporarily unable to perform his duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until such disability is removed. [L. '91, p. 95, § 5; 2 H. C., § 87.]

Cited in 21 Wash. 62.

The court has no power to appoint special counsel to represent the state before the grand jury while the prosecuting attorney stands ready and willing to per-

form his duties in that respect: *State v. Heaton*, 21 Wash. 59.

But it is within the discretion of the court to allow special counsel to aid the prosecuting attorney in the prosecution of a case: *State v. Hosher*, 26 Wash. 643.

§ 115. (4756.*) Deputy Prosecuting Attorneys—Appointment.

The prosecuting attorney of each county may appoint, by and with the consent of the county commissioners, one or more deputies who shall have the same power in all respects as their principal. Such appointment shall be in writing, signed by the prosecuting attorney and filed in the county auditor's office. Each deputy thus appointed shall have the same qualifications required of the prosecuting attorney, but his appointment may be revoked by the prosecuting attorney or county commissioners at will. The prosecuting attorney shall be responsible for the acts of his deputies. [L. '03, p. 7, § 1. Cf. L. '91, p. 96, § 6; 2 H. C., § 88; see L. '86, p. 63, § 17.]

Cited in 33 Wash. 327.

Under § 2142, Code 1881, providing that each prosecuting attorney may appoint deputies, etc., a deputy prosecuting attorney has the power to subscribe his principal's name to an information: *Hammond v. State*, 3 Wash. 171.

And the fact that in the body of the affidavit he is described as prosecuting attorney instead of deputy is immaterial. The verification by the deputy is also sufficient: *Id.*

It is proper for the deputy in executing papers pertaining to his duties to sign his own name thereto as such, and it is unnecessary that he sign in the name of his principal, by himself as deputy: *State v. Devine*, 6 Wash. 587.

An assistant prosecuting attorney is ex officio one of the attorneys for plaintiff in action to foreclose delinquency tax certificate where the action is brought by the prosecuting attorney under Laws of 1899, p. 296: *Swanson v. Hoyle*, 32 Wash. 169.

§ 116. (4757.) General Powers and Duties of Prosecuting Attorneys.

The prosecuting attorney of each county shall have authority, and it shall be his duty, subject to the supervisory control and direction of the attorney general, to appear for and represent the state and the county of which he is prosecuting attorney, in all criminal and civil actions and proceedings in such county in which the state or such county is a party. [L. '91, p. 96, § 7; 2 H. C., § 89.]

See *infra*, § 3958 et seq.

Cited in 21 Wash. 61; 28 Wash. 500.

Where a county on relation of its prosecuting attorney makes application for a writ of mandate against the county commissioners and the writ is allowed, such attorney cannot be permitted in the after proceedings, though with the consent of

the parties, to represent both the county and its commissioners: *Clark County v. Commissioners*, 1 W. T. 250.

The fact that an action to restrain the issuance of a warrant upon a claim against the county had been instituted by the prosecuting attorney in his own name in-

stead of that of the county would not affect the validity of the judgment in the action, when such suit had been directed to be brought by the county commissioners, and where it appeared that the

county was the real party in interest, had appeared and no objection had been raised as to the title of party plaintiff: *State ex rel. Porter v. Headlee*, 18 Wash. 220.

CHAPTER X.

ATTORNEYS AND COUNSELORS AT LAW.

Compensation of: See *infra*, § 474 et seq.

§ 118. (4758.) **Attorney and Counsel Defined.**

An attorney is a person duly admitted to practice law and authorized to appear for and represent a party in the written proceedings in any action or proceeding in any stage thereof. An attorney other than the one who represents the party in the written proceedings may also appear for and represent a party in court or before a judicial officer, and then he is known in the particular action or proceeding as counsel only, and his authority is limited to the acts that are done in the court or before such officer at that time. [L. '91, p. 95, § 1; 2 H. C., § 90; L. '95, p. 178, § 1.]

Cited in 30 Wash. 234.

§ 119. **Attorneys to be Admitted.**

No person shall be permitted to practice as an attorney and counselor at law or to commence, conduct or defend any action or proceeding in which he is not a party concerned, in any of the courts of this state, either by using or subscribing his own name or the name of any other person, or to solicit business as, or to advertise, or represent himself, in any way, as an attorney or counselor at law, unless he has been previously admitted to practice law in this state. [L. '09, p. 533, § 1. Cf. L. '63, p. 403, § 1; L. '77, p. 321, § 1; Cd. '81, § 3275; L. '91, p. 96, §§ 8, 10; 2 H. C., §§ 91, 93; L. '95, p. 178, § 2; L. '03, p. 391, § 1.]

See § 142, *infra*. See, also, Rules of Court, XXIV to XXXV, 51 Wash. xliii, et seq.

§ 120. **General Qualifications for Admission—Fee.**

No person shall hereafter be admitted to practice law in this state except by order of the supreme court, either on motion or by examination. Each applicant for admission shall show by his affidavit to the court that he is over twenty-one years of age, a citizen of the United States and a resident of this state, or has come into this state for the purpose of making it his permanent residence, that he intends to actively engage in the practice of the law as a profession, and that he is not laboring under suspension or disbarment of any court whatsoever, and that he never was suspended or disbarred by any court, or if so, in what courts and when, and giving the time of reinstatement, and shall also file a certificate of at least two members of the bar of the supreme court to the effect that he is of good moral character and recommending his admission: Provided, that attorneys living outside of this state may practice in the courts of this state on the same terms and conditions as attorneys of this state are permitted to practice in the courts of their respective states, territories or districts, and not otherwise. The fee for admission shall be twenty-five dollars, to be paid to the clerk of the court at the time of filing his application, and in case the court refuses to admit

the applicant the fee shall be returned to him, otherwise to be accounted for as other court fees. It shall be competent for any person to present to the court any reason why an applicant should not be admitted as an attorney and counselor at law in this state. [L. '09, p. 533, § 2. Cf. Cd. '81, § 3276; L. '91, p. 96, § 9; 2 H. C., § 92; L. '95, p. 179, § 4. Cf. L. '97, p. 12, § 1.]

A Japanese is not a citizen entitled to admission to practice law: See 1 Remington's Digest, p. 317, § 1; Yamishita, In re, 30 Wash. 234.

In an action for an attorney's compensation, in which the pleadings admit

that he is admitted to practice, the defendant is not entitled to show that plaintiff resorted to bribery to secure his admission to practice: *Dodds v. Gregson*, 35 Wash. 402.

§ 121. Admissions on Motion—Law Graduates—Certificates.

The following applicants may be admitted on motion:—

(a) Graduates of the law department of the state university.

(b) Members of the bar of other states having been entitled to practice in the highest courts of record in their respective states for at least two years immediately preceding their application for admission to practice in this state: Provided, That such applicant upon showing the qualifications as provided in the next preceding section, the court, if satisfied of the applicant's fitness, shall enter an order permitting such applicant to practice law in this state for a period of one year, at the end of which time, the court being satisfied that such applicant is of good moral character and a fit and proper person to practice law in this state, an order shall be entered so admitting such applicant. [L. '09, p. 534, § 3. Cf. L. '03, p. 391, § 1.]

§ 122. Notice of Application for Examination—Fee.

All persons making application for admission to the bar as herein provided, shall file a notice of such application with the clerk of the supreme court at least one week before the date of such examination, as shall be fixed by rule of the supreme court, and shall pay to said clerk the sum of \$25, in full for all fees, for filing his application, entering his admission and the issuing of a certificate therefor, and the fee so paid to the clerk shall be accounted for by him as other fees. [L. '95, p. 179, § 5; L. '03, p. 392, § 3; L. '07, p. 407, § 1.]

This section may be superseded. \$20 changed to \$25, by § 120, supra.

§ 123. Examinations—Qualifications.

Examinations for admission to the bar shall be held at the state capital on the first Thursday and Friday after the second Monday in January, May, and October of each year, and shall be both oral and written as to the applicant's knowledge of the law. No person shall be admitted to such examination unless he present to the court evidence that he has sufficient general education to admit him to the freshman or higher class in the state university, or has completed a full four years' course in a high school of approved standing, or holds a certificate or diploma recognized as equal or equivalent to a diploma from such high school, or is the holder of a first grade teachers' certificate in this state, or a certificate of a higher grade. Nor shall any such applicant be examined unless he shall have filed with the clerk of the supreme court, two years before such examination, a notice of his commencement of the study of the law: Provided, this provision shall not apply to anyone taking the examination within two years after the taking effect of

this act, who shall on or before the first day of January, 1910, file with the said clerk a statement in which the time he commenced the study of the law is set forth, provided the time he applies for admission is at least two years after the time named in such statement. Every applicant shall also present an affidavit by some member of the bar of the supreme court, or a certificate from the dean, or head, of some law school of approved standing, to the effect that such applicant has regularly and attentively studied law under the direction of the affiant, or dean or head of such law school, as the case may be, for a period of two years: Provided, that thirty-five full weeks of study in a law school in any one year shall be equivalent to a year's study. [L. '09, p. 534, § 4. Cf. L. '95, p. 179, § 3.]

§ 124. Rules—Examining Board—Appointment—Compensation.

The supreme court shall make such other rules as may be necessary for the admission of applicants to practice law, and for the purpose of conducting the examination of applicants may appoint a board consisting of three lawyers, who shall hold their office for a term of three years unless sooner removed by the court: Provided, however, that the first appointments after the taking effect of this act one member shall be appointed for one year, one for two years and one for three years, and thereafter each member shall be appointed for a term of three years, except to fill a vacancy. No person shall be eligible as a member of such board unless he shall have been a member in good standing of the bar of the supreme court of this state for not less than five years immediately preceding his appointment, and no person shall be eligible to succeed himself on such board. Each member of said board shall be allowed ten dollars (\$10) per day for each day actually spent in the performance of his duties, and five cents per mile for each mile actually and necessarily traveled in going to and returning from attendance on the court to conduct such examinations. [L. '09, p. 535, § 5. Cf. L. '03, p. 391, § 1.]

§ 125. Oath.

Every person before being admitted to practice law in this state shall take and subscribe the following oath:

(1) I will support the constitution of the United States and the constitution and laws of the state of Washington;

(2) I will maintain the respect due to the courts of justice and judicial officers;

(3) I will not counsel or maintain any suit or proceedings which shall appear to be illegal and unjust except such as I believe to be honestly debatable under the law of the land;

(4) I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth, and never seek to mislead the judge or jury by any artifice or false statement of fact or law;

(5) I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with his business except from him or with his knowledge and approval;

(6) I will abstain from all offensive personalities and advance no fact prejudicial to the honor or reputation of a fellow attorney, party or witness unless required by the justice of the cause with which I am charged;

(7) I will never reject from any consideration of personal matters the cause of the defenseless or oppressed or delay any man's cause for lucre or malice, so help me God. [L. '09, p. 535, § 6.]

§ 126. Revocation of License.

Upon the production of proof to the supreme court that any person admitted to practice law in this state, has been at the time of his admission to practice law, disbarred or suspended from practice in any state or territory of the United States, or that there was pending against such person any proceedings for disbarment or suspension in any such state or territory at the time of his admission to practice here laboring under any disability to practice in the courts, of any such state or territory, or that such person had ever been, at the time of his admission to practice here, convicted of a felony or misdemeanor involving moral turpitude, then said supreme court shall revoke and cancel the certificate of admission granted to such person. The proceedings for the revocation and cancellation of such certificate may be taken by the court of its own motion, or may be taken upon the information of another, and in either case the party shall have the privilege of making his own defense; such proceedings shall be by motion and answer, and evidence may be examined on either side. [L. '09, p. 536, § 7.]

For removal and suspension, see § 139, *infra*.

§ 127. (4763.) Disqualifications.

No person shall practice as an attorney and counselor at law in any court of this state who does not reside in the state, or is not a citizen of the United States, or who holds a commission as judge of any court of record, or who is a sheriff, coroner or deputy sheriff; nor shall the clerk of the supreme court or of the superior court, or the deputy of either, practice in the particular court of which he is clerk or deputy clerk; but nothing herein contained shall prevent attorneys and counselors at law, who reside without this state, practicing in this state, unless the state or territory in which they reside prohibits attorneys and counselors at law residing in this state to practice therein, but nothing herein contained shall prevent any judge of any of the courts of this state from finishing any business by him undertaken in the district, circuit or supreme court of the United States prior to his election as judge. [L. '95, p. 179, § 6.]

See *supra*, § 81, clerk of court or partner.

See *supra*, § 49, partners of justices of the peace.

See *supra*, § 55, judicial officer.

Nonresident attorneys who have been admitted to the bar in this state, may sue summons in actions in this state: *Wagnitz v. Ritter*, 31 Wash. 343.

§ 128. (4764.) No Exclusion on the Ground of Sex.

No person shall be excluded from acting as an attorney at law and practicing in all the courts of this state on account of sex. [L. '95, p. 180, § 7.]

§ 129. (4765.) Duties of Attorneys and Counselors.

It shall be the duty of an attorney and counselor,—

1. To support the constitution of the United States and the laws of the state;
2. To maintain the respect due to the courts of justice and judicial officers;
3. To counsel or maintain such actions, proceedings, or defenses only as appear to him legal and just, except the defense of a person charged with a public offense;
4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judge by any artifice or false statement of fact or law;

5. To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client;

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;

7. Never to reject, from any consideration personal to himself, the cause of the defenseless or oppressed. [L. '63, p. 404, § 5; Cd. '81, § 3279; 2 H. C., § 94.]

Cited in 5 Wash. 332; 18 Wash. 480; 48 Wash. 158.

See 1 Remington's Digest, pp. 323, 324, §§ 30-34.

An attorney, when he enters into the employ of another, undertakes that he possesses a reasonable amount of skill and knowledge as an attorney and also that he will exercise the same in the course of his employment, but he is not a guarantor of results nor liable for losses unless occasioned by neglect or want of reasonable skill and knowledge as an attorney: *Isham v. Parker*, 3 Wash. 755, 778.

Professional confidence once reposed in an attorney cannot be divested by the expiration of his professional employment: *Nichols v. Griffin*, 1 W. T. 374. But see *Messenger v. Murphy*, 33 Wash. 353.

An attorney is an officer of the court and takes his office with all its burdens as well as privileges; and among the burdens thus assumed as that of being obliged, when requested by the court, to conduct without compensation the defense of pauper criminals, where the law provides no compensation therefor: *Presby v. Klickitat Co.*, 5 Wash. 329, 332.

Assignment as counsel by the court: See 2 Remington's Digest, p. 317, § 5; *Jenkins v. Jenkins University*, 17 Wash. 160.

As to acting for adverse parties, see 1 Remington's Digest, p. 317, §§ 3, 4; *Clarke County v. County Commrs.* 1 W. T. 250; *Nickles v. Griffin*, 1 W. T. 374; *Messenger v. Murphy*, 33 Wash. 353; *Shine v. Culver*, 42 Wash. 484.

Dealings between attorney and client:

See 1 Remington's Digest, pp. 323, 324, §§ 32-34.

As to what facts do not show fraud on part of attorney, see *Snohomish Land Co. v. Blood*, 40 Wash. 626; *Gaffney v. Jones*, 18 Wash. 311.

A sale of mining stock by an attorney to his client, an old lady inexperienced in business matters, for whom he had been transacting business, will be canceled for fraud, if proved: *Landis v. Wintermute*, 40 Wash. 673.

The fact that an attorney, while conducting litigation respecting certain land in behalf of a client, buys up the tax titles against such land, would not constitute a violation of his duty as attorney: *Payette v. Willis*, 23 Wash. 299. Attorney taking assignment of mortgage for his corporation: See *Security Sav. Soc. v. Cohalan*, 31 Wash. 266.

Attorney buying outstanding title adverse to his client: See *Carson v. Fogg*, 34 Wash. 448.

An attorney is guilty of contemptuous conduct warranting his suspension from practice, under this section, where his petition for a rehearing attempts to intimidate the court into rendering a favorable decision by setting forth that scandalous and offensive rumors are current to the effect that a majority of the court had prejudged the case and agreed to dismiss the appeal in return for political favors received, and that the only way to refute such scandals and uphold the dignity of the court would be to deny the motion to dismiss and hear the case on its merits: *In re Robinson*, 48 Wash. 153.

§ 130. (4766.) Authority of Attorneys and Counselors.

An attorney and counselor has authority,—

1. To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of or any of the proceedings in an action or special proceeding, unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him, or signed by the party against whom the same is alleged, or his attorney;

2. To receive money claimed by his client in an action or special proceeding during the pendency thereof, or after judgment upon the payment thereof, and not otherwise, to discharge the same or acknowledge satisfaction of the judgment;

3. This section shall not prevent a party employing a new attorney, or from issuing an execution upon a judgment, or from taking other proceedings prescribed by statute for its enforcement. [L. '63, p. 404, § 6; Cd. '81, § 3280; 2 H. C., § 95.]

See *infra*, § 133, change of attorney.

Cited in 7 Wash. 213; 23 Wash. 251; 23 Wash. 492; 34 Wash. 234; 41 Wash. 30; 46 Wash. 44.

Retainer and authority: See 1 Remington's Digest, pp. 318-323, §§ 10-29.

An attorney may discontinue a suit by virtue of his general power as an attorney of record: *Simpson v. Brown*, 1 W. T. 247.

Courts will not allow an issue to be joined where both plaintiff and defendant are represented by the same attorney: *Clark County v. Commrs.*, 1 W. T. 250; *Simpson v. Brown*, *supra*.

An attorney employed by a railroad company specially to represent it in a condemnation proceeding has no authority to bind the company by an agreement for the payment of damages to a person not a party to the proceeding: *Haynes v. Tacoma, Olympia etc. Ry. Co.*, 7 Wash. 211.

The guardian of a minor who wages an action has the same right to control it that any other suitor has, and may stipulate for a dismissal of an appeal regardless of the objections of his attorney: *South Bend Land Co. v. Denio*, 7 Wash. 303. See, also, *Schultheis v. Nash*, 27 Wash. 250.

Money and notes secured by mortgage received by an attorney in settlement of a client's claim, though one of the notes is payable to the attorney, belong, in the absence of some special agreement, to the client, who may intervene in a foreclosure suit brought by the attorney, and obtain a decree for his use and benefit: *Parker v. Esch*, 5 Wash. 296.

The court will not presume, merely because one of the defendants is represented specially by a firm, one of whose members has the same surname as the attorney signing the stipulation, that the latter is a member of said firm: *Haas v. Gaddis*, 1 Wash. 89, 93.

For power to sell as agent, see *Scully v. Book*, 3 Wash. 182.

Although a stipulation for the compromise of a suit may have been entered into by the attorneys for the respective parties, without authority, yet it will be sufficient if it appears that their action was subsequently ratified by their clients: *Denney v. Parker*, 10 Wash. 218.

The fact that the attorney for a plaintiff in a mortgage foreclosure suit was also the attorney for a claimant in a lien foreclosure suit, involving the same property, will not charge the lien claimant with notice of the pendency of the suit of mortgage foreclosure, when he has not been made a party nor has knowledge

thereof through a lis pendens: *Pacific Mfg. Co. v. Brown*, 8 Wash. 347.

A party is charged with the notice of a fact of which his attorney has knowledge, where such knowledge is obtained in the course of his employment for the party sought to be charged therewith: *Pacific Mfg. Co. v. Brown*, *Id.*; following *Hood v. Fahnestock*, 8 Watts. 489, 34 Am. Dec. 489; *Rodgers v. Palmer*, 102 U. S. 263. See, also, *Deering v. Holcomb*, 26 Wash. 588.

A judgment rendered against a party not served with process, but upon the appearance of an unauthorized attorney, will be set aside as a nullity when the relief therefrom is claimed promptly and proof of unauthorized is clear and convincing: *McEachern v. Brackett*, 8 Wash. 652, 655.

Acceptance of an attorney of the fruits of a decree in the lower court will, as a general rule, be regarded as the acceptance of his client: *Lyons v. Alexander*, 1 W. T. 482.

And the fact that the moneys received were afterward returned does not change the rule: *Id.*

A creditor is chargeable with the knowledge of his attorney that he intends to make an assignment at the time he confesses judgment in favor of a creditor, though such knowledge was gained while the attorney had been the attorney for the debtor: *Heyman v. Barmon*, 6 Wash. 516, 519.

In an action by an attorney to recover pay for services rendered in certain cases, it is not error to refuse to instruct that "the burden of proof is upon the attorney in all such cases to show the validity of the contract made and dealings had with his client": *Isham v. Parker*, 3 Wash. 755, 765.

In a suit to recover attorney's fees, when plaintiff has shown the character of services rendered by him and time occupied therein, the testimony of other attorneys is competent as to what such services were worth: *Id.*

Where an attorney is under a written contract to receive a stated compensation for conducting certain cases through the courts to the court of last resort, he is entitled to extra compensation for all unusual proceedings and services therein: *Id.*

And the fact that additional counsel were employed with his consent does not deprive him from recovering the reasonable worth of his services, irrespective of the number of counsel engaged therein: *Id.* See *Ramage v. Littlejohn*, 17 Wash. 386.

Under a contract whereby an attorney agrees to render professional services in certain cases for a reasonable attorney's fee, such as the client thinks reasonable and is able to pay, the attorney is bound by the client's judgment as to what is a reasonable fee, in the absence of a showing that the client has refused, through some fraudulent or other bad motive, to name or pay what is clearly a reasonable fee: *Howe v. Kenyon*, 4 Wash. 677.

Receipt by attorney of a party to a judgment, given to the clerk of court for money paid into clerk's office in satisfaction of the judgment, will bind the client: *Lyons v. Bain et al.*, 1 W. T. 482. See, also, *High v. Emerson*, 23 Wash. 103; *Gaffney v. Megrath*, 23 Wash. 476.

Stipulation by attorney, who, without objection, has appeared generally in an action, that notice of appeal might be given and statement of facts settled after the expiration of the time limited by law, is binding on all the defendants, though other defendants were represented, specially, by other attorneys; and the fact that a third defendant was specially represented by a firm, one of whose members bears the same surname as the attorney stipulating, will not warrant the court in assuming the attorney signing the stipulation was the member of the firm, and that he represented only the third defendant: *Haas v. Gaddis*, 1 Wash. 89.

Scope of authority in general: See *Ashcraft v. Powers*, 22 Wash. 440; *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346; *Eldridge v. Stenger*, 19 Wash. 697; *Smalley v. Laugenour*, 30 Wash. 307.

By accepting the benefits of a stipulation made by its attorney in compromising a suit to foreclose sewer and grade assessments, a city is estopped to question the authority of the attorney, or the validity of the judgment confessed, by reason of the fact that the settlement and judgment included the discharge of taxes and assessments: *State ex rel. Lippincott v. Spokane*, 44 Wash. 688.

Control of judgment: See *Sturgiss v. Dart*, 23 Wash. 244; *Carson v. Fogg*, 34 Wash. 448.

SATISFACTION OF JUDGMENT OR EXECUTION.—If the attorney of record is specially authorized to compromise the

suit after judgment, he may satisfy the same of record upon the full execution of an agreement of settlement made by him: *High v. Emerson*, 23 Wash. 103.

An attorney employed by a guardian ad litem to prosecute an action for a minor has authority to receive payment of the judgment and enter satisfaction thereof, where there is no general guardian, especially in view of above section: *State ex rel. Lane v. Ballinger*, 41 Wash. 23.

Settlements, compromises, and releases in general: See 1 Remington's Digest, p. 322, §§ 26, 27; *Livesley v. Pier*, 11 Wash. 268; *High v. Emerson*, 23 Wash. 103; *Collins v. Fidelity Trust Co.*, 33 Wash. 136; *Sawyer v. Vermont Loan etc. Co.*, 41 Wash. 524; *Lambert v. Gillette*, 24 Wash. 726; *Gaffney v. Megrath*, 23 Wash. 476.

The attorney's knowledge of fraudulent acts by the adverse party even if acquired in past transactions is constructive notice to his client, when there is no showing of collusion between the attorney and the adverse party: *Deering v. Holcomb*, 26 Wash. 588.

Where, after a judgment for plaintiff has been assigned, an appeal is taken and plaintiff's attorney of record appeared for the respondent on the appeal, he was the attorney for the assignee of the judgment, although paid by the plaintiff, and had authority to receive payment and satisfy the judgment under this section: *Hayes v. Koepyi*, 46 Wash. 43.

Where an attorney foreclosed a mortgage upon a tract of land subject to a water right, the extent of which was in dispute, and in litigating the question suppressed knowledge of a lost unrecorded deed which granted to the defendants the greater water right contended for by them, whereby a decree was entered in favor of the plaintiffs adjudging the premises subject to the lesser water right only, the knowledge of the attorney becomes the knowledge of another of his clients who purchased the lesser right shortly after the foreclosure, who accordingly would not be entitled to equitable relief to obtain the greater water right as against the purchaser at the foreclosure sale: *Schmidt v. Olympia Light and Power Co.*, 46 Wash. 360.

§ 131. (4767.) Proceedings When Attorney Appears Without Authority.

If it be alleged by a party for whom an attorney appears that he does so without authority, the court may at any stage of the proceedings relieve the party for whom the attorney has assumed to appear from the consequences of his act; it may also summarily, upon motion, compel the attorney to repair the injury to either party consequent upon his assumption of authority. [L. '69, p. 405, § 7; Cd. '81, § 3281; 2 H. C., § 96.]

Cited in 21 Wash. 436.

As to proof of authority, see 1 Remington's Digest, p. 318, §§ 11-13; *Ashcraft v. Powers*, 22 Wash. 440; *Lacaff v. Dutch*

Miller Min. & Smelt. Co., 31 Wash. 566; *Fernald v. Spokane and British Col. Tel. & Tel. Co.*, 31 Wash. 672; *Turner v. Turner*, 33 Wash. 118; *Dormitzer v. German*

Savings & Loan Soc., 23 Wash. 132; Erickson v. McNeeley & Co., 41 Wash. 509; Roberts v. Railway Co., 21 Wash. 428.

As to employment of attorney, see 1 Remington's Digest, p. 325, § 35; Ramage v. Littlejohn, 17 Wash. 386; Schultheis v.

Nash, 27 Wash. 250; Sullivan's Estate, In re, 36 Wash. 217.

Sufficiency and proof of authority to settle: See 1 Remington's Digest, p. 322, § 27; Timm v. Timm, 34 Wash. 228; Erickson v. McNeeley & Co., 41 Wash. 509.

§ 132. (4768.) Attorney may be Required to Show Authority.

The court or a judge may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove the authority under which he appears, and until he does so, may stay all proceedings by him on behalf of the party for whom he assumes to appear. [L. '63, p. 405, § 8; Cd. '81, § 3282; 2 H. C., § 97.]

A party for whom an attorney assumes to act may question the attorney's authority in a proceeding to set aside the judg-

ment: Dormitzer v. German Sav. & Loan Soc., 23 Wash. 132.

§ 133. (4769.) Change of Attorneys.

The attorney in an action or special proceeding may be changed at any time before judgment or final determination as follows:—

1. Upon his own consent, filed with the clerk or entered upon the minutes; or

2. Upon the order of the court, or a judge thereof, on the application of the client, or for other sufficient cause; but no such change can be made until the charges of such attorney have been paid by the party asking such change to be made. [L. '63, p. 405, § 9; Cd. '81, § 3283; 2 H. C., § 98.]

Cited in 23 Wash. 305; 27 Wash. 114; 27 Wash. 255.

Change and substitution: See 1 Remington's Digest, pp. 319, 320, §§ 14-16; Belle City Mfg. Co. v. Kemp, 27 Wash. 111; Schultheis v. Nash, 27 Wash. 250; Payette v. Willis, 23 Wash. 299; Farwell v. Colman, 35 Wash. 308.

In an action to recover attorney's fees by an attorney who had been discharged, evidence on the part of the defendant that plaintiff did not attend to the taking of certain depositions is inadmissible under an answer alleging a discharge on account of plaintiff's improper conduct in having instigated the case, and where it did not appear that the depositions were necessary: Sessions v. Warwick, 46 Wash. 165.

In an action by an attorney to recover on an entire contract for the payment of \$1,000 for services to be rendered in an-

other suit, the jury is properly discharged and judgment rendered for the plaintiff, where the defendant's evidence admits the contract and the balance due, and there was no evidence of any defense to go to the jury; it appearing that the only ground alleged in the answer for discharging the plaintiff was known to the defendant before employing the plaintiff: Sessions v. Warwick, 46 Wash. 165.

A party plaintiff may settle his cause of action without the consent of his attorney notwithstanding an agreement that the attorney was to be compensated by receiving one-half of the amount of any judgment recovered, where no collusion or fraud against the attorney is practiced and the attorney has not taken the steps provided by statute for asserting a lien upon the subject matter of the action: McRea v. Warehime, 49 Wash. 194.

§ 134. (4770.) Notice of Change and Substitution.

When an attorney is changed, as provided in the last section, written notice of the change, and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party; until then, he shall be bound to recognize the former attorney. [L. '63, p. 405, § 10; Cd. '81, § 3284; 2 H. C., § 99.]

See notes to last section.

Cited in 3 Wash. 392; 27 Wash. 114.

§ 135. (4771.) Proceedings on Death or Removal of Attorney.

When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney must, at least twenty days before any further proceedings against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person. [L. '63, p. 405, § 11; Cd. '81, § 3285; 2 H. C., § 100.]

Cited in 35 Wash. 387.

This section does not apply to a voluntary withdrawal by the attorney, since a twenty days' delay could thereby be secured by collusion: *McInnes v. Sutton*, 35 Wash. 384.

§ 136. (4772.) Lien of Attorneys.

An attorney has a lien for his compensation, whether specially agreed upon or implied, as hereinafter provided,—

1. Upon the papers of his client, which have come into his possession in the course of his professional employment;
2. Upon money in his hands belonging to his client;
3. Upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;
4. Upon a judgment to the extent of the value of any services performed by him in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed, and date of filing notice. [L. '63, p. 406, § 12; Cd. '81, § 3286; 2 H. C., § 101.]

See §§ 474, 475, *infra*, relating to compensation of attorneys.

Cited in 3 Wash. 375; 11 Wash. 208; 23 Wash. 307; 25 Wash. 511; 41 Wash. 196.

See 1 Remington's Digest, pp. 327, 328, §§ 45-48.

Where parties to an action, on a hearing before a court commissioner, agree that the commissioner shall fix the attorney fee therein, no proof is necessary as to what constitutes reasonable attorneys' fees: *Wheeler v. Ralph*, 4 Wash. 617, 625.

A finding that \$250 is a reasonable attorney's fee for services rendered is without support, where the case was tried upon an agreed statement of facts which fails to state what was a reasonable amount; and where it was agreed that a bill for \$150 had been presented before suit, the judgment will, on appeal, be reduced to such amount: *Bates v. School District No. 10 of Pierce County*, 45 Wash. 498.

Where a county attorney seeks to recover fees from a school district for attending to the trial of a case, rendered upon request of the district, without any express agreement, the fact that for five years previously, while the attorney was first deputy, the school district had been in the habit of paying the county attorney for such services is material, as it shows that the attorney was not estopped to recover fees by reason of a course of

conduct in the county attorney's office: *Bates v. School District No. 10 of Pierce County*, 45 Wash. 498.

Three thousand five hundred dollars is an unreasonable allowance for attorney's fees for services rendered in securing a restraining order preventing the dismantling of a smelter and the removal of machinery, the property being worth \$250,000, where it appears that the application therefor was not contested and the order was continued in force from time to time without resistance, the complaint embracing only six pages of typewritten matter: *McMullan v. Northport Smelting and Refining Co.*, 49 Wash. 76.

ATTORNEY'S LIEN.—Mandamus will not lie against the mayor and city clerk to pay attorney's lien filed on judgment obtained for a client against the city, which client had assigned and satisfaction of which had been entered of record, where no judicial proceedings have been had to determine validity: *Chambers v. Territory of Washington*, 3 W. T. 280.

Where attorneys have filed a lien against a money decree in divorce for their fees, the court has power to summon them before it to determine what lien they have, and what would be a reasonable fee for their services: *State v. Sachs*, 3 Wash. 311.

The fact that an attorney has knowledge of an assignment by his client of a claim which he is prosecuting to judgment will not estop the attorney from claiming a lien upon the judgment recovered, when there has been no express waiver of the right of lien: *Niagara Fire Ins. Co. v. Hart*, 13 Wash. 651.

Although a judgment debtor may have notice of a lien claimed by the attorney for the adverse party, such judgment debtor has a right to pay the amount of the judgment into court to be thereafter disbursed to the proper parties entitled thereto, and such payment would discharge all his obligations under the judgment and lien: *Wooding v. Crain*, 11 Wash. 207.

The fact that an attorney had perfected his lien against a judgment in the superior court, from which an appeal had been taken, would not, when notice of lien had not been filed with the clerk of the supreme court, preclude that officer from disbursing the amount paid on the judgment entered in the supreme court, free of all claim of lien: *Id.*

The general or retaining lien of an attorney at common law, and by this section, is nonassignable and lost by delivery of the papers, and cannot be enforced by action: *Gottstein v. Harrington*, 25 Wash. 508.

§ 137. (4773.) Proceedings to Compel Delivery of Papers.

When an attorney refuses to deliver over money or papers to a person from or for whom he has received them in the course of professional employment, whether in an action or not, he may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he should not be punished for a contempt. [L. '63, p. 406, § 13; Cd. '81, § 3287; 2 H. C., § 102.]

Cited in 3 Wash. 16, 376.

§ 138. (4774.) Proceedings Where Lien Exists.

If, however, the attorney claim a lien upon the money or papers, under the provisions of this chapter, the court or judge may,—

1. Impose as a condition of making the order that the client give security, in a form and amount to be directed, to satisfy the lien, when determined in an action;

2. Summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or

3. To refer it, and upon the report determine the same as in other cases. [L. '63, p. 406, § 14; Cd. '81, § 3288; 2 H. C., § 103.]

As to lien for contingent fees, see *Carson v. Fogg*, 34 Wash. 448.

§ 139. (4775.*) Removal and Suspension of Attorneys.

An attorney and counselor may be removed or suspended by any court of record of the state, for either of the following causes, arising after his admission to practice: 1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence. 2. Willful and malicious disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of, his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney and counselor. 3. Corruptly or willfully, and without authority, appearing as attorney for a party to an action or proceeding. 4. Lending his name to be used as attorney and counselor by another person who is not an attorney and counselor. 5. For the commission of any act involving moral turpitude, dishonesty or corruption, whether the same be committed in the course of his relations as an attorney or counselor at law, or otherwise, and whether the same shall constitute a felony or misdemeanor or not; and in the event that

such act shall constitute a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disbarment or suspension from practice therefor. 6. In all cases where an attorney is removed or suspended by a superior court, the judgment or order of removal or suspension may be reviewed on appeal by the supreme court. [L. '09, p. 130, § 1. Cf. L. '63, p. 406, § 15; Cd. '81, § 3289; 2 H. C., § 104; L. '97, p. 9, § 1.]

Violation of duty: See *supra*, § 129, and notes.

Revocation of license: See *supra*, § 126.

Cited in 32 Wash. 58; 45 Wash. 88.

See 1 Remington's Digest, pp. 317, 318, §§ 6-9.

Where the court has fined an attorney for contempt and entered an order suspending him from practice therein until he has purged himself from the contempt by apologizing, the supreme court can intervene by mandamus to compel said court to vacate and set aside the order of suspension: *State v. Sachs*, 2 Wash. 373.

The right of an attorney to appear in court, being property, cannot be taken from him excepting by due process of law: *State v. Sachs*, *supra*, 376.

A petitioner for disbarment of an attorney has no such interest in the subject matter thereof as to entitle him to appeal from a judgment of dismissal of his petition: *In re Ault's Disbarment*, 15 Wash. 417.

Jurisdiction of the supreme court to suspend: *Lambuth*, *In re*, 18 Wash. 478; *Waugh*, *In re*, 32 Wash. 50. The supreme court has inherent original jurisdiction, irrespective of statutes, to suspend or disbar an attorney for contemptuous conduct: *In re Robinson*, 48 Wash. 153.

Grounds for suspension or for striking from roll: See *Lambuth*, *In re*, 18 Wash. 478; *Jones v. Waugh*, 20 Wash. 711.

Findings of fact showing the securing of employment as an attorney through false representations as to other counsel, and as to the status of a case pending in the supreme court, and the representing of adverse interests in the same case, and conduct while acting as judge which necessarily involves immorality as a man and

lawyer, are sufficient to support a judgment of disbarment of an attorney for unprofessional conduct, without regard to any provision of the barratry statute of 1903 prohibiting the solicitation of business; since this section authorizing the removal of an attorney for any violation of his oath or of his duties as an attorney comprehends all acts involving the attorney's honesty and reliability: *State ex rel. Dill v. Martin*, 45 Wash. 76.

The state courts have jurisdiction to disbar an attorney for the solicitation of money for the purpose of bribing a referee in bankruptcy, appointed by the United States court, as it directly involves the attorney's integrity and professional conduct, and it is immaterial in what court the act was committed: *State ex rel. Hardin v. Grover*, 47 Wash. 39.

In proceedings in disbarment of an attorney founded on two distinct charges, findings stated as if the charge contained but one specification are sufficient, as the law does not require findings to be separated as to distinct causes of action: *Id.*

A disavowal of improper motive in the employment of scandalous and contemptuous language in a petition for a rehearing, with an apology, will not be considered a complete defense to disbarment proceedings, where the attorney had long experience at the bar; and the offense being flagrant, mere reprimand is insufficient, and the attorney will be suspended for six months, and costs of briefs taxed against him: *In re Robinson*, 48 Wash. 153.

§ 140. (4776.) Proceedings for Removal or Suspension.

The proceedings to remove or suspend an attorney and counselor, as provided in the last section, must be taken by the court of its own motion for matter within its knowledge, or may be taken upon the information of another, and in either case the party shall have the privilege of making his defense. [L. '63, p. 406, § 16; Cd. '81, § 3290; 2 H. C., § 105.]

See Rule XXXIV, 51 Wash. xlv.

Cited in 45 Wash. 84.

Nature of proceedings to disbar: See 1 Remington's Digest, p. 318, § 8; *Waugh*, *In re*, 32 Wash. 50; *Ault's Disbarment*, *In re*, 15 Wash. 417; *State ex rel. Martin v. Poindexter*, 43 Wash. 147.

Proceedings for the disbarment of an attorney at law may be instituted on the

information or relation of the bar association composed of attorneys who are members of the bar of the county: *State ex rel. Dill v. Martin*, 45 Wash. 76.

In a proceeding for the disbarment of an attorney, it is reversible error to tax costs against the defendant, there being no statute in this state authorizing costs against either party: *Id.*

§ 141. (4777.) Mode of Proceeding.

Such proceedings shall be by motion and answer, and evidence may be examined on either side. [L. '63 p. 407, § 17; Cd. '81, § 3291; 2 H. C., § 106.]

For revocation of license: See *supra*, § 126.

§ 142. (4778.) Persons not Admitted cannot Practice.

No person shall practice in any court of record except a party or his regularly authorized attorney and counselor at law: Provided, that nothing herein contained shall be so construed as to prevent a party from employing any person to assist him in the preparation of his papers in the case before the time of trial, nor so as to prevent any person from trying any particular cause in court, leave of court being first had and obtained, and entered of record. [L. '63, p. 407, § 18; Cd. '81, § 3292; 2 H. C., § 107.]

This section is probably superseded by § 119, *supra*.

PROCEDURE IN COURTS OF RECORD.

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CHAPTER I.

RULES OF DECISION AND CONSTRUCTION.

§ 143. (4783.) **Common Law, How Far Prevails.**

The common law, so far as it is not inconsistent with the constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state. [Cf. L. '63, p. 88, § 1; Cd. '81, § 1; L. '91, p. 31, § 1; 2 H. C., § 108.]

Common-law offenses: See *infra*, §§ 2299, 2723.

Cited in 3 Wash. 226; 14 Wash. 78; 17 Wash. 281; 19 Wash. 252; 23 Wash. 355; 29 Wash. 638; 30 Wash. 279; 33 Wash. 388.

The statute of frauds and of 13th Elizabeth are in force in this state by virtue of this section: *Wagner v. Law*, 3 Wash. 502; *Bates v. Drake*, 28 Wash. 447; *Richards v. Redelsheimer*, 36 Wash. 325.

What is meant by this section is, that where there are no governing provisions of the written laws, the courts of this state are to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law; but not that the decisions of the English courts are to be taken blindly and without inquiry as to their reasoning and application to the circumstances: *Sayward v. Carlson*, 1 Wash. 29, 40, 41; *Lane v. Spokane Falls & N. R. Co.*, 21 Wash. 119.

The phrase "laws of the United States," as used in the organic act, does not relate simply to statute law, but embraces all other rules of propriety and conduct in which the supreme power exhibits, and according to which it exerts its governmental force. "Laws of the territory" means the laws which the territory, considered as a political power subordinate to the general government, has authority to administer: *Phelps v. S. S. City of Panama*, 1 W. T. 519, 525.

The statutory action for the possession of real property is the common-law action of ejectment, with the added incident of the determination of title, and the departure of allowing action against one not in possession, but claiming an interest or title to the land: *Smith v. Wingard*, 3 W. T. 291, 298.

The rule of the common law that the flow of surface water from premises of an upper proprietor to those of a lower may not be obstructed or diverted to his damage is in force in this state: *Cass v. Dicks*, 14 Wash. 75, 78.

The common law of England was expressly adopted by the first legislature of the territory of Washington and applies in all its original rigor in this state: *State v. Williams*, 18 Wash. 47.

§ 144. (4784.) Laws to be Liberally Construed.

The provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction. [Cf. L. '54, p. 221, § 504; Cd. '81, §§ 758, 1686; L. '91, p. 40, § 1; 2 H. C., § 1707.]

See *infra*, § 285, pleadings to be liberally construed.

See *infra*, § 677, in cases of attachment.

See *infra*, §§ 1208, 1209, in cases of statutory liens.

See *infra*, § 1147, in cases of mechanic's liens.

Construction of criminal laws: See *infra*, § 2298.

General rules of construction—Application—Principles of construction: See 2 Remington's Digest, p. 2628, §§ 53, 54; *Bloomer v. Todd*, 3 W. T. 599; *Coleman v. Yesler*, 1 W. T. 591; *Armour & Co. v. Western Const. Co.*, 36 Wash. 529; *Townsend Gas etc. Co. v. Hill*, 24 Wash. 469; *State ex rel. Improvement Co. v. Bridges*, 19 Wash. 431.

Judicial authority and duty: See 2 Remington's Digest, p. 2628, § 55; *Spokane & Eastern Trust Co. v. Lavigne*, 14 Wash. 681; *State ex rel. Calderwood v. Schomber*, 23 Wash. 573; *Smith v. Seattle*, 25 Wash. 300; *State v. Vance*, 29 Wash. 435; *State ex rel. Campbell v. Superior Court*, 25 Wash. 271.

Intention of legislature—Meaning of language: See 2 Remington's Digest, pp. 2628, 2629, §§ 56-59; *Bloomer v. Todd*, 3 W. T. 599; *Northern Pac. R. Co. v. Haas*, 2 Wash. 376; *Olympia Water Works v. Thurston County*, 14 Wash. 268; *State ex rel. Chamberlain v. Daniel*, 17 Wash. 111; *Palmer v. Laberee*, 23 Wash. 409; *Dennis v. Moses*, 18 Wash. 537; *Point Roberts Fishing Co. v. George & Barker Co.*, 28 Wash. 200; *State ex rel. McKenzie v. Forrest*, 11 Wash. 227; *Knipe v. Austin*, 13 Wash. 189; *Townsend Gas & Elec. Co. v. Hill*, 24 Wash. 469; *Farwell v. Seattle*, 43 Wash. 141; *Scouten v. Whatcom*, 33 Wash. 273.

Statute as a whole and intrinsic aids to construction: See 2 Remington's Digest, pp. 2629, 2630, §§ 60-64; *Davidson v. Carson*, 1 W. T. 307; *Mead v. French*, 4 Wash. 11; *State v. McArthur*, 5 Wash. 558; *State ex rel. Chamberlain v. Daniel*, 17 Wash. 111; *New Whatcom v. Roeder*, 22 Wash. 570; *Bloomer v. Todd*, 3 W. T. 599; *Dennis v. Moses*, 18 Wash. 537; *Barto v. Stewart*, 21 Wash. 605; *Littell & Smythe Mfg. Co. v. Miller*, 3 Wash. 480; *McKnight v. McDonald*, 34 Wash. 98; *Mills v. Thurston County*, 16 Wash. 378; *State ex rel. Swan v. Taylor*, 21 Wash. 672; *State v. Hall*, 24 Wash. 255; *State ex rel. Zenner v. Graham*, 34 Wash. 81.

Extrinsic aids to construction: See 2 Remington's Digest, pp. 2630, 2631, §§ 64, 71; *State v. Sharpless*, 31 Wash. 191; *How-*

lett v. Cheetham, 17 Wash. 626; *Scouten v. Whatcom*, 33 Wash. 273; *State ex rel. Chamberlain v. Daniel*, 17 Wash. 111; *McSorley v. Hill*, 2 Wash. 638; *Keane v. Brygger*, 3 Wash. 338; *Spokane & Eastern Trust Co. v. Young*, 19 Wash. 122; *Hicks v. King*, 21 Wash. 567; *Semon v. Callvert*, 27 Wash. 679; *Graves v. Seattle*, 8 Wash. 248; *State ex rel. Heaton v. Beman*, 15 Wash. 24.

Construction with reference to other statutes: See 2 Remington's Digest, pp. 2630, 2631, §§ 69-71; *New Whatcom v. Roeder*, 22 Wash. 570; *Newman v. North Yakima*, 7 Wash. 220; *Ford v. Durie*, 8 Wash. 87; *School Dist. v. Fairchild*, 10 Wash. 198; *State ex rel. Smith v. Parker*, 12 Wash. 685; *Chelan County v. Navarre*, 38 Wash. 684; *State v. Sharpless*, 31 Wash. 191; *Davidson v. Carson*, 1 W. T. 307; *State ex rel. Malony v. Spike*, 19 Wash. 652.

Construction of statutes adopted from other states or countries: See 2 Remington's Digest, p. 2631, § 72; *Spokane Lumber Co. v. McChesney*, 1 Wash. 609; *Brown v. Seattle*, 5 Wash. 35.

Construction as mandatory or directory: See 2 Remington's Digest, p. 2632, § 73; *Tolmie v. Dean*, 1 W. T. 46; *Seattle & Montana Ry. Co. v. O'Meara*, 4 Wash. 17.

Provisos, exceptions and saving clauses—Codes: See 2 Remington's Digest, p. 2632, §§ 74, 75; *Germond v. Tacoma*, 6 Wash. 365; *State v. Wilson*, 9 Wash. 218; *State ex rel. Chamberlain v. Daniel*, 17 Wash. 111; *Sackman v. Thomas*, 23 Wash. 660; *Nathan v. Spokane County*, 35 Wash. 26; *Marston v. Humes*, 3 Wash. 267; *Littell v. Smyth Mfg. Co. v. Miller*, 3 Wash. 480.

Liberal or strict construction as affected by nature of act: See 2 Remington's Digest, p. 2632, §§ 76, 77; *Hays v. Miller*, 1 W. T. 143; *Smith v. United States*, 1 W. T. 262; *Scott v. Patterson*, 1 Wash. 487; *Thurston County v. Sisters of Charity*, 14 Wash. 264; *Seattle v. Fidelity Trust Co.*, 22 Wash. 154; *State ex rel. Atty. Gen. v. Superior Court*, 36 Wash. 381; *State ex rel. Wyman, Partridge & Co. v. Superior Court*, 40 Wash. 443; *United States, Use etc. v. Aetna Indemnity Co.*, 40 Wash. 87; *Mc-*

Carty v. State, 1 Wash. 377; *Hathaway v. McDonald*, 27 Wash. 659.

Time of taking effect: See 2 Remington's Digest, p. 2633, §§ 78-81; *State ex rel. Stratton v. Rogers*, 24 Wash. 417; *In re Boyce*, 25 Wash. 612; *Leschi v. Washington Territory*, 1 W. T. 13; *Boyer v. Fowler*, 1 W. T. 101.

Retroactive operation—Express provisions—Retrospective construction: See 2 Remington's Digest, pp. 2633, 2634, §§ 82, 83; *State ex rel. Savings Union v. Whittlesey*, 17 Wash. 447; *Garrison v. Cheeney*, 1 W. T. 489; *Fowler v. Fairchild*, 3 Wash. 747; *Heilig v. City Council of Puyallup*, 7 Wash. 29; *Herrick v. Neisz*, 16 Wash. 74; *New Whatcom v. Roeder*, 22 Wash. 570; *Rogers v. Trumbull*, 32 Wash. 211.

Remedial statutes and statutes impairing vested rights: See 2 Remington's Digest, p. 2634, §§ 84, 85; *Investment Co. v. Hambach*, 37 Wash. 629; *Barton v. Wickizer*, 41 Wash. 293; *In re Heilbron's Estate*, 14 Wash. 536; *Clay v. Selah Valley Irr. Co.*, 14 Wash. 543; *Herrick v. Niesz*, 16 Wash. 74; *Hale v. Stenger*, 22 Wash. 516.

Statutes relating to remedies and procedure and curative statutes: See 2 Remington's Digest, p. 2635, §§ 86, 87; *Marston*

v. Humes, 3 Wash. 267; *Ford v. Durie*, 8 Wash. 87; *Heilig v. City Council of Puyallup*, 7 Wash. 29; *Ward v. Huggins*, 7 Wash. 617; *Oliver v. Lewis*, 9 Wash. 572; *Bowman v. Calfax*, 17 Wash. 344; *Seattle v. De Wolfe*, 17 Wash. 349; *Swinburne v. Mills*, 17 Wash. 611; *Holmes & Bull Furn. Co. v. Hedges*, 13 Wash. 696; *Karasek v. Peier*, 22 Wash. 419.

Repealing acts: See 2 Remington's Digest, p. 2636, §§ 88-91; *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467; *State v. Oliver*, 12 Wash. 547; *State v. Allen*, 14 Wash. 103; *Leschi v. Territory*, 1 W. T. 13; *Corbett v. Washington Territory*, 1 W. T. 431; *Ewing v. Van Wagenon*, 6 Wash. 39; *Wintermute v. Carner*, 8 Wash. 585; *Wooding v. Puget Sound National Bank*, 11 Wash. 527; *McQuesten v. Morrill*, 12 Wash. 335; *Woodham v. Anderson*, 32 Wash. 500; *Hopkins v. Jamieson-Dixon Mill Co.*, 11 Wash. 308; *Brookman v. State Ins. Co.*, 15 Wash. 29; *Woodward v. Taylor*, 33 Wash. 1.

Prospective construction of retrospective laws: See 2 Remington's Digest, p. 2637, § 92; *Mann v. Young*, 1 W. T. 454; *Heilig v. City Council of Puyallup*, 7 Wash. 29.

§ 145. (4785.) Laws Continued.

The provisions of a statute, so far as they are substantially the same as those of a statute existing at the time of their enactment, must be construed as continuations thereof. [Cf. Cd. '81, §§ 761, 1681; L. '91, p. 40, § 1; 2 H. C., § 1708.]

Criminal laws, as continuations of former acts: See *infra*, § 2300.

The following sections relating to construction of statutes appear in the Code of 1881: "Sec. 760. No action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions; but the proceedings therein must conform to the requirements of this code as far as applicable." See, also, *Id.*, § 1682; *Abb. R. P. S.*, p. 265.

"Sec. 762. No statute law, or rule, is continued in force because it is consistent with the provisions of this code on the same subject; but in all cases provided for by this code, all statutes, laws and rules heretofore in force in this territory, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated." See, also, *Id.*, § 1684; *Abb. R. P. S.*, pp. 265-267.

"Sec. 763. This repeal, or abrogation, does not revive any former law heretofore repealed, nor does it affect any rights already existing or accrued, or any action or proceeding already taken, except as in this code provided; nor does it affect any private statute not expressly repealed." See, also, *Id.*, § 1685; *Abb. R. P. S.*, pp. 266, 267.

"Sec. 1683. When a limitation, or period of time prescribed in any existing statute for acquiring a right or barring a remedy has begun to run before this code takes effect, and the same or any other limitation is prescribed in this code, the time which is run shall be deemed part of the time prescribed as such limitation." *Abb. R. P. S.*, p. 267; § 133a, 2 H. C.

For construction of this last section see *Baer v. Choir*, 7 Wash. 631. See, also, *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619.

And in the Laws of 1890, page 94, § 1, the following construction of the term "territory" is authorized:

"Sec. 1. Wherever in the laws now in force in the state of Washington or in the laws of the territory of Washington as continued in force by virtue of the acts of Congress, as under the operations and provisions of the constitution of this state, the words territory and territory of Washington shall be used, the same shall be construed to mean state and state of Washington": See *In re Rafferty*, 1 Wash. 382.

§ 146. (4786.) Word "Person" Defined.

The term "person" may be construed to include the United States, this state, or any state or territory, or any public or private corporation, as well as an individual. [Cf. L. '54, p. 99, § 134; L. '57, p. 46; Cd. '81, §§ 756, 964; L. '91, p. 40, § 1; 2 H. C., § 1709.]

This section and § 148, *infra*, were enacted as a part of the criminal code as well as of the civil code: See Code 1881, §§ 964, 965.

See *infra*, §§ 2011, 2303, term "person" defined.

See *infra*, § 1208, construction in lien cases.

Cited in 6 Wash. 137.

While the term "person" may, under this section, be construed to include a private corporation, the term "any two or more persons," used in § 3679, *infra*, should not be so construed: *Denny Hotel Co. v. Schram*, 6 Wash. 134, 137. Held in *Nyman v. Berry*, 3 Wash. 734, that an insolvent cor-

poration does not come within the provisions of the insolvent debtor's law. See, also, *Barnes v. Flummerfelt*, 21 Wash. 498, 500; *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 642; *State ex rel. Atty. Gen. v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 493; *State v. Packenham*, 40 Wash. 403, 406.

§ 147. (4787.) Term "Officer" Defined.

Whenever any term indicating an officer is used it shall be construed, when required, to mean any person authorized by law to discharge the duties of such officer. [L. '54, p. 221, § 501; Cd. '81, § 755; 2 H. C., § 1710.]

A road supervisor is not an "officer": See *State ex rel. Griffith v. Newland*, 37 Wash. 428, 431.

§ 148. (4788.) Words Importing Number and Gender, How Construed.

Words importing the singular number may also be applied to the plural of persons and things; words importing the plural may be applied to the singular; and words importing the masculine gender may be extended to females also. [Cf. L. '54, p. 99, § 135; *Id.*, p. 221, § 502; L. '57, p. 45, § 1; Cd. '81, §§ 756, 965; L. '91, p. 40, § 1; 2 H. C., § 1711.]

See note to § 146, *supra*.

See *infra*, § 1208, construction in lien cases.

Cited in 20 Wash. 523.

§ 149. (4789.) Word "Month" Defined.

The word "month" or "months," whenever the same occurs in the statutes of this state now in force, or in statutes hereinafter enacted, or in any contract made in this state, shall be taken and construed to mean "calendar month." [L. '77, p. 333; Cd. '81, § 759; L. '91, p. 40, § 1; 2 H. C., § 1712.]

It was intimated in *Hale v. Finch*, 1 W. T. 517, that when in the statute the word "month" is used a lunar month is meant, unless the contrary is indicated. The above section was, however, enacted subsequent to this ruling.

§ 150. (4790.) Computation of Time.

The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last, unless the last day is a holiday or Sunday, and then it is also excluded. [Cf. L. '54, p. 219, § 486; Cd. '81, § 743; L. '88, p. 32, § 1; 2 H. C., § 794.]

See *infra*, § 252, computation of time for service of notice.

Cited in 7 Wash. 537; 18 Wash. 263; 40 Wash. 40.

See 2 Remington's Digest, pp. 2720-2722.

A notice of application to settle a statement of facts on appeal served May 20th, to be heard May 31st, when May 30th was

a legal holiday, is a full ten days' notice exclusive of May 30th, and is sufficient: *Thompson v. Huron L. Co.*, 5 Wash. 527. See, also, *State ex rel. Bickford v. Benson*, 21 Wash. 365; *Spokane & Idaho Lumber Co. v. Stanley*, 25 Wash. 653; *Perkins v.*

Jennings, 27 Wash. 145. Excluding Sunday or nonjudicial day: See Martin v. Sunset Telephone & Telegraph Co., 18 Wash. 260; Perkins v. Jennings, supra;

Kubillus v. Ewert, 40 Wash. 38. Fractions of day not noticed: See Goetzinger v. Rosenfeld, 16 Wash. 392; Perkins v. Jennings, supra.

§ 151. Adoption of Ballinger's Code.

The compilation arranged by R. A. Ballinger and known as Ballinger's Annotated Codes and Statutes of Washington, two volumes, is hereby adopted as an official compilation of existing statutes of the state, up to and including the year 1897, but of no greater authority than all other existing official compilations or session laws of the state. [L. '99, p. 109, § 1.]

§ 152. Amendments to Code.

It shall be proper for the legislature in amending or repealing existing statutes, and for the courts in referring to existing statutes, to refer to or cite Ballinger's Annotated Codes and Statutes of Washington, containing such law. [L. '99, p. 110, § 2.]

CHAPTER II.

FORMS OF ACTIONS.

§ 153. (4793.) Only One Form of Action.

There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action. [L. '54, p. 131, § 1; L. '60, p. 5, § 1; L. '71, p. 3, § 1; L. '73, p. 4, § 2; Cd. '81, § 2; 2 H. C., § 109.]

See infra, § 255, forms of pleading.

See infra, § 296, what causes may be united.

Cited in 1 Wash. 193; 3 Wash. 587; 11 Wash. 664; 18 Wash. 100; 23 Wash. 576; 24 Wash. 329; 27 Wash. 396; 28 Wash. 133, 210; 30 Wash. 76; 40 Wash. 454; 46 Wash. 114, 115; 47 Wash. 479.

See 1 Remington's Digest, pp. 30-32, §§ 8-18.

Section 2 of the Practice Act of 1869 (Laws 1869, p. 3, § 1) was amended in 1871 (Laws 1871, p. 3, § 1) so as to revive the distinction between actions at law and suits in chancery to the extent of adopting the laws of the United States and the chancery rules of the United States courts, as the law and practice in the territorial courts in equity causes, with slight modifications: Garrison v. Cheeney, 1 W. T. 489; but the present rule was restored by the Laws of 1873. The courts recognize natural inherent distinctions not recognized by law: Overlock v. Shinn, 28 Wash. 205. There is a distinction between law and equity, although difference in forms are abolished: Barto v. Seattle etc. R. Co., 28 Wash. 179.

Under the code system of pleading, the technical learning of the common-law pleader is of little value: Puget Sound Iron Co. v. Worthington, 2 W. T. 472. While under the code system few common-law forms of pleading may be demurrable, most are obnoxious to motions, and none

are so concise as our practice act contemplates: Renton v. St. Louis, 1 W. T. 215. Pleadings under the code are not subjected to the rules of the old system of pleadings: Newburg v. Farmer, 1 W. T. 182.

The respective jurisdictions of law and equity have not been changed by the reformed procedure, except to allow legal and equitable causes of action to be joined in the same complaint, without affecting the allegations in either necessary to constitute a cause of action: Thompson v. Caton, 3 W. T. 31, 36. An action at law is maintainable upon an equitable assignment: Dickerson v. Spokane, 26 Wash. 292; Barto v. Seattle etc. R. Co., supra.

The fictions of the common law are abolished and presumptions are not to be pleaded as facts, but the facts themselves must be stated: Distler v. Dabney, 3 Wash. 200, 203. But it is error to compel the trial of a cause as an action at law, when both the complaint and answer invoke the equity powers of the court: Distler v. Dabney, 7 Wash. 431.

Although an action may be commenced as an equitable one, yet, when there is nothing to give equity jurisdiction the court may still permit it to be tried as an action at law, if defendant is not thereby prevented from having a fair trial: Surber v. Kittinger, 6 Wash. 240; see, also, Knox

v. Bard, 7 Wash. 41. And equitable relief is given in actions at law: *Young v. Stampfer*, 27 Wash. 350; *Goupille v. Chaput*, 43 Wash. 702. The name given to an action is immaterial: *Watson v. Glover*, 21 Wash. 677; *Dornitzer v. German-American Sav. etc. Soc.*, 23 Wash. 132; *Dunlap v. Rauch*, 24 Wash. 620.

Receivers may be appointed by the court whether sitting as a court of law or chancery, and liens and mortgages are foreclosed in equity because of the relief sought being of an equitable nature, and the principle is not affected by the requirement that there shall be but one form of action: *Washington Iron Co. v. Jenson*, 3 Wash. 584, 590. But courts of equity have no jurisdiction to collect a tax or to appoint a receiver for that purpose: *Pierce County v. Merrill*, 19 Wash. 175. The test by which to determine whether an action is properly brought in equity is whether the relief sought is of an equitable nature: *Washington Iron Co. v. Jenson*, *supra*. The intention of the code is to abolish distinc-

tions between legal and equitable actions, but it is not within the spirit of the code to dismiss an action for damages, if the facts alleged show that a party is entitled to any equitable relief: *Browder v. Phinney*, 30 Wash. 74. Under this section an action may be maintained for both legal and equitable relief: *Durga v. Lincoln Creek Lumber Co.*, 47 Wash. 477.

An action by a judgment creditor to quiet title, in which the complaint alleges a conveyance in fraud of creditors and the purchase of the property by plaintiff on execution sale, should not be dismissed for error in the form of action, in that the complaint failed to allege that the plaintiff was in possession, or that the land was vacant and unoccupied, but alleged the defendants to be in possession by the receipt of rents; since the code abolishes all distinctions in the forms of action, and the court may give the relief sought where the facts stated show the party entitled thereto: *Brown v. Baldwin*, 46 Wash. 106.

§ 154. (4794.) Parties, How Designated.

The party commencing the action shall be known as the plaintiff, and the opposite party the defendant. [L. '54, p. 131, § 2; Cd. '81, § 3; 2 H. C., § 110.]

Cited in 35 Wash. 137.

CHAPTER III.

LIMITATION OF ACTIONS.

§ 155. (4796.) Limitations Prescribed—Objections, How Taken.

Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer. [Cf. L. '54, p. 362, § 1; L. '60, p. 289, § 1; L. '63, p. 85, § 16; L. '69, p. 8, § 25; L. '73, p. 8, § 25; Cd. '81, § 25; L. '85, p. 74, § 1; L. '91, p. 90, § 1; 2 H. C., § 111.]

See *infra*, § 259, grounds of demurrer.

See *infra*, § 890, limitations against the state.

See *infra*, § 1477, limitations on claims against estates.

See *infra*, § 2005 et seq., limitations of criminal actions.

Section 133a, 2 Hill's Code (§§ 1294, 1683, Cd. 1881), being of a temporary nature and obsolete, is omitted. See note to § 145, *supra*, where this section is given in full. See, also, *Packscher v. Fuller*, 6 Wash. 534; *Baer v. Choir*, 7 Wash. 631, decided thereunder.

Cited in 7 Wash. 86; 12 Wash. 669; 25 Wash. 388; 26 Wash. 423, 467, 487; 27 Wash. 151, 595; 28 Wash. 538; 34 Wash. 569; 41 Wash. 611; 42 Wash. 453.

See 2 Remington's Digest, pp. 1723-1745.

Under the weight of authority the statute of limitations is not now, at least, generally regarded as an unconscionable defense: *Morgan v. Morgan*, 10 Wash. 99, 194. See, also, *Deering v. Holcomb*, 26 Wash. 588; *Liberman v. Gurensky*, 27 Wash.

410. The statute is not to be viewed with disfavor: *McClaine v. Fairchild*, 23 Wash. 758. See, also, *Thomas v. Price*, 33 Wash. 459; *Peterson v. Philadelphia Mtg. etc. Co.*, 33 Wash. 464.

It is a statute of repose: *Wickham v. Sprague*, 18 Wash. 466; *Bettman v. Cowley*, 19 Wash. 207; *Northern Pacific R. Co. v. Ely*, 25 Wash. 384; *Northern Pacific R. Co. v. Hasse*, 28 Wash. 353.

But the statute, as a defense, must be clearly established, as it is not such

a meritorious defense that either the law or the facts should be strained in aid of it: *Bowman v. Colfax*, 17 Wash. 344; *Port Townsend v. Eisenbeis*, 28 Wash. 533.

If it appear from the face of the complaint that the statute of limitations has run against the demand pleaded, advantage thereof may be taken by demurrer: *Wilt v. Buchtel*, 2 W. T. 417; *Weber v. Yancy*, 7 Wash. 84; *Ritchie v. Carpenter*, 2 Wash. 512, 524. And by § 259, subd. 7, *infra*, it is now necessary to raise the question by demurrer where the bar appears upon the face of the complaint, otherwise it will be treated as waived. Or by answer if defect does not clearly appear on face of complaint: *Damon v. Leque*, 17 Wash. 573.

But a demurrer for want of sufficient facts does not present the objection that it appears on face of complaint that action is barred by the statute of limitation: *Joergenson v. Joergenson*, 28 Wash. 477. See, also, *Hays v. Peavey*, 43 Wash. 163; *Board of Church Erec. Fund etc. v. First Presbyterian Church*, 19 Wash. 455. But see *Roche v. Spokane*, 22 Wash. 121.

When the defendants have failed to set up the statute of limitations in the lower court, the objection will not be entertained in the appellate court: *Mudgett v. Clay*, 5 Wash. 103, 112; *Herrick v. Niesz*, 16 Wash. 74; and will not be allowed on retrial after a reversal on appeal: *Bay View Brewing Co. v. Grubb*, 31 Wash. 34. But see *Peterson v. Dillon*, 27 Wash. 78.

Under § 265 *infra*, if a counterclaim be not barred by the statute of limitations at the commencement of the action in which it is pleaded, it does not become so afterward during the pendency of that action: *Shelton v. Conant*, 10 Wash. 193.

If the nature of the answer and the proof thereunder clearly indicate that it was intended to plead a three years' statute as a bar, and by mistake two years had been specified instead, it is not error to allow an amendment correcting the same: *Morgan v. Morgan*, 10 Wash. 99. See, also, *Kinkhead v. Holmes & Bull Furniture Co.*, 24 Wash. 216.

If a defendant wishes to avail himself of the fact of nonresidence, he must allege it affirmatively in his answer: *Lake v. Steinbach*, 5 Wash. 654, 664. See, also, *Gleason v. Hawkins*, 32 Wash. 464.

Limitation laws will not be given a retroactive effect, unless it appears that such was clearly the legislative intention: *Moore v. Brownfield*, 7 Wash. 23, 25; *Gillette v. Hibbard*, 3 Mont. 412. See, also, *State v. Aberdeen*, 34 Wash. 61; *Seattle v. De Wolfe*, 17 Wash. 349; *Bowman v. Colfax*, 17 Wash. 344; *State ex rel. Hemen v. Ballard*, 16 Wash. 418; *Young v. Tacoma*, 31 Wash. 153.

If the legislature reduces the period of limitation for the commencement of an action, rights already accrued are not

barred until the lapse of the full statutory period: *Moore v. Brownfield*, *supra*; see, also, *Raymond v. Morrison*, 9 Wash. 156.

Time for commencing an action relates to the remedy only, and may be abridged if a reasonable time is allowed for commencing actions upon pre-existing causes: *Bettman v. Cowley*, 19 Wash. 207.

If the period of limitation is reduced by statute from twenty to ten years, the limitation does not begin to run as to accrued actions until the taking effect of the new law, unless the legislative intent to give it a retroactive effect clearly appears: *Moore v. Brownfield*, *supra*; *Scurry v. Seattle*, 8 Wash. 278; see *Raymond v. Morrison*, *supra*.

When the statute begins to run in cases of fraud: See *Morgan v. Morgan*, *supra*.

The statute of limitations, embodied in this chapter, is not controlled or affected by §§ 1294, 1683, Code of 1881, providing that "when a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy has begun to run before this code takes effect, and the same or any limitation is prescribed in this code, the time which has already run shall be deemed to be part of the time prescribed as such limitation by this code," as such sections were parts of laws on special subjects enacted in 1881, and were not embraced in the civil practice act of that year: *Baer v. Choir*, 7 Wash. 631.

Actions against sureties: See 2 *Remington's Digest*, p. 2351, § 52: *Spokane County v. Prescott*, 19 Wash. 418; *Bassett v. Thrall*, 21 Wash. 231; *Beebe v. Redward*, 35 Wash. 615; *Denny v. Spurr*, 38 Wash. 347; *Pacific Bridge Co. v. U. S. Fidelity etc. Co.*, 33 Wash. 47; *Bennett v. Thorne*, 36 Wash. 253; *Henry v. Aetna Indemnity Co.*, 36 Wash. 553.

Failure to pay an installment of interest, under a clause authorizing the payee to declare the whole debt due does not start the running of the statute of limitations: *Weinberg v. Naher*, 51 Wash. 591.

LIMITATION AS AGAINST STATE OR MUNICIPALITY.—Adverse possession of county or city streets does not run against the public: *West Seattle v. West Seattle Land & Imp. Co.*, 38 Wash. 359; *Rapp v. Stratton*, 41 Wash. 263. See, also, *Northern Pacific R. Co. v. Ely*, 25 Wash. 384; *Port Townsend v. Eisenbach*, 28 Wash. 533. Estoppel to rely on limitation: See *Denny v. Palmer*, 26 Wash. 469.

Under the provisions of the charter of the city of Port Townsend in regard to taxes levied in said city, the general statute of limitations for the commencement of actions has no application to a suit to foreclose a tax lien: *Port Townsend v. Trumbull*, 40 Wash. 386. It seems that the statute should commence to run from the time the action could have been per-

fectured with reasonable diligence: *Bowman v. Colfax*, 17 Wash. 344.

COMPUTATION OF TIME: See 2 Remington's Digest, pp. 1733-1742, §§ 28-66; *Perkins v. Jennings*, 27 Wash. 145. See, also, *Spinning v. Pierce County*, 20 Wash. 126; *George v. Butler*, 26 Wash. 456; *Gove v. Tacoma*, 26 Wash. 474; *West Coast Imp. Co. v. West Coast Mfg. Co.*, 25 Wash. 628; *Bank*

v. Lucas, 26 Wash. 417; *Hanna v. Kasson*, 26 Wash. 568; *Sterrett v. Mining etc. Co.*, 30 Wash. 164; *Brigham-Hopkins Co. v. Gross*, 30 Wash. 277; *Morrissey v. Faucett*, 28 Wash. 52; *Sears v. Kilbourn*, 28 Wash. 194; *First Nat. Bank v. Parker*, 28 Wash. 234; *Potter v. Whatcom*, 20 Wash. 589; *State v. Lorenz*, 22 Wash. 289; *Raymond v. Boles*, 26 Wash. 494.

§ 156. (4797.) Actions to be Commenced in Ten Years.

The period prescribed in the preceding section for the commencement of actions shall be as follows:—

Within ten years,—

1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within ten years before the commencement of the action. [Cf. L. '54, p. 363, § 2; Cd. '81, § 26; 2 H. C., § 112; see ref. to § 155, supra.]

See infra, § 165, and notes, actions not otherwise provided for.

See infra, § 785 et seq., actions to recover real property.

See infra, §§ 967-973, actions by and against executors and administrators.

See infra, § 7906, actions on local assessments.

Cited in 6 Wash. 536-538; 7 Wash. 25, 636; 8 Wash. 291; 10 Wash. 104; 25 Wash. 388, 572; 27 Wash. 595; 28 Wash. 359; 36 Wash. 216; 41 Wash. 281, 611; 43 Wash. 672; 49 Wash. 334; 50 Wash. 117.

As to adverse possession of real property, see 1 Remington's Digest, pp. 44-55.

Our statute of limitations is one of adverse possession, under which the rightful owner of real estate is seised of the same, whether in actual possession thereof or not, unless the same is in the actual adverse possession of another, and ownership and seisin once shown will be presumed to have continued until overcome by proof of adverse possession: *Balch v. Smith*, 4 Wash. 497, 499.

Actual, uninterrupted and notorious possession, under claim of right, but without color of title, is sufficient to entitle the possessor to the benefit of the statute, and such possession need not be adverse as to all the world: *Moore v. Brownfield*, 7 Wash. 23. As to adverse possession of part of railroad right of way, see *Northern Pacific R. Co. v. Ely*, 25 Wash. 384; *Northern Pac. R. Co. v. Hasse*, 28 Wash. 353.

Possession by grantee of land in a deed placed in escrow, but never delivered, and that of grantee's agent, is possession of grantor for purposes of adverse possession: *McAuliff v. Parker*, 10 Wash. 141. But possession maintained by force does not constitute peaceable adverse possession: *Laurendeau v. Fugelli*, 5 Wash. 632. Possession under a contract forbidden by law, is not adverse, and does not entitle the possessor to the benefit of the statute: *Bullene v. Garrison*, 1 W. T. 587. Posses-

sion by adjoining land owners who had agreed as to division line: See *Lindley v. Johnston*, 42 Wash. 257.

If title is claimed by adverse possession, there is no question but that the possession must be adverse, and that the adverseness thereof is the essential ingredient that ripens into title; and that without that element the statute would not run. But there are certain facts which must be pleaded and proved to warrant the legal conclusion of adverse holding: *Bellingham Bay L. Co. v. Dibble*, 4 Wash. 764. Not adverse if held under or subservient to higher title: *Port Townsend v. Lewis*, 34 Wash. 419. Possession must be under claim of right, and actual, open, notorious, continuous and under color of title: *Blake v. Shriver*, 27 Wash. 597; *Yesler Estate v. Holmes*, 39 Wash. 35; *Lohse v. Burch*, 42 Wash. 161.

An allegation in a complaint that the ancestor of plaintiff died seised and possessed of the premises is a sufficient allegation of plaintiff's possession: *Balch v. Smith*, supra.

Adverse possession may be established by proof that the premises in controversy were generally reputed in the community where situated to belong to the party setting up such claim of title: *McAuliff v. Parker*, supra. And adverse possession for ten years subsequent to passage of Code of 1881 is sufficient to bar a recovery, although at the time the right of action accrued the limitation was twenty years: *McAuliff v. Parker*, supra; citing *Baer v. Choir*, 7 Wash. 631.

Adverse possession cannot be established by proof of a general understanding in the community that the property was reputed

to belong to the claimant or his grantors, in the absence of testimony showing that the claimant had ever exercised any acts of ownership over it: *McInerney v. Beck*, 10 Wash. 515.

Although possession be held in subordination to the title of the United States, it may be adverse to one claiming against the possession: *Moore v. Brownfield*, supra; *Francoeur v. Newhouse*, 43 Fed. Rep. 230.

Possession of a donation claim under a writing, purporting to be a quitclaim deed, executed before the expiration of the four years' residence required by the donation act, is possession under a contract prohibited by law, and hence gives no color of title; such possession cannot be adverse, so as to entitle possessor to the benefit of the statute of limitations: *Bulene v. Garrison*, supra.

Although a person may own a specific interest in a certain parcel of land, yet if he stands by at an administrator's sale thereof and permits the whole tract to be sold as the property of decedent, and permits the purchaser to pay for and take possession of the land, improve it and pay taxes thereon under claim of absolute ownership, and sets up no claim of interest during a period of fifteen years, he is estopped from claiming ownership: *Roeder v. Fouts*, 5 Wash. 135.

In order to bar an action for the recovery of real estate under this section, adverse possession must have been maintained for a period of ten years subsequent to the taking effect of the statute: *Tacoma Bldg. etc. Assn. v. Clark*, 8 Wash.

289. See, also, *Moore v. Brownfield*, supra; *Raymond v. Morrison*, 9 Wash. 156; *Weber v. Yancy*, 7 Wash. 84.

While a new statute of limitations takes effect upon pre-existing rights of action, and limits them, yet the full time allowed by the new statute should be available to the complainant: *Baer v. Choir*, 7 Wash. 631, following *Sohn v. Watterson*, 17 Wall. 596; see *McAuliff v. Parker*, supra; *Packscher v. Fuller*, 6 Wash. 534; distinguished in *Scurry v. Seattle*, 8 Wash. 278. See, also, *Bowman v. Colfax*, 17 Wash. 344; *State ex rel. Hemen v. Ballard*, 16 Wash. 418; *Young v. Tacoma*, 31 Wash. 153.

An action to redeem real property sold under a decree of foreclosure of mortgage does not fall within this section, but under § 165, infra: *Parker v. Dacres*, 2 W. T. 439.

Adverse possession of real estate as a bar: See *Long v. Eisenbeis*, 23 Wash. 556; *Krutz v. Isaacs*, 25 Wash. 566; *Northern Pac. R. Co. v. Ely*, 25 Wash. 384; *Lindley v. Johnston*, 42 Wash. 257; *Hyde v. Britton*, 41 Wash. 277; *Ferrell v. Lord*, 43 Wash. 667; *Slaght v. Northern Pac. R. Co.*, 39 Wash. 576; *Thornley v. Andrews*, 40 Wash. 580; *Chezum v. McBride*, 21 Wash. 558; *Jones v. Herrick*, 35 Wash. 434; *Brodack v. Morsbach*, 38 Wash. 72. An action to quiet title on the ground of fraud, not commenced until more than twenty years after discovery of the fraud, is barred by the statute of limitations: *Carroll v. Hill Tract Improvement Co.*, 44 Wash. 569.

§ 157. (4798.) Within Six Years.

Within six years,—

1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States;
2. An action upon a contract in writing, or liability express or implied arising out of a written agreement;
3. An action for the rents and profits or for the use and occupation of real estate. [L. '54, p. 363, § 3; Cd. '81, § 27; 2 H. C., § 113; see ref. to § 155, supra.]

See infra, § 810 et seq., forcible entry and detainer.

See infra, § 1432, limitation of actions against sureties on administrators' bonds.

See infra, § 1368, limitation upon letters of administration to bind decedent's real estate.

Cited in 1 Wash. 8; 7 Wash. 86; 19 Wash. 419; 25 Wash. 401; 26 Wash. 418, 419, 456, 467, 492, 500, 559; 27 Wash. 151, 595; 28 Wash. 480; 32 Wash. 468, 486; 34 Wash. 569; 41 Wash. 301, 302; 50 Wash. 490; 51 Wash. 415.

This section, subdivision 1, does not apply to judgments rendered by courts of this state or of the late territory: *Burns v. Conner*, 1 Wash. 6.

This section is applicable to domestic, as well as to foreign, judgments: *Citizens' National Bank of Crawfordsville v. Lucas*, 26 Wash. 417.

A statute of another state prohibiting action on a judgment obtained in one of its courts, unless leave of court is first obtained, affects the remedy merely, and does not apply to an action on such judgment in a court of this state: *Weber v. Yancy*, 7 Wash. 84.

The proceeding prescribed by the statute to revive the lien of a judgment (§ 459, infra) is not the commencement of an action, but only the mode which secures the fruits of an action already determined, and hence not controlled by this section: *Burns v. Conner*, supra.

An action on a bond for conveyance of realty, held barred in *Wilt v. Buchtel*, 1 W. T. 417, 420.

An agreement to convey land being an executory contract, the statute of limitations will not begin to run as a bar to action thereon until after a breach of the contract: *Maitland v. Langa*, 14 Wash. 92.

Where street railway franchises contained conditions whereby the company agreed to keep certain portions of streets in repair, and to save the city harmless from the payment of damages growing out of or in any way connected with the franchises, an action by the city to recover over the amount of a judgment for damages caused by defects in the streets is not based upon the common-law liability making the city and the company joint tort feorsors; and such action, therefore, will not be barred by the statute of limitations in two years, but the six-year or three-year limitation for actions on contract applies: *Seattle v. Northern Pac. R. Co.*, 47 Wash. 552.

Where a city is indemnified by provisions of a franchise from damages for defects in certain portions of the street, the statute of limitations does not begin to run upon the recovery of a judgment for damages against the city, where the cause was appealed, but only from the date of the affirmance of the judgment in the supreme court or perhaps from the date of its payment by the city: *Seattle v. Northern Pac. R. Co.*, 47 Wash. 552.

An action to foreclose a mortgage must be commenced within six years after condition broken: *Krutz v. Gardner*, 25 Wash. 396. See, also, *Gleason v. Hawkins*, 32 Wash. 464.

An action against the surety upon a promissory note is barred by the lapse of six years after its maturity, where no payments have been made by the surety, and he has not ratified any payments by his principal: *Bassett v. Thrall*, 21 Wash. 231.

An action for contribution between co-sureties upon a promissory note is upon an implied liability arising out of an express contract, and is controlled by this section: *Caldwell v. Hurley*, 41 Wash. 296.

Upon the insolvency of a banking corporation and the appointment of a receiver, the right of action on unpaid stock subscriptions is barred six years after insolvency and the appointment of a receiver: *Bennett v. Thorne*, 36 Wash. 253; *Chilberg v. Siebenbaum*, 41 Wash. 663.

As to limitations under mortgages, see *Northern Pac. R. Co. v. Ely*, 25 Wash. 384; *Krutz v. Gardner*, 25 Wash. 396; *Hanna v. Kasson*, 26 Wash. 568; *Catlin v. Murray*, 37 Wash. 164; *Investment Securities Co. v. Adams*, 37 Wash. 211.

As to covenants of warranty, quiet enjoyment and for payment of taxes, see *West Coast Mfg. etc. Co. v. West Coast*

Imp. Co., 25 Wash. 627; *Litchfield v. Cowley*, 34 Wash. 566.

On cause of action against surety, see *Spokane County v. Prescott*, 19 Wash. 418; *Bennett v. Thorne*, 36 Wash. 253; *Pacific Bridge Co. v. United States Fidelity Co.*, 33 Wash. 47.

On instruments for payment of money, see *Perkins v. Jennings*, 27 Wash. 145; *Joergenson v. Joergenson*, 28 Wash. 477.

A mortgage is a mere incident to the notes, and the right of action upon each note accrues as fast as it matures, and thereupon starts the running of the statute as to such note: *George v. Butler*, 26 Wash. 456. See, also, *First Nat. Bank of Snohomish v. Parker*, 28 Wash. 234; *White v. Krutz*, 37 Wash. 34.

As to notice required to set the statute running, see *Potter v. New Whatcom*, 20 Wash. 589; *State v. Lorenz*, 22 Wash. 289; *McClaine v. Fairchild*, 23 Wash. 758; *Gove v. Tacoma*, 34 Wash. 434; *Northwestern Lumber Co. v. Aberdeen*, 35 Wash. 636; *Hemen v. Ballard*, 40 Wash. 81; *Chilberg v. Siebenbaum*, 41 Wash. 663.

Where no administration upon the estate of a deceased person has been taken out within six years after his death, his real estate cannot, under § 1368, *infra*, be subject to a mortgage foreclosure, although no one appears to defend the action as to a portion of the title: *Fuhrman v. Power*, 43 Wash. 533.

The limitation in this section against right of action upon contracts in writing after the expiration of six years, is not extended in case of the death of a debtor by the provisions of §§ 1470, 1472, as the latter sections give that right only to claims not already barred by the general statute of limitations: *Bank of Montreal v. Buchanan*, 32 Wash. 480.

A mortgagee is entitled to the allowance of the mortgage debt, as a claim against the estate, when duly presented to the administrator, notwithstanding the fact that twenty years may have elapsed between the death of the mortgagor and the appointment of the administrator, and that the right to enforce the mortgage lien became barred at the end of six years: *Gleason v. Hawkins*, 32 Wash. 464.

The presumption as to the validity of a judgment cannot be overthrown on collateral attack on the ground that the face of the record shows that the cause of action might have been barred by the statute of limitations: *Christofferson v. Pfennig*, 16 Wash. 491.

The defense of the statute of limitations is a personal privilege, and can be pleaded only by the person directly entitled to the benefit of it; it cannot be set up by other defendants in the action: *Board of Church Erec. Fund etc. v. First Presbyterian Church*, 19 Wash. 455.

Where it appears that at least some of the items in a bill of particulars are within six years, it is error to sustain a

demurrer to complaint, on ground of the statute of limitation: See *Hayes v. Peavey*, 43 Wash. 163.

As to suits on judgments, see *Bignold v. Carr*, 24 Wash. 413; *Bank v. Lucas*, 26 Wash. 417; *Shepherd v. Gove*, 26 Wash. 452; *Cathcart v. Bryant*, 28 Wash. 31.

Actions for rent—Installments: See *Mounts v. Gorenson*, 29 Wash. 262.

An equitable defense to a judgment in that it was procured by collusion and fraud is not barred by the statute of limitations or by laches, as long as a right of action on the judgment survives, but may be made whenever the judgment is sought to be enforced: *State ex rel. American Freehold-Land Mortgage Co. v. Tanner*, 45 Wash. 348.

§ 158. (4799.) Within Five Years.

No action for the recovery of any real estate sold by an executor or administrator under the laws of this state, or the laws of the territory of Washington, shall be maintained by any heir or other person claiming under the deceased, unless it is commenced within five years next after the sale, and no action for any estate sold by a guardian shall be maintained by the ward, or by any person claiming under him, unless commenced within five years next after the termination of the guardianship, except that minors and other persons under legal disability to sue at the time when the right of action first accrued may commence such action at any time within three years after the removal of the disability. [Cf. L. '54, p. 290, §§ 137, 138; L. '90, p. 81, § 1; 2 H. C., § 114.]

See *infra*, § 1693 et seq., validity of sales of estates.

Cited in 3 Wash. 517.

§ 159. (4800.) Within Three Years.

Within three years,—

1. An action for waste or trespass upon real property;
2. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
3. An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
5. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subdivision shall not apply to action for an escape;
6. An action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different penalty [limitation];
7. An action for seduction and breach of promise of marriage. [Cf. L. '54, p. 363, § 4; L. '69, p. 8, § 28; Cd. '81, § 28; 2 H. C., § 115; see ref. to § 155, *supra*.]

See *infra*, § 4000, liability of sheriff.

See *infra*, §§ 160, 163, action upon a statute for a penalty.

See *infra*, § 573 et seq., and § 707 et seq., action to recover specific personalty.

See *infra*, § 937 et seq., action for waste, trespass, etc.

See *infra*, § 963 et seq., action for fines and forfeitures.

See *infra*, § 166, action upon open account.

See *infra*, § 161, action for escape.

Action to set aside a tax or tax deed: See *infra*, § 162.

Cited in 7 Wash. 314; 10 Wash. 101, 215; 18 Wash. 471; 19 Wash. 419; 26 Wash. 96, 487, 559, 594; 27 Wash. 263, 396; 28 Wash. 302; 35 Wash. 4; 36 Wash. 633; 41 Wash. 301; 44 Wash. 573; 46 Wash. 344, 345; 51 Wash. 515.

If services are rendered upon a contract of employment for an indefinite period, at an agreed rate of wages per month, the contract is continuous, and the statute of limitations will not begin to run until the services are ended: *Ah How v. Furth*, 13 Wash. 550; *Morrissey v. Faucett*, 28 Wash. 58.

Plaintiff in an action for recovery of damages for change of street grade cannot file an amended complaint setting up a second cause of action for injury to land caused by raising the grade above the natural surface, when the work has been done more than three years prior to its filing. If actions of this kind are to be regarded as trespasses on real property, this section governs, and if not, § 165 governs: *Sargent v. Tacoma*, 10 Wash. 212, 215. "Liability," as used in this section, applies to contracts only: *Suter v. Wenatchee Water Power Co.*, 35 Wash. 4.

An action to quiet title as against a fraudulent conveyance of land is not an action for relief on the ground of fraud, within the meaning of subdivision 4 of this section. This subdivision refers to suits by parties to contracts seeking to be relieved from them when fraudulently induced. The fraud must be the substantive cause of the action and not incidental: *Wagner v. Law*, 3 Wash. 500; *Stewart v. Thompson*, 32 Cal. 260. But an action to set aside a deed by wife of community lands for fraud against her husband was held to fall under this subdivision: *Morgan v. Morgan*, 10 Wash. 99.

A wife domiciled in another state than that of her husband is subject to the statutory provisions as to limitations affecting actions for the wrongful taking and detention of her personal property, as her residence does not, under our statute, necessarily follow that of her husband: *McCain v. Gibbons*, 7 Wash. 314.

In order to rescind a contract on the ground of fraud, an action therefor should be promptly commenced upon the discovery of the fraud: *Sackman v. Campbell*, 15 Wash. 57. See, also, *Pronger v. Old Nat. Bank*, 20 Wash. 626; *Gay v. Havermale*, 30 Wash. 624.

An action on an open account for services accrues at the date of full perform-

ance, at which time the right to compensation fully accrues: *Happy v. Prickett*, 24 Wash. 290.

As to action on official bonds: See *Spokane County v. Prescott*, 19 Wash. 418; *Dickman v. Strobach*, 26 Wash. 558. An action upon a statutory bond given to a school district to guarantee a building contract is barred where the same was not commenced within three years from the time that the debt was contracted and the statute had run against such debt: *Johnson Service Co. v. Aetna Indemnity Co.*, 46 Wash. 434.

INJURIES TO THE PERSON.—The right of action given to personal representatives of one whose death has been caused by the wrongful act of another may be commenced at any time within three years under this section: *Robinson v. Baltimore & Seattle Min. etc. Co.*, 26 Wash. 484.

As to injuries to property, see *Suter v. Wenatchee Water P. Co.*, 35 Wash. 1.

For acts or omissions in official capacity: See *Quaker City v. Nat. Bank of Tacoma*, 27 Wash. 259.

Miscellaneous actions: See *Wickham v. Sprague*, 18 Wash. 466; *Morrissey v. Faucett*, 28 Wash. 52; *Smith v. Seattle*, 18 Wash. 484; *Doran v. Seattle*, 24 Wash. 182; *Sterrett v. Northport Min. etc. Co.*, 30 Wash. 164; *Spokane County v. Prescott*, 19 Wash. 418.

Vacation of judgment: See *Peyton v. Peyton*, 28 Wash. 278.

An action for relief on the ground of fraud within the meaning of the statute, will not be deemed as having accrued until the discovery by the aggrieved party of the facts constituting the fraud: *Stearns v. Hockbrunn*, 24 Wash. 206; *Fidelity Nat. Bank v. Adams*, 38 Wash. 75; *Walla Walla County v. Oregon R. & Nav. Co.*, 40 Wash. 398.

Want of diligence by person entitled to sue: See 2 *Remington's Digest*, p. 1740, § 57; *Morgan v. Morgan*, 10 Wash. 99; *Irwin v. Holbrook*, 32 Wash. 249; *Bellingham Bay Imp. Co. v. Fairhaven etc. R. Co.*, 17 Wash. 371.

What constitutes discovery of fraud: See 1 *Remington's Digest*, p. 1740, § 58; *Irwin v. Holbrook*, 26 Wash. 89; *Gove v. Tacoma*, 26 Wash. 474; *Deering v. Holcomb*, 26 Wash. 588; *Griffith v. Seattle Consolidated St. R. Co.*, 36 Wash. 627; *Wickham v. Sprague*, 18 Wash. 466.

Existence of trust: See *Snipes v. Kelleher*, 31 Wash. 386.

§ 160. (4801.) Within Two Years.

Within two years,—

1. An action for libel, slander, assault, assault and battery, and false imprisonment;

2. An action upon a statute for a forfeiture or penalty to the state. [Cf. L. '54, p. 363, § 5; L. '69, p. 9, § 29; Cd. '81, § 29; 2 H. C., § 116; see ref. to § 155, supra.]

See last section, subd. 6, and § 163, *infra*, forfeiture or penalty to state.

See *infra*, § 4000, liability of sheriff.

Cited in 41 Wash. 301.

§ 161. (4802.) **Within One Year.**

Within one year,—

1. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process;

2. An action by an heir, legatee, creditor, or other party interested, against an executor or administrator, for alleged misfeasance, malfeasance or mismanagement of the estate within one year from the time of final settlement, or the time such alleged misconduct was discovered. [Cf. L. '54, p. 364, § 5; L. '69, p. 9, § 30; Cd. '81, § 30; 2 H. C., § 117; see ref. to § 155, *supra*.]

See *supra*, § 159, subd. 5, action against officer.

See *infra*, § 967, actions by and against executors, etc.

See *infra*, § 1432, limitation against sureties on administrator's bond.

Cited in 4 Wash. 634.

An action by an administrator against a former administrator to recover money and property of the estate is not subject to the limitation imposed by subdivision 2 of this section. This subdivision has reference to

the time of the final settlement of the estate and not to the settlement of accounts of intermediate administrators in the progress of the settlement of the estate: *Bartels v. Gove*, 4 Wash. 632.

§ 162. **Action to Cancel Tax or Tax Deed.**

Actions to set aside or cancel the deed of any county treasurer issued after and upon the sale of lands for general, state, county or municipal taxes, or for the recovery of lands sold for delinquent taxes, must be brought within three years from and after the date of the issuance of such treasurer's deed: Provided, this section shall not apply to actions not otherwise barred on deeds heretofore issued if the same be commenced within one year after the passage of this act. [L. '07, p. 398, § 1.]

§ 163. (4803.) **Special Provisions for Action on Penalty.**

An action upon a statute for a penalty given in whole or in part to the person who may prosecute for the same shall be commenced within three [one] years [year] after the commission of the offense; and if the action be not commenced within one year by a private party, it may be commenced within two years after the commission of the offense in behalf of the state by the prosecuting attorney of the county where said offense was committed. [Cf. L. '54, p. 364, § 6; Cd. '81, § 31; 2 H. C., § 118; see ref. to § 155, *supra*.]

See *supra*, § 159, subd. 6, and § 160, subd. 2, forfeiture and penalty.

The words in brackets were in the Laws of 1854 and subsequent enactments down to Code 1881, and the change appears to be inadvertent.

§ 164. (4804.) **Within Three Months.**

Within three months,—

(1) An appeal from any order of a board of county commissioners, or upon a claim rejected by said boards;

(2) Upon claims against an estate, rejected by an executor or administrator within three months after the rejection. [Cf. Cd. '81, § 32; 2 H. C. § 119.]

See *infra*, § 967, actions by and against executors and administrators.

See *infra*, §§ 1477, 1480, limitations on rejected claims.

The first subdivision of this section conflicts with § 3909, *infra*. See note to that section.

Cited in 5 Wash. 713.

§ 165. (4805.) Actions for Relief not Otherwise Provided for.

An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued. [L. '54, p. 364, § 7; Cd. '81, § 33; 2 H. C., § 120; see ref. to § 155, supra.]

See notes to § 159, supra.

Cited in 3 Wash. 517; 10 Wash. 215; 18 Wash. 488; 22 Wash. 295; 25 Wash. 400; 26 Wash. 418-487; 28 Wash. 538; 30 Wash. 167, 631; 35 Wash. 4; 39 Wash. 439; 46 Wash. 83, 344.

Under this section and § 155 supra, an action by a municipal corporation for the foreclosure of a lien created by an assessment upon property for street grading purposes must be commenced within two years after the cause of action accrues: *Spokane v. Stevens*, 12 Wash. 667. See infra, § 7906, limitation in cases of special assessment liens. See, also, *Interstate Sav. & L. Co. v. Cairns*, 16 Wash. 215; *State ex rel. Hemmen v. Ballard*, 16 Wash. 418; *Bowman v. Colfax*, 17 Wash. 344; *Seattle v. De Wolf*, 17 Wash. 349. Limitation to enforce assessment prior to March 9, 1892, was two years: *Frye v. Mount Vernon*, 42 Wash. 272. But this limitation was extended to ten years by § 7906: *Young v. Tacoma*, 31 Wash. 164. A street assessment is subject to the statute of limitations: *Hinckley v. Seattle*, 37 Wash. 271.

An action to quiet title as against a fraudulent conveyance of land is not subject to the limitations of this section: *Wagner v. Law*, 3 Wash. 500, 517.

An action to redeem real property sold on foreclosure of a mortgage falls under this section and not the provisions relating to real actions (see supra, § 156): *Parker v. Dacres*, 2 W. T. 439; *Id.*, 130 U. S. 43.

An action for death by wrongful act falls under the provisions of this section, and the statute begins to run at the time the death occurs, although long after the injury is received causing it: *Nestelle v. N. P. Ry. Co.*, 56 Fed. 261.

As to actions or proceedings not specially provided for, see 2 Remington's Digest, p. 1732, § 26; *Spokane v. Stevens*, 12 Wash. 667; *Ballard v. West Coast Imp. Co.*, 15 Wash. 572; *Seattle v. De Wolfe*, 17 Wash. 349; *Gaffner v. Johnson*, 39 Wash. 437; *Smith v. Seattle*, 18 Wash. 484. An action for damages to abutting property resulting from the change of a street grade is not an action for trespass, barred by the statute of limitations within three years, under § 159, subdivision 1, but is an action for relief not otherwise provided for, limited to two years by this section: *Denny v. Everett*, 46 Wash. 342.

§ 166. (4806.) Actions on Mutual Open Accounts.

In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side; but whenever a period of more than one year shall have elapsed between any of the series of items or demands they are not to be deemed such an account. [L. '54, p. 364, § 8; L. '69, p. 10, § 33; Cd. '81, § 34; 2 H. C., § 121; see ref to § 155, supra.]

See supra, § 159, subd. 3, and notes, action on contract not in writing.

An entry by a creditor upon his own books, of an alleged payment of an account by a debtor, is not admissible, in a suit against the debtor, to remove the bar of the statute of limitations: *Schlotfeldt v. Bull*, 18 Wash. 64.

Upon a counterclaim for a board bill, it is proper to instruct that the lapse of three years would defeat a recovery unless a payment had been made on the liability, without instructing that the statute

begins to run only from the close of the account, where the periods covered a number of years and were so infrequent and far removed that they became independent transactions, precluding the idea of a continuous transaction: *Hendelman v. Kahan*, 50 Wash. 247.

On open accounts: See *Bellingham Bay Imp. Co. v. Fairhaven etc. Co.*, 17 Wash. 371.

§ 167. (4807.*) Actions in Name of State, etc.

The limitations prescribed in this act (chapter) shall apply to actions brought in the name or for the benefit of any county or other municipality or quasi municipality of the state, in the same manner as to actions brought by private parties: Provided, that there shall be no limitation to actions

brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: And further provided, that no previously existing statute of limitation shall be interposed as a defense to any action brought in the name of or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to the adoption of this act, nor shall any cause of action against the state be predicated upon such a statute. An action shall be deemed commenced when the complaint is filed. [L. '03, p. 26, § 1. Cf., L. '54, p. 364, § 9; L. '69, p. 10, §§ 34, 35; L. '73, p. 10, §§ 34, 35; Cd. '81, § 35; 2 H. C., § 122; see ref. to § 155.]

See notes to § 155, *supra*.

See *infra*, § 220 et seq., commencement of actions.

See *infra*, § 890, limitation of actions against state.

See *infra*, § 7906, limitations of actions to enforce special assessments.

Cited in 12 Wash. 669; 28 Wash. 359, 538; 30 Wash. 621; 34 Wash. 63, 64; 42 Wash. 453; 49 Wash. 54, 56, 334; 51 Wash. 55, 56, 606-608.

Proceedings constituting commencement of action: See 2 Remington's Digest, p. 1742, § 64; Powell v. Nolan, 27 Wash. 318; Lewis v. Seattle, 28 Wash. 639; Cresswell v. Spokane County, 30 Wash. 620; Service v. McMahon, 42 Wash. 452; Northern Pac. R. Co. v. Hasse, 28 Wash. 353.

Effect of change or repeal of limitation: See 2 Remington's Digest, pp. 1727, 1728, §§ 4-6½; Seattle v. De Wolfe, 17 Wash. 349; State v. Aberdeen, 34 Wash. 61; Bowman v. Colfax, 17 Wash. 344; State ex rel. Hemen v. Ballard, 16 Wash. 418; Young v. Tacoma, 31 Wash. 153.

Limitations do not run as against state or municipality: See West Seattle v. West Seattle Land & Imp. Co., 38 Wash. 359; Rapp v. Stratton, 41 Wash. 263; Laurendeau v. Fugelli, 5 Wash. 632; Northern Pac. R. Co. v. Ely, 25 Wash. 384. An assessment for local improvements: Port Townsend v. Eisenbeis, 28 Wash. 533.

Under this section title by adverse possession may be acquired under the statute of limitations as against a railroad right of way, although granted by act of Congress: Northern Pac. R. Co. v. Hasse, 28 Wash. 353.

Estoppel to rely on limitation: See Denny v. Palmer, 26 Wash. 469.

Reimbursement from person ultimately liable: See Gaffner v. Johnson, 39 Wash. 437.

Accrual of liabilities for acts or omissions in official capacity: See Spokane County v. Prescott, 19 Wash. 418; Spinning v. Pierce County, 20 Wash. 126.

Conditions precedent to accrual: See Bowman v. Colfax, 17 Wash. 344; Bennett v. Thorne, 36 Wash. 253.

As to necessity for demand, see 2 Remington's Digest, p. 1736, § 44; Sayward v. Gardner, 5 Wash. 247; Bidwell v. Tacoma, 26 Wash. 518; New York Security T. Co. v. Tacoma, 30 Wash. 661; Chilberg v. Siebenbaum, 41 Wash. 663.

The title to the act of 1903 is not broad enough to embrace the provision that an action shall be deemed commenced when the complaint is filed; but the act does not repeal by implication that part of Bal. Code, § 4807, which provides that an action is deemed commenced when the complaint is filed: Blalock v. Condon, 51 Wash. 604.

Actions brought by private parties are not deemed commenced until the complaint is filed: *Id*.

Bal. Code, § 4807 (prior to amendment), providing that limitations prescribed for the commencement of actions shall run against the state, county or other public corporations, so far as the same gives title to school lands by adverse possession, is repugnant to the state constitution and to the acts of Congress providing that school lands shall not be disposed of except at public auction for full market value paid or secured to the state: O'Brien v. Wilson, 51 Wash. 52.

§ 168. (4808.) Operation of Statute Suspended, When.

If the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the state, or after the time of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action. [L. '54, p. 364, § 10; Cd. '81, § 36; 2 H. C., § 123; see ref. to § 155, *supra*.]

Cited in 5 Wash. 664; 10 Wash. 432; 26 Wash. 461, 492; 41 Wash. 533, 534; 51 Wash. 415.

Absence or departure from state suspending the operation of the statute: See 2 Remington's Digest, p. 1738, § 53; Bignold v. Carr, 24 Wash. 413; Meek v. White, 26 Wash. 491; Fidelity Nat. Bank v. Adams, 38 Wash. 75; Denny v. Palmer, 26 Wash. 469; George v. Butler, 26 Wash. 456; Perkins v. Bailey, 38 Wash. 46; Marvin v. Yates, 26 Wash. 50.

Return and residence after absence: See 2 Remington's Digest, p. 1739, § 55; Omaha Nat. Bank v. Lindsay, 41 Wash. 531.

As to effect of denial of nonresidence under this section, see Meek v. White, 26 Wash. 491.

The word "return," used in this section, must be construed to come into, and consequently applies to nonresidents coming for the first time into this state, as well as to former residents returning after temporarily sojourning out of the state: Weber v. Yancy, 7 Wash. 84; Lake v. Steinbach, 5 Wash. 659, 664; Omaha Nat. Bank v. Lindsay, 41 Wash. 531; see Citizens' Nat. Bank v. Lucas, 26 Wash. 417.

The fact that a nonresident owns property in the state liable to attachment will not set the statute running from the time the right of action accrues, but the statute is tolled during his absence: Denny v. Sayward, 10 Wash. 422, 431; Meek v. White, 26 Wash. 491.

Residence in a certain state for a number of years will, when nothing appears to the contrary, raise the presumption of citizenship there: Weber v. Yancy, supra.

The fact that a defendant is a nonresident of the state at the time the cause

of action accrues against him must be affirmatively alleged in his answer, in the absence of such averment in the complaint, in order to rebut the presumption of his residence in the state: Lake v. Steinbach, 5 Wash. 659, 662; and where his nonresidence is not shown by the pleadings he cannot avail himself of the objection that he was a nonresident: Id.

Action upon a judgment of another state against a nonresident there is not barred by our statute, when the judgment defendant has not become a resident of this state, until after the expiration of six years from the time of the commencement of such residence here: Weber v. Yancy, supra; Lake v. Steinbach, supra.

The running of the statute of limitations against relief on the ground of fraud is not affected by ill-health or negotiations that did not commence until the statute had run: Carroll v. Hill Tract Improvement Co., 44 Wash. 569.

An action to foreclose a mortgage is barred as against a purchaser of the property from the mortgagor more than six years after maturity of the debt, when the action was not commenced within a reasonable time (fifteen months after the purchase), as the absence of the mortgagor from the state does not suspend the running of the statute: Boyer v. Price, 45 Wash. 667.

A judgment debtor is a nonresident of this state, within the meaning of this section, where she had her abode in Idaho and rented a house and taught school there since 1897, living with her daughter as the only member of her family, and only returned to this state to spend her vacation after being elected to teach in Idaho for another year: Dignam v. Shaff, 51 Wash. 412.

§ 169. (4809.) Suspension for Personal Disability.

If a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be, at the time the cause of action accrued, either under the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than his natural life, the time of such disability shall not be a part of the time limited for the commencement of action. [Cf. L. '54, p. 364, § 11; L. '61, p. 61, § 1; L. '69, p. 10, § 38; Cd. '81, § 37; 2 H. C., § 124; see ref. to § 155, supra.]

See infra, § 175, cumulative disabilities.

See infra, § 174, disability must have existed when action accrued.

See infra, § 193, continuance of action by representative.

Cited in 41 Wash. 611; 10 Wash. 665; 50 Wash. 693.

See 2 Remington's Digest, p. 1737, §§ 47, 48.

Under this section an action commenced within four years after the minor attains his majority is within time: May v. Sutherland, 41 Wash. 609.

After a ward becomes of age she stands in the relation of a creditor of her guardian and where she has knowledge after

majority sufficient to put her on inquiry as to whether her guardian has appropriated a portion of her property, her right of action against him for fraud would accrue from the date of such knowledge: Wickham v. Sprague, 18 Wash. 466.

The ten-year statute of limitations for actions for the recovery of real property does not begin to run against a minor until he attains his majority: McMillan v. Walker, 48 Wash. 342.

§ 170. (4810.) Suspension by Death.

If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of the time and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration. [L. '54, p. 364, § 12; Cd. '81, § 38; 2 H. C., § 125; see ref. to § 155, supra.]

See infra, § 193, continuance of action by representative.

See infra, § 967, actions by and against executors and administrators.

See infra, § 1368, letters to be issued within six years.

Cited in 32 Wash. 468, 487; 34 Wash. 564.

See 2 Remington's Digest, p. 1748, §§ 49-51.

When the statute has commenced to run against a party, its operation is not arrested by his subsequent death before the end of the statutory period: *McAuliff v. Parker*, 10 Wash. 141, 146.

It was held in *Scott v. McNeal*, 5 Wash. 309, that the court was warranted in finding a party dead who had been absent from the state for seven years, where there was no evidence that he still lived, and in ordering administration upon his estate; and further, that although the supposed deceased person returned to this state he could not maintain ejectment

against an innocent purchaser of his estate sold under decree in probate; but this case was reversed on writ of error: *Scott v. McNeal*, 154 U. S. 34, 35. See *State ex rel. Young v. Superior Court*, 43 Wash. 34.

This section is superseded, so far as actions to charge land with debt are concerned, by § 1368; *Gleason v. Hawkins*, 32 Wash. 464.

As to effect of death of person liable, see *Gleason v. Hawkins*, 32 Wash. 464; *Frew v. Clark*, 34 Wash. 561; *Fuhrman v. Power*, 43 Wash. 533; *Bank of Montreal v. Buchanan*, 32 Wash. 480.

Effect of administration: *Brigham-Hopkins Co. v. Gross*, 20 Wash. 218; *Brigham-Hopkins Co. v. Gross*, 30 Wash. 277.

§ 171. (4811.) Suspension by War.

When a person shall be an alien subject or a citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the period limited for the commencement of the action. [L. '54, p. 365, § 13; Cd. '81, § 39; 2 H. C., § 126; see ref. to § 155, supra.]

§ 172. (4812.) Suspension by Judicial Proceedings.

When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action. [L. '54, p. 365, § 14; Cd. '81, § 40; 2 H. C., § 127; see ref. to § 155, supra.]

Cited in 30 Wash. 280; 32 Wash. 205.

Pendency of action or other proceeding: See 2 Remington's Digest, p. 1741, §§ 60-63; *Hinchman v. Anderson*, 32 Wash. 198.

Property in custody of the law: See *Brigham-Hopkins Co. v. Gross*, 20 Wash.

218; *Brigham-Hopkins Co. v. Gross*, 30 Wash. 277.

Pendency of proceedings in insolvency: See *Chilberg v. Siebenbaum*, 41 Wash. 633.

Suspension of statute of limitations as against the state: See *State v. Aberdeen*, 34 Wash. 61.

§ 173. (4813.) Suspension by Reversal of Judgment.

If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on error or appeal, the plaintiff, or if he die and the cause of action survive, his heirs or representatives, may commence a new action within one year after reversal. [L. '54, p. 365, § 15; Cd. '81, § 41; 2 H. C., § 128; see ref. to § 155, supra.]

§ 174. (4814.) When Disability Available.

No person shall avail himself of a disability unless it existed when his right of action accrued. [L. '54, p. 365, § 16; Cd. '81, § 42; 2 H. C., § 129; see ref. to § 155, supra.]

See next section and supra, § 169, other disabilities.

§ 175. (4815.) Cumulative Disabilities.

When two or more disabilities shall coexist at the time the right of action accrues, the limitation shall not attach until they all be removed. [L. '54, p. 365, § 17; Cd. '81, § 43; 2 H. C., § 130; see ref. to § 155, supra.]

See last section and supra, § 169, other disabilities.

§ 176. (4816.) New Promise must be in Writing.

No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter, unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest. [L. '54, p. 365, § 18; Cd. '81, § 44; 2 H. C., § 131; see ref. to § 155, supra.]

See next section and notes, effect of payment.

Cited in 27 Wash. 421; 51 Wash. 369.

New promise: See 2 Remington's Digest, pp. 1742, 1743, §§ 67-69.

Persons by whom made and against whom available: See White v. Krutz, 37 Wash. 34; Liberman v. Gurensky, 27 Wash. 420.

Sufficiency of acknowledgment or promise in general: See Liberman v. Gurensky, 27 Wash. 410.

Correspondence relating to several promissory notes, when not sufficient to remove the bar of the statute, under this section: Bank of Montreal v. Guse, 51 Wash. 365.

§ 177. (4817.) Effect of Partial Payment.

When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made. [L. '54, p. 365, § 19; Cd. '81, § 45; 2 H. C., § 132; see ref. to § 155, supra.]

See last section and notes.

Cited in 13 Wash. 553; 20 Wash. 444; 27 Wash. 151.

See 2 Remington's Digest, pp. 1743, 1744, §§ 1670-1678.

A payment and acceptance of interest on a promissory note relieves the note from the statute: Koslowski v. Yesler, 2 W. T. 407.

Payment made upon an indebtedness after the same has become due fixes a new date for the running of the statute of limitations in respect to actions thereon: Ah How v. Furth, 13 Wash. 550.

Part payment: See Perkins v. Jennings, 27 Wash. 145; Warnock v. Itawis, 38 Wash. 144; Stubblefield v. McAuliff, 20 Wash. 442; Bassett v. Thrall, 21 Wash.

231; Hannah v. Kasson, 26 Wash. 568; Gibson v. Kerry, 19 Wash. 159.

Part payment by joint maker of note: See Old Dominion Min. etc. Co. v. Daggett, 38 Wash. 675.

As to sufficiency of part payment, see Bellingham Bay Imp. Co. v. Fairhaven etc. R. Co., 17 Wash. 371.

As to indorsement on note or other instrument, see Schlotfeldt v. Bull, 18 Wash. 64.

As to revival of debt as revival of lien or other security, see Damon v. Leque, 17 Wash. 573; George v. Butler, 26 Wash. 456; Raymond v. Bales, 26 Wash. 493; Hanna v. Kasson, 26 Wash. 568; De Voe v. Rundle, 33 Wash. 604.

§ 178. (4818.) Foreign Statutes of Limitations, How Applied.

When the cause of action has arisen in another state, territory, or country between nonresidents of this state, and by the laws of the state, territory, or

country where the action arose an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state. [L. '54, p. 365, § 20; Cd. '81, § 46; 2 H. C., § 133; see ref. to § 155, supra.]

See notes to § 155, supra.

Cited in 6 Wash. 537; 7 Wash. 315; 24 Wash. 9; 41 Wash. 533.

In transitory actions, the statute of limitations of the forum, and not that of the place where the contract was made, governs; hence, when a maker of a promissory note, given in California, removed to Washington territory before the statute had run on the same, he cannot thereafter here plead the statute of California in order to bar the action: *Adams v. Kelly*, 2 W. T. 263.

Where a married woman, after the removal of her husband to this state, remained in Dakota for the purpose of settling up the affairs of her separate property, preparatory to following him, she cannot, under the provisions of this section, maintain an action in this state for the wrongful taking and detention of personal property in Dakota by a resident there, when such action is barred by the laws of that state, as, under the laws giving a married woman complete control of

her separate property, her residence does not necessarily follow the domicile of her husband: *McCain v. Gibbons*, 7 Wash. 314.

This section is inapplicable in the case of an action upon a promissory note by a resident of this state against a nonresident, although at the time of the execution of the note both plaintiff and defendant were nonresidents, where plaintiff had taken up his residence within this state prior to the maturity of the note: *Freundt v. Hahn*, 24 Wash. 8.

An action upon a judgment of the state of Minnesota entered in 1903 is not barred by the statute of limitations in this state in the year 1905: *Childs v. Blethen*, 40 Wash. 340.

"Arose" and "arisen," in this section should be defined not to have been used in the sense of "originated," but rather in the sense of the right of action having "accrued": *Freundt v. Hahn*, 24 Wash. 8. See, also, *Omaha National Bank v. Lindsay*, 41 Wash. 531.

CHAPTER IV.

PARTIES TO ACTIONS.

§ 179. (4824.) In Whose Name Actions to be Prosecuted.

Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law. [Cf. L. '54, p. 131, § 3; L. '69, p. 3, § 4; L. '75, p. 4, § 1; L. '77, p. 4, § 4; Cd. '81, § 4; 2 H. C., § 134.]

See *infra*, § 189, for necessary parties.

See *infra*, § 191, for assignees of choses in action, etc.

See *infra*, § 192, for joinder of parties.

See *infra*, § 259, and notes, demurrer.

Cited in 4 Wash. 784; 5 Wash. 362; 16 Wash. 588; 21 Wash. 454; 22 Wash. 272; 23 Wash. 444; 27 Wash. 10, 335; 28 Wash. 183; 33 Wash. 165, 678.

See 2 *Remington's Digest*, pp. 2193-2196, §§ 1-14.

The rule of the common law that the death of the plaintiff, or the determination of his interest in the subject matter of the action, abated the suit, is modified by this section, taken in connection with § 193, *infra*, where the cause of action survives or continues: *Box v. Kelso*, 5 Wash. 360, 362.

A cause of action which survives to a personal representative can be enforced in the name of an assignee, but mere personal torts which die with the party, and do not survive to the personal representative, are not capable of passing by assignment, so as to preserve the right of action: *Slauson v. Schwabacher*, 4 Wash. 783. See *Jones v. Miller*, 35 Wash. 499.

A creditor may bring an action in his own name to set aside a fraudulent conveyance made by the debtor prior to making an assignment for benefit of creditors: *Fidelity Nat. Bank v. Adams*, 38 Wash. 70.

Under the provisions of this section the courts are governed by the rules of the common law as modified by 3 Edward III, and our local statutes, permitting assignments of choses in action to extend to commercial paper: *Id.*, 784.

In an action upon a promissory note by an indorsee who makes the payee a party defendant, only slight proof that the plaintiff is the real party in interest is necessary, as the indorser would be bound by the judgment, and no injury could result to the maker; furthermore, the introduction of the note indorsed in blank is *prima facie* sufficient: *Yakima Nat. Bank v. Knipe*, 6 Wash. 348. See, also, *Seattle Nat. Bank v. Emmons*, 16 Wash. 585;

Lodge v. Lewis, 32 Wash. 191; State v. Headlee, 18 Wash. 220; Capital Brewing Co. v. Crosbie, 22 Wash. 270.

A plaintiff is sufficiently shown to be the real party in interest when he introduces the note sued on purporting to be indorsed in blank, since the production of such note in evidence prima facie establishes the fact that plaintiff is the owner and holder thereof: *Id.* See, also, *Little v. Saulsberry*, 40 Wash. 550.

A general assignment for the benefit of creditors does not cut off the assignor from prosecuting an action already begun in his own name, until the assignee makes application for substitution: *Box v. Kelso*, supra.

In a suit brought by A. against B. for damages to crops by B.'s cattle, on the trial it was discovered that C. had an in-

terest in part of the crop injured. Held, that C.'s interest was consistent with A.'s right to recover for the trespass, and, at most, could only operate as a partial failure of proof: *Washburn v. Case*, 1 W. T. 253.

Indians sustaining tribal relations are capable of entering into binding contracts except in cases prohibited by Congress, hence they may sue and be sued: *Gho v. Julles*, 1 W. T. 325.

Where the defect of parties appears on the face of a claim filed and summons issued, defendant's appearance and pleading to the merits is a waiver: *Baxter v. Scoland*, 2 W. T. 86.

A defect of parties is waived where the same is not raised by demurrer, answer, or otherwise in the court below: *Budlong v. Budlong*, 48 Wash. 645.

§ 180. (4825.) **Executor, Trustee, etc., may Sue in Their Own Names.**

An executor or administrator, or guardian of a minor or person of unsound mind, a trustee of an express trust, or a person authorized by statute, may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another. [L. '54, p. 131, § 4; L. '69, p. 4, § 5; Cd. '81, § 5; 2 H. C., § 135.]

See infra, § 187, suing by guardian.

See infra, § 296, joinder of actions.

See infra, § 489, costs in such cases.

See infra, § 967 et seq., actions by and against executors and administrators.

See, also, § 1535, certain actions by and against executors and administrators.

Cited in 23 Wash. 444; 26 Wash. 82; 27 Wash. 10; 43 Wash. 525; 44 Wash. 588.

See 2 Remington's Digest, p. 2194, § 4.

Under this section a bank may maintain an action in its own name for the purpose of securing relief against excessive taxation of its capital stock: *Citizens' Nat. Bank of Dayton v. Columbia County*, 23 Wash. 441.

Under the act of Congress of August 13, 1894, which provides that persons having a right of action for unpaid labor and materials may bring suit on such bond in the name of the United States for their use and benefit, the United States is a proper party plaintiff in the courts of the state, under this section: *United States v. Rundle*, 27 Wash. 7.

Consignors cannot maintain an action of conversion against the carrier as trus-

tees of an express trust, where they unconditionally parted with title, especially when the suit is not prosecuted for the benefit of the purchasers: *Sweeney v. Waterhouse & Co.*, 39 Wash. 507.

A foreign executor of an estate, who is, in writing, empowered by the beneficiaries of such estate to purchase certain property in the interest of the estate, is thereby constituted a trustee of an express trust, within this section: *Doe v. Tenino Coal & Iron Co.*, 43 Wash. 523.

A trustee of an express trust may be sued without joining his beneficiary: See *Thompson v. Price*, 37 Wash. 394.

A person to whom a deed of land is conveyed without consideration, to hold the title for the grantors, is a trustee of an express trust, within this section, and may sue to quiet title without joining the real owners: *Carr v. Cohn*, 44 Wash. 586.

§ 181. (4826.) **Husband and Wife must Join—Exception.**

When a married woman is a party, her husband must be joined with her, except,—

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone;

2. When the action is between herself and her husband, she may sue or be sued alone;

3. When she is living separate and apart from her husband, she may sue or be sued alone. [L. '54, p. 131, § 5; L. '69, p. 4, § 6; L. '75, p. 4, § 2; Cd. '81, § 6; 2 H. C., § 136.]

See *infra*, §§ 5917, 5918, parties to actions involving community rights.

See *infra*, § 5920, wife's right to bring and defend actions for personal labor.

See *infra*, § 5921, earnings of wife separate property, when.

See *infra*, § 5926, civil disabilities of wife removed.

See *infra*, § 5928, may sue each other.

See *infra*, § 5931, liability for family expenses.

See next section, when husband and wife may join.

Cited in 21 Wash. 236; 25 Wash. 5.

An action brought for permanent injuries to community real estate must be brought by husband and wife jointly: *Parke v. Seattle*, 8 Wash. 78.

And the rule extends to actions for rents and profits: *Lownsdale v. Gray's Harbor Co.*, 21 Wash. 542.

But the wife is not a necessary party plaintiff in action for damages on breach of contract beneficial to community property: *Belt v. Washington Water Power Co.*, 24 Wash. 387; see *O'Toole v. Faulkner*, 34 Wash. 371.

The wife is a proper although not a necessary party to actions for her personal injuries: *Hawkins v. Front St. Cable Ry. Co.*, 3 Wash. 592.

Where the wife brought an action in her own name for personal injuries sustained by her, the husband's name may be added by amendment at the trial: *Davis v. Seattle*, 37 Wash. 223.

Where plaintiff had owned the land and been in possession thereof from a date long prior to the passage of the first statute of this state as to community property, it cannot be presumed that his wife has such an interest therein as to make her a necessary party to the action for damage to the same: *Spurlock v. Port Townsend Southern R. Co.*, 13 Wash. 29.

But wife is a necessary party in action for wrongful appropriation of community property: *Lownsdale v. Gray's*

Harbor Boom Co., 21 Wash. 542. See, also, *Armstrong v. Oakley*, 23 Wash. 122; *Dane v. Daniel*, 23 Wash. 379; *Chehalis County v. Ellingson*, 25 Wash. 638.

As to whether the wife is a necessary party in actions involving community rights and liabilities: *Ballinger Com. Prop.*, § 185 et seq.

Under the laws of the state of New Hampshire, a wife domiciled in that state, and owning an interest in real property in this state, may maintain an action in this state for a partition without joining her husband as party plaintiff: *Sawyer v. Vermont Loan & T. Co.*, 41 Wash. 524.

In an action of replevin by a married woman under statutes authorizing her to acquire, hold and sue for property as if she were unmarried, a complaint alleging that she was the owner and entitled to the possession of the property is sufficient without deraigning her title; and an answer that she was a married woman and that the "property had been acquired since the marriage" states no affirmative defense, and requires no reply from her showing that she acquired the property as separate property: *Hester v. Stine*, 46 Wash. 469.

A married woman may maintain an action in her own name for alienation of her husband's affections: *Brach v. Brown*, 20 Wash. 266.

Also, to restrain the sale of a community property homestead: *Ross v. Howard*, 25 Wash. 2.

§ 182. (4827.) When Husband and Wife may Join.

Husband and wife may join in all causes of action arising from injuries to the person or character of either or both of them, or from injuries to the property of either or both of them, or arising out of any contract in favor of either or both of them. If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also. And she may defend in all cases in which she is interested, whether she is sued with her husband or not. [Cf. L. '54, p. 219, § 492; L. '77, p. 4, § 7; L. '75, p. 4, § 3; Cd. '81, § 7; 2 H. C., § 137.]

See notes to last section.

See *infra*, § 5926, civil disabilities of wife abolished.

See *infra*, § 5920, right of wife to prosecute and defend, when.

Cited in 3 Wash. 596; 21 Wash. 490; 39 Wash. 298; 51 Wash. 569.

An action for personal injuries to the wife, caused by the negligence of an-

other, must be brought in the name of the husband, and the wife, while not a necessary, is a proper, party to such action: *Hawkins v. Front St. Cable Ry Co.*, 3

Wash. 592; see *Phelps v. S. S. City of Panama*, 1 W. T. 518, 535.

An action by a husband and wife for failure to properly bury the dead body of their child is not subject to the objection that there is a defect of parties plaintiff: *Wright v. Beardsley*, 46 Wash. 16.

A wife may be joined with the husband to recover loss of community property by fire: *Hedican v. Penn. Fire Ins. Co.*, 21 Wash. 488.

This section authorizes an action by husband and wife to recover for personal injuries sustained by the husband: *Apker v. Hoquiam*, 51 Wash. 567.

§ 183. (4828.*) When Survivor's Heirs or Representatives may Sue.

The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. If the deceased leave no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support and who are resident within the United States at the time of his death, may maintain said action. When the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square or wharf, his heirs or personal representatives, or if deceased leaves no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support, and who are resident within the United States at the time of his death, may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, as under all circumstances of the case may to them seem just. [L. '09, p. 425, § 1. Cf. L. '54, p. 220, § 496; L. '75, p. 4, § 4; Cd. '81, § 8; 2 H. C., § 138.]

See next section.

See *infra*, § 194, survival of action for personal injury.

See *infra*, § 967 et seq., actions by and against executors, etc.

See *infra*, § 5418 and notes, damages for injuries caused by intoxicated person.

Cited in 3 Wash. 194-196, 199, 225-227; 4 Wash. 401-403, 433; 5 Wash. 262; 8 Wash. 151, 152, 364; 17 Wash. 593; 19 Wash. 134, 138; 26 Wash. 489; 33 Wash. 419; 34 Wash. 47, 407; 39 Wash. 212, 214; 46 Wash. 174, 176.

Actions for wrongful death: See 1 Remington's Digest, pp. 900-905, §§ 1-29.

Abatement and survival: See 1 Remington's Digest, pp. 7, 8, §§ 18-26.

Bal. Code, § 4828, being the later expression of the legislative will upon the subject, supersedes § 703 of 2 Hill's Code, which is irreconcilable and repugnant to its provisions: *Gractz v. McKenzie*, 3 Wash. 194; *N. P. Ry. Co. v. Ellison*, 3 Wash. 225; *Hedrick v. Ilwaco R. & N. Co.*, 4 Wash. 409; *Klepsch v. Donald*, 4 Wash. 436, 443; *Dahl v. Tibbals*, 5 Wash. 259; see *Atrops v. Costello*, 8 Wash. 149. See, also, *Copeland v. Seattle*, 33 Wash. 415. See *Robinson v. Baltimore etc. Red Co.*, 26 Wash. 484; *Nesbit v. Northern Pacific R. Co.*, 22 Wash. 698. Under Bal. Code, § 4828, before its amendment action could be brought in favor of wife and children only: *Robinson v. Baltimore etc. Red Co.*, *supra*; *Copeland v. Seattle*

supra; *Noble v. Seattle*, 19 Wash. 133; *Manning v. Tacoma R. & P. Co.*, 34 Wash. 406; *Johnson v. Seattle Electric Co.*, 39 Wash. 211.

A husband can recover for his loss of time and funeral expenses resulting from the wrongful death of his wife, irrespective of statutes: *Philby v. Northern Pac. R. Co.*, 46 Wash. 173.

In an action for death caused by the wrongful act of the defendant there can be no recovery on the ground of contributory negligence of the defendant, when the evidence shows that he was an employee of defendant railway company and was well informed of his situation and of the danger involved: *Brennan v. Front St. Cable Ry. Co.*, 8 Wash. 363.

In an action for death by wrongful act of defendant, recovery is based on proof of pecuniary damage and not of the death caused by the unlawful act or neglect: *Klepsch v. Donald*, *supra*, 444.

Where blasting in a certain locality is not unlawful, the fact that a man was killed by a rock thrown by the blast between 940 and 1200 feet in a horizontal direction, constitutes only a *prima facie*

case of negligence, which may be rebutted by showing due care in discharging the blast; and the question of negligence in such case cannot be taken from the jury: *Id.*

In an action for injuries to a woman pregnant with child, there can be no recovery for death of child, but there may be for the woman's suffering, etc., where such death is shown to be due to negligence of defendant: *Hawkins v. Front St. Cable Ry Co.*, 3 Wash. 592.

An action for wrongful death may be

prosecuted in the name of the administratrix of the deceased's estate, although it is not alleged that it is for the benefit of the widow and children, where they are named in the complaint, as the action will inure to their benefit by operation of law: *Archibald v. Lincoln County*, 50 Wash. 55.

Nonresident aliens may maintain an action for wrongful death under our statutes authorizing an action for the benefit of the widow and children: *Anustasakas v. International Contract Co.*, 51 Wash. 119.

§ 184. (4829.) Action for Injury or Death of Child or Ward.

A father or in case of the death or desertion of his family the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward. [L. '69, p. 4, § 9; L. '73, p. 5, § 10; Cd. '81, § 9; 2 H. C., § 139.]

See notes to last section.

Cited in 4 Wash. 401-403; 8 Wash. 150-152; 19 Wash. 135; 29 Wash. 141; 52 Wash. 301.

This section does not repeal § 194, *infra*: *Noble v. Seattle*, 19 Wash. 133.

A father may maintain an action for the death of his child, under the provisions of this section, although the administrator of the child's estate may have, theretofore, recovered judgment against the same defendant for causing the child's death by wrongful act or negligence: *Hedrick v. Ilwaco R. & N. Co.*, 4 Wash. 400.

The measure of damages in such cases is the value of the child's services from date of injury to time of majority, taken in connection with prospects of life less cost of support and maintenance, to which may be added in proper cases expense of nursing and medical treatment: *Id.* 404.

In an action for damages for negligently causing the death of a child, pleading and proof of special pecuniary damages is unnecessary, as, in such cases, it falls within the province of the jury to judge of the pecuniary loss to the parents from the evidence showing the age of the child, its health, habits, character, and

the station in life of the parents: *Atrops v. Costello*, 8 Wash. 149.

Punitive or exemplary damages cannot be recovered in an action brought under this section: *Id.*, 152. See, also, *Woodhouse v. Powles*, 43 Wash. 617.

In an action by husband and wife to recover damages for death of their minor child, it is proper to grant leave to dismiss the wife as a party plaintiff: *Dean v. Oregon R. & Nav. Co.*, 38 Wash. 565.

A mother may maintain an action for the death of her child, when: See *Clark v. Northern Pac. R. Co.*, 29 Wash. 139.

In an action by parents for the death of their minor son who had run away from home, in which the defense is that he was emancipated and contributed nothing to the plaintiff's support, conversations and letters expressing an intent on the part of the decedent to contribute to such support are not incompetent as self-serving declarations: *Dean v. Oregon R. & Nav. Co.*, 44 Wash. 564.

In an action by parents to recover for the death of their minor son, the sum of \$178 for burial expenses and transporting the body to the old home is a proper item for recovery: *Id.*

§ 185. (4830.) Action by Parent for Seduction of Daughter.

A father, or in case of his death or desertion of his family, the mother, may maintain an action as plaintiff for the seduction of a daughter, and the guardian for the seduction of a ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterward, and there be no loss of service. [L. '69, p. 4, § 10; Cd. '81, § 10; 2 H. C., § 140.]

Cited in 1 Wash. 413.

Facts held sufficient to constitute seduction in *State v. Carter*, 8 Wash. 272; but

facts held insufficient in *State v. Cochran*, 10 Wash. 562. See *State v. O'Hare*, 36 Wash. 516.

§ 186. (4831.) Action by Woman for Her Own Seduction.

An unmarried female over twenty-one years of age may maintain an action as plaintiff for her own seduction, and recover therein such damages

as may be assessed in her favor; but the prosecution of an action to judgment by the father, mother, or guardian, as prescribed in the preceding section, shall be a bar to an action by such unmarried female. [L. '54, p. 220, § 497; L. '69, p. 5, § 11; Cd. '81, § 11; 2 H. C., § 141.]

Cited in 51 Wash. 98.

This section authorizes a suit in this state for a seduction committed in another state or territory, in the absence of allegation as

to the laws of the sister state, the presumption being that they are the same as the laws of this state: *Murrilla v. Guis*, 51 Wash. 93.

§ 187. (4832.) Appointment of Guardian Ad Litem for Infants.

When an infant is a party, he shall appear by guardian, or if he has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act. Said guardian shall be appointed as follows:—

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant;

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within thirty days after the service of the summons; if he be under the age of fourteen, or neglect to apply, then upon the application of any other party to the action, or of a relative or friend of the infant. [Cf. L. '54, p. 132, §§ 6, 7; Cd. '81, § 12; L. '91, p. 69, § 1; 2 H. C., § 142.]

See supra, § 180, when executor, etc., may sue without joining party.

See infra, § 1644, appointment of in guardianship.

See infra, § 1502, appointment of in probate sales.

Authority of guardians to sue: See infra, §§ 1636, 1637, 1662, and 1771.

Cited in 24 Wash. 129.

Upon objection that minors interested in the estate of their deceased father are necessary parties plaintiff, it is proper to appoint their mother guardian ad litem and join them as parties plaintiff by filing an amended complaint: *Zeimautz v. Blake*, 39 Wash. 6.

After pleading to the merits the objection cannot be raised that parties are minors and appear without guardian ad litem: *Blumauer v. Clock*, 24 Wash. 596; *Donald v. Ballard*, 34 Wash. 576.

A nonresident parent may be appointed guardian ad litem: See *Shannan v. Consol. Tiger etc. Min. Co.*, 24 Wash. 119.

§ 188. Guardian Ad Litem of Insane Persons.

When an insane person is a party to an action in the superior courts he shall appear by guardian, or if he has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act as guardian ad litem. Said guardian shall be appointed as follows:

(1) When the insane person is plaintiff, upon the application of a relative or friend of the insane person.

(2) When the insane person is defendant, upon the application of a relative or friend of such insane person, such application shall be made within thirty days after the service of summons if served in the state of Washington, and if served out of the state or service is made by publication, then such application shall be made within sixty days after the first publication of summons or within sixty days after the service out of the state. If no such application be made within the time above limited, application may be made by any party to the action. [L. '99, p. 144, § 1.]

See notes to last section.

§ 189. (4833.) Who must be Made Parties.

All persons interested in the cause of action, or necessary to the complete determination of the question involved, shall, unless otherwise provided by

law, be joined as plaintiffs when their interest is in common with the party making the complaint, and as defendants when their interest is adverse to the plaintiff: Provided, that where good cause exists, which shall be made to appear in the complaint, why a party who should be a plaintiff cannot, from a want of consent on his part or otherwise, be made such plaintiff, he shall be made a defendant. [L. '54, p. 132, § 8; Cd. '81, § 13; 2 H. C., § 143.]

See supra, § 181, husband and wife as necessary parties.

See infra, §§ 259, 264, how defect of parties taken advantage of.

See infra, § 408, subd. 5, for failure to make necessary party.

See supra, § 179, real party in interest.

See infra, §§ 196, 197, bringing in new parties.

See infra, § 191, actions by assignees.

See infra, §§ 229, 232, 239, process against unknown parties.

See infra, § 306, defendant designated by fictitious name.

Cited in 9 Wash. 159, 507; 12 Wash. 139, 167; 13 Wash. 658; 22 Wash. 378; 28 Wash. 183; 40 Wash. 584; 51 Wash. 283.

See 2 Remington's Digest, pp. 2196-2199, §§ 12-14, 22-31.

No binding order can be made upon a person in nowise made a party to the suit: *Madison v. Madison*, 1 W. T. 60.

An order of court requiring certain persons, not impleaded in an action, nor parties thereto except as garnishees, and having no notice, to deliver certain property claimed by them to another also not a party to the suit, is void for want of jurisdiction, and amounts to the taking of private property without due course of law: *Weisbach v. Arnold*, 3 W. T. 111; *Coombs v. Davis*, 2 W. T. 467.

If defect of parties is not raised by answer or demurrer, the court cannot dismiss an action for such defect unless upon refusal or neglect of plaintiff to make the necessary parties after an order to that effect: *Harrington v. Miller*, 4 Wash. 808. Objection to defect of parties cannot be raised by objections to testimony: *Green v. Finnell*, 22 Wash. 186; see infra, § 408, subd. 5, and § 196.

The tenant in possession is the only necessary party defendant in an action of ejectment; and although he may set up that there are tenants in common with him and ask that they may be made parties, plaintiff cannot be compelled to bring them in: *Raymond v. Morrison*, 9 Wash. 156. One partner, sued for the torts of the copartnership, cannot take advantage of any defect in parties defendant where the objection was not raised by demurrer: *Grissom v. Hofus*, 39 Wash. 51.

In an action of replevin the one in possession of the chattel claimed is the only necessary defendant, although an interest is asserted therein by others: *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630. See *O'Brien v. Seattle Ice Co.*, 43 Wash. 217.

The assignor of a leasehold interest in real estate is not a necessary party to an action to foreclose a lien thereon: *Harrington v. Miller*, supra.

A trustee named in a mortgage to secure the payment of certain notes is the

proper party to institute foreclosure thereof, whether he has the legal title to any of the notes or not: *Thompson v. Huron Lumber Co.*, 4 Wash. 600.

Where a number of loggers have participated in cutting and rafting a boom of logs, upon which they have filed liens, their joinder as plaintiffs in an action for damages for the destruction of the logs is proper: *Peterson v. Sayward*, 9 Wash. 503.

Parties injured by the same wrong may bring action jointly: *Coleman v. Rathbun*, 40 Wash. 303.

Although one of two joint lessees paid all the money on a contract of lease, this will not warrant an action by him alone for breach of the contract: *Dietz v. Winehill*, 6 Wash. 109.

Where an agent takes a promissory note, payable to himself, his principal may sue on it without any indorsement: *Stinson v. Sachs*, 8 Wash. 391. See, also, *Wash. Nat. Bank v. Moyer*, 22 Wash. 622.

The state is not a necessary party to an action for appropriation by a boom company of tide lands, which it has contracted to sell, as its interest therein is not subject to condemnation: *North River Boom Co. v. Smith*, 15 Wash. 138; *Seattle & M. Ry. Co. v. State*, 7 Wash. 150. See, also, *Samish Boom Co. v. Callvert*, 27 Wash. 611; *State ex rel. Trimble v. Superior Court*, 31 Wash. 445; *State ex rel. Atty. Gen. v. Superior Court*, 36 Wash. 381.

In an action for the recovery of premises, all the owners are proper parties plaintiff, although they do not own the premises by unity of title, where the action arises out of a common cause against the same party: *Snyder v. Harding*, 34 Wash. 286.

Creditors are proper parties plaintiff to an action on a judgment entered in their favor against stockholders of insolvent corporations: *Childs v. Blethen*, 40 Wash. 340.

Parties having claims for services may join, when: See *Gleason v. Tacoma Hotel Co.*, 16 Wash. 412; *Fitch v. Applegate*, 24 Wash. 25.

Where a timber company and a mill company were both owned and managed by the same individuals and are practically one concern and both were interested in the business of the removal of timber constituting a trespass, they may be joined in one action for damages for a joint trespass: *Heybrook v. Index Lumber Co.*, 49 Wash. 378.

An agreement, as part consideration for the sale of a stock of goods, that the defendants would obtain an extension of their lease of a storeroom then in their possession, and that they would sublease one-half of the room to the plaintiffs for the term of the renewal, will be enforced, and it is not ground for denying specific performance that the court had no jurisdiction over the defendant's son, a non-resident, in whose name the renewal was taken, and who, at their request, held the lease in his name as their agent; it appearing from the evidence that the son had no interest in the lease or leased property, that the defendants retained and occupied the premises and paid the rent, and were the only real parties in interest: *Capps v. Frederick*, 44 Wash. 38.

A city is not a necessary party in an action of mandamus against the city treasurer to enforce payment of a warrant, duly executed by the proper city officers: *Savage v. Sternberg*, 19 Wash. 679.

In a mandamus proceeding to compel a public officer to convey lands purchased at a tax sale, private persons who claim an interest in the land are proper parties: *State ex rel. Race v. Cranney*, 30 Wash. 594.

The state is not a necessary party defendant to an action by a lessee of state lands for a trespass thereon: *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127.

Wife as necessary party defendant: See *Chehalis County v. Ellington*, 21 Wash. 638; *Armstrong v. Oakley*, 23 Wash. 122; *McNair v. Ingebrigsten*, 36 Wash. 186; *Seattle v. Baxter*, 20 Wash. 715; *Dane v. Daniel*, 23 Wash. 379.

As to misjoinder and waiver of objections, see 2 *Remington's Digest*, pp. 2205, 2206, §§ 56-63; *State ex rel. Dye v. Reilly*, 40 Wash. 217; *Gleason v. Tacoma Hotel Co.*, 16 Wash. 412; *Womer v. O'Brien*, 37 Wash. 9; *Schreiner v. Stanton*, 26 Wash. 563.

Owners of separate parcels cannot join as plaintiffs in action to quiet title: See *Utterback v. Meeker*, 16 Wash. 185.

On contract liability of partnership, incurred before appointment of receiver, see *Flynn v. Furth*, 25 Wash. 105.

In an action of ejectment heirs who are nonresidents and whose consent to bringing the action could not be procured, are prop-

er but not necessary parties defendant: *Johnston v. Gerry*, 34 Wash. 524.

As to persons who must be joined, see *State ex rel. Reed v. Gormley*, 40 Wash. 601; *Walla Walla County v. Oregon R. & Nav. Co.*, 40 Wash. 398; *Smithson Land Co. v. Brautigan*, 16 Wash. 174.

As to proper, but not necessary, parties, see *Morrison v. Blue Star Nav. Co.*, 26 Wash. 541; *Abb v. Northern Pac. R. Co.*, 28 Wash. 428; *Howe v. Northern Pac. R. Co.*, 30 Wash. 569; *McHugh v. Northern Pac. R. Co.*, 32 Wash. 30; *Morrison v. Northern Pac. R. Co.*, 34 Wash. 70; *Winsor v. German Sav. & L. Soc.*, 31 Wash. 335; *Ritterhoff v. Puget Sound Nat. Bank*, 37 Wash. 76; *Spokane & Idaho Lum. Co. v. Boyd*, 28 Wash. 90; *State ex rel. Withrop v. Brown*, 19 Wash. 383; *Savage v. Sternberg*, 19 Wash. 679; *Abbott v. Gaches*, 20 Wash. 517; *Long v. Eisenbeis*, 23 Wash. 556.

As to title to or interest in property, see *Denny v. Cole*, 22 Wash. 372.

As to heirs or legatees, see *Anrud v. Scandinavian-Amer. Bank*, 27 Wash. 16; *Sawyer v. Vermont Loan & T. Co.*, 41 Wash. 524.

As to persons necessary to a complete determination of the action, see *State ex rel. Race v. Cranney*, 30 Wash. 594; *State ex rel. Reed v. Gormley*, 40 Wash. 601.

A trial judge is not a proper party to a proceeding for contempt of court over which he presided and when joined an appeal from the judgment will be dismissed as to him: *State ex rel. Martin v. Pendergast*, 39 Wash. 132. See, also *State ex rel. Dye v. Reilly*, 40 Wash. 217; *State v. Nicoll*, 40 Wash. 517. A stockholder in a corporation cannot maintain an action against third parties for breach of contract, or for fraud, where the corporate authorities have not refused to act in the matter: *Ninneman v. Fox*, 43 Wash. 43.

An information in the nature of quo warranto is properly dismissed if not brought by the proper officer authorized or charged by law to institute the same: *State ex rel. Attorney Gen. v. Seattle Gas etc. Co.*, 28 Wash. 488.

A defendant is not entitled to a dismissal for nonjoinder of a party who claimed a lien on corporate stock held by defendant, against which judgment was rendered: *Hardin v. White Swan Min. etc. Co.*, 26 Wash. 583.

As to the necessity and mode of objection etc., see 2 *Remington's Digest*, p. 2205, §§ 54, 55; *Harrington v. Miller*, 4 Wash. 808; *Greene v. Finnell*, 22 Wash. 186; *Scott v. Hallock*, 16 Wash. 439; *Sander v. Wilson*, 34 Wash. 659; *Bignold v. Carr*, 24 Wash. 413; *Criswell v. Directors School Dist. No. 24*, 34 Wash. 420; *Grisom v. Hofius*, 39 Wash. 51.

§ 190. (4834.) Where Parties are Numerous One or More may Sue.

When the question is one of common or general interest to many persons, or where the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. [L. '54, p. 132, § 9; Cd. '81, § 14; 2 H. C., § 144.]

See notes to last section.

Cited in 1 Wash. 413, 414; 14 Wash. 549; 32 Wash. 167.

See 2 Remington's Digest, pp. 2195, 2196, §§ 5-7.

A part of the bondholders may maintain an action to foreclose a trust deed securing the bonds, where there are numerous bondholders residing at a distance who are unknown to plaintiffs, under this section: *Clay v. Selah Valley Irrigation Co.*, 14 Wash. 543.

But this rule does not apply to the right to substitute one plaintiff for another: *Hight v. Batley*, 32 Wash. 165. See, also, *Morrison v. Blue Star Nav. Co.*, 26 Wash. 541.

In an action by stockholders of a corporation to compel a reconveyance to the corporation, the complaint is sufficient to

show legal capacity of the plaintiff to sue, without any allegation that they had moved the corporation to begin suit, where it appears that the officers and a majority of the trustees were wrongdoers and in control of the corporation and that a demand for corporate action would have been useless: *Williams v. Erie Mountain Consolidated Mining Co.*, 47 Wash. 360. See, also, *Coleman v. Rathbun*, 40 Wash. 303; *Bacon v. O'Keefe*, 13 Wash. 655; *Childs v. Blethen*, 40 Wash. 340.

An action to remove a cloud upon the titles of plaintiffs to their respective pieces of land cannot be maintained jointly by parties claiming under separate and distinct contracts and deeds: *Utterback v. Meeker*, 16 Wash. 185.

§ 191. (4835.) Actions on Assigned Instruments and Choses in Action.

Any assignee or assignees of any judgment bond, specialty, book account, or other chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, therein named, notwithstanding the assignor may have an interest in the thing assigned: Provided, that any debtor may plead in defense a counterclaim or an offset, if held by him against the original owner, against the debt assigned, save that no counterclaim or offset shall be pleaded against negotiable paper assigned before due, and where the holder thereof has purchased the same in good faith and for value, and is the owner of all interest therein. [Cf. L. '54, p. 131, § 3; L. '79, p. 122, § 1; Cd. '81, § 15; L. '91, p. 69, § 2; 2 H. C., § 145.]

See notes to § 693, *infra*.

See *supra*, § 179, and notes, in whose name action to be prosecuted.

Cited in 14 Wash. 177; 17 Wash. 74; 25 Wash. 513; 26 Wash. 19; 28 Wash. 183; 32 Wash. 194, 688; 36 Wash. 321.

The complaint in an action upon an assignment of an account need not allege that the assignment is in writing, even in case proof of written assignment should be necessary upon the trial: *Rice v. Yakima & P. C. R. Co.*, 4 Wash. 724.

A joint creditor may assign his undivided interest in an entire contract for the payment of money unless the objection is made by the debtor; but the assignment by all the joint creditors of their interest to another is not subject to the consent or objection of the debtor: *Grippin v. Benham*, 5 Wash. 589. See, also, *Hays v. Hill*, 23 Wash. 730; *Seattle National Bank v. Emmons*, 16 Wash. 585.

The undisputed construction of this section is that an assignment for the purpose of collection is an assignment for a valuable consideration, and where promissory notes have been assigned to plaintiff for the purpose of suit, he has sufficient interest therein to constitute him the real party in interest in an action to enforce collection thereof: *McDaniel v. Pressler*, 3 Wash., 636, 638; citing *Hays v. Hathorn*, 74 N. Y. 486. See, also, *Lodge v. Lewis*, 32 Wash. 191; *Von Tobel v. Stetson & Post Mill Co.*, 32 Wash. 683.

Mere personal torts, which die with the party and do not survive to the personal representative, are not capable of passing by assignment: *Slausson v. Schwabacher*, 4 Wash. 783; see *Jones v. Miller*, 35 Wash. 499.

The assignee of an insolvent debtor cannot maintain an action against an attaching creditor and the sheriff for injury to business credit and reputation of his assignor resulting from a malicious levy of the writ prior to the assignment: *Id.*, 787.

An action upon a bond may be maintained by assignees who hold under separate assignments from the several obligees, when the action is brought jointly upon the entire cause of action by such assignees: *McElroy v. Williams*, 14 Wash. 627.

An assignment of a promissory note to an attorney at law for the purpose of col-

lection is sufficient to warrant the bringing of suit thereon in his own name: *Riddell v. Prichard*, 12 Wash. 601; following *McDaniel v. Pressler*, *supra*. See, also, *Lodge v. Lewis*, *supra*; *Von Tobel v. Stetson & Post Mill Co.*, *supra*.

An assignee in writing of a chose in action who holds the claim by a mere naked legal title may, under this section, maintain an action thereon in his own name, notwithstanding the assignor still has an interest in the claim: *Von Tobel v. Stetson etc. Mill Co.*, 32 Wash. 683. See, also, *State ex rel. Porter v. Headlee*, 18 Wash. 220.

§ 192. (4836.) Actions Against Persons Severally Liable.

Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff. [L. '54, p. 132, § 10; Cd. '81, § 16; 2 H. C., § 146.]

See *supra*, § 179, in whose name actions to be prosecuted.

See *supra*, § 181, certain disabilities of married women.

See *infra*, § 967, actions by and against administrators.

See *infra*, § 407, judgments against several parties.

See *infra*, § 436, judgments against joint debtors.

Cited in 7 Wash. 322; 20 Wash. 707.

An indorser of a promissory note may, under this section, be joined as defendant in an action against the makers: *Maine v. Johnson*, 7 Wash. 321. Parties severally liable may or may not be joined: *Gilmore v. Skookum Box Factory*, 20 Wash. 703; *Johnson v. Shuey*, 40 Wash. 22.

A judgment in which the parties are described by their partnership name is not void for that reason when the action has been waged against them as individuals comprising the partnership; and it will not preclude an action upon the judgment against one of the judgment debtors: *Olson v. Veazie*, 9 Wash. 481. See, also, *Bignold v. Carr*, 24 Wash. 413; *Childs v. Bletheu*, 40 Wash. 340.

Where two persons not jointly liable upon a contract are joined in an action for its breach, the complaint is subject to demurrer: *Clark v. Great Northern R. Co.*, 31 Wash. 658.

In an action on a joint and several bond, an objection to any evidence because of the failure to bring the principal into court is properly overruled, since the statute authorizes a joint or several suit at the option of the plaintiff: *Pacific Bridge Co. v. U. S. Fidelity etc. Co.*, 33 Wash. 47.

A payee suing upon a note can elect which of the parties liable thereon he will make parties defendant, and the maker has no right to a delay, that he may make the indorsers parties: *Shuey v. Adair*, 18 Wash. 188.

Where the interests of two obligees in a statutory bond are several and not joint, either one may maintain an action for his damages: *Harrington v. Gordon*, 42 Wash. 692.

The receiver of an insolvent corporation may join all the stockholders in an action to recover the amount of their unpaid stock subscriptions: *Cox v. Dickie*, 48 Wash. 264.

§ 193. (4837.) Action not to Abate by Disability.

No action shall abate by the death, marriage, or other disability of the party, or by the transfer of any interest therein, if the cause of action survive or continue; but the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his representatives or successors in interest. [Cf. L. '54, p. 132, § 11; L. '69, p. 6, § 17; Cd. '81, § 17; 2 H. C., § 147.]

See *infra*, §§ 1474, 1477, 1479, 1481.

See *infra*, § 967 et seq., actions by and against executors, etc.

See *infra*, § 1512, certain actions by and against executors, etc.

See *infra*, §§ 1610-1620, specific performance of decedent's contracts.

See *supra*, § 179, note, in whose name action to be prosecuted.

See supra, § 170, limitation in case of death.

See supra, § 169, suspension for personal disability.

Cited in 5 Wash. 362, 363; 8 Wash. 600; 27 Wash. 345; 28 Wash. 207; 33 Wash. 678.

See 1 Remington's Digest, pp. 6-8, §§ 16-27.

Plaintiffs' disability caused by making a general assignment including the subject matter of the action, pendente lite, does not abate the action, but they may prosecute the action to final judgment in their own names. The assignee alone is the proper party to move for a substitution of parties plaintiff: *Box v. Kelso*, 5 Wash. 360. But defendants in default are entitled to notice of the substitution: *Powell v. Nolan*, 27 Wash. 318. See, also, *Lavanaway v. Cannon*, 37 Wash. 593. An order, made upon the ex parte application of plaintiff, substituting an administrator as a party to the action upon the death of the defendant, is not erroneous on the ground that it was made without notice to the administrator: *Strong v. Eldridge*, 8 Wash. 595.

Where a judgment has been rendered in a cause prior to the death of a party defendant, the jurisdiction of the appellate court to determine the appeal therefrom is not affected by the failure to present the claim upon which the action is founded to the administrator of the defendant's estate for allowance: *Strong v. Eldridge*, supra, citing *Johnson v. Superior Court*, 60 Cal. 578. An action to quiet title does not abate by conveyance before trial: *Boyer v. Robinson*, 43 Wash. 97.

When action abates upon the death of plaintiff: See *Overlock v. Shinn*, 28 Wash. 205.

Upon the death of a joint debtor, the right of action on the liability survives

against his representatives: *Megrath v. Gilmore*, 15 Wash. 558.

Where executors have been substituted as parties defendant in a cause by stipulation, it is unnecessary to file an amended complaint showing the death of the defendant and the appointment and substitution of his executors: *Id.*

A purchaser of property which is specially affected by a temporary injunction granted to the original owner restraining a public nuisance has a right to be substituted as party plaintiff, under this section: *Baker v. Northwest Building etc. Co.*, 33 Wash. 677; *Powell v. Nolan*, 27 Wash. 318.

As to failure to amend the pleadings at the time of making a substitution of parties, when no objection thereto was made in the court below: *Ellsworth v. Layton*, 37 Wash. 340. In an action to quiet title, where the plaintiff conveyed the premises pending the suit, an order substituting the purchasers as parties plaintiff, unexcepted to and unappealed from, would probably authorize the prosecution of the suit by the substituted plaintiffs; and certainly, where the conveyance pending the action was satisfactorily proved: *Vietzen v. Otis*, 46 Wash. 402.

Where the bankruptcy court, in the dismissal of the petition in bankruptcy, inadvertently recited that the dismissal was without right to further prosecute the claim, an appeal from an order correcting the inadvertence will not abate an action in the state courts against the debtor, as the plea in abatement is easily determinable without reference to the appeal: *Veysey v. Thompson*, 49 Wash. 571.

§ 194. (4838.*) Action for Personal Injury Survives to Wife, Child, or Heirs.

No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death. [L. '09, p. 566, § 1. Cf. L. '54, p. 220, § 495; Cd. '81, § 18; 2 H. C., § 148.]

See notes to § 183, supra, when survivor, etc., may sue.

See notes to § 193, supra, when action does not abate.

See infra, § 967 et seq., actions by and against executors, etc.

Cited in 19 Wash. 138; 26 Wash. 486; 33 Wash. 419.

See 1 Remington's Digest, pp. 7, 8, §§ 18-24.

This section does not repeal § 184, supra: *Noble v. Seattle*, 19 Wash. 133.

§ 195. (4839.) Parties and Judgment in Actions for Purchase Price of Land.

In any action brought for the recovery of the purchase money against any person holding a contract for the purchase of lands, the party bound to perform the contract, if not the plaintiff, may be made a party, and the court in a final judgment may order the interest of purchaser to be sold or transferred to the plaintiff upon such terms as may be just, and may also order a specific performance of the contract in favor of the complainant, or the purchaser in case a sale be ordered. [L. '54, p. 219, § 490; Cd. '81, § 19; 2 H. C., § 149.]

Where the vendor of real estate retains the legal title, and afterward mortgages his interest to a third person, and also assigns to such person the purchaser's notes given for the purchase price, such mortgagee and assignee may maintain an action against the vendee on the notes, and the contract lien is secured thereby. In such case the vendor is a proper though

not a necessary party: *Shelton v. Jones*, 4 Wash. 692.

Where a party sells all the timber upon a tract of land, and subsequently makes another bill of sale of all the cedar timber on the same land, he is a proper party defendant to an action by his first grantees, brought to quiet title to the timber: *Larson v. Allen*, 34 Wash. 113.

§ 196. (4840.) Bringing in New Parties.

The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in. [L. '69, p. 6, § 20; Cd. '81, § 20; 2 H. C., § 150.]

See supra, §§ 189, 190, who must be made parties.

See infra, § 202, intervention.

See infra, § 198, interpleader and substitution.

See infra, § 408, subd. 5, judgment of nonsuit.

Cited in 4 Wash. 811; 12 Wash. 139, 698; 16 Wash. 129; 29 Wash. 526.

See 2 Remington's Digest, p. 2203, §§ 41-43.

If other parties than those before the court are necessary to a complete determination of the matter in controversy, it is the duty of the court to cause them to be brought in: *Harrington v. Miller*, 4 Wash. 808.

A new party should be brought in whenever, in the progress of the proceeding, and before the final order, there appears reason to believe that he owns an interest in the money or other property sought to be subjected to the judgment: *Murne v. Schwabacher*, 2 W. T. 130, 134; modified in *Id.*, 2 W. T. 192. See *Davis v. Seattle*, 37 Wash. 223; *Moore v. Gilmore*, 16 Wash. 123.

When no power in garnishment to order

in a new party: *State ex rel. Nolte v. Superior Court*, 15 Wash. 500.

As to determination of any controversy between defendants, see *Seattle v. Turner*, 29 Wash. 515.

In an action to quiet title, it is discretionary to deny an application by plaintiff, made after resting and after the defendants had put in part of their evidence, for leave to file a complaint in intervention on behalf of one not a party, in order to litigate the validity of a deed not questioned theretofore on the trial: *Johnson v. Conner*, 48 Wash. 431.

Where a deed has been delivered in escrow, the remedy of the vendee, upon a refusal to deliver the deed, is against the escrow holder, and there is no defect of parties defendant by reason of failure to join the vendors: *Bronx Inv. Co. v. National Bank of Commerce*, 47 Wash. 566.

§ 197. (4841.) New Party Entitled to Service of Summons.

When a new party is introduced into an action as a representative or successor of a former party, such new party is entitled to the same summons, to be served in the same manner, as required for defendants in the commencement of an action. [L. '54, p. 219, § 485; L. '60, p. 99, § 477; L. '63,

p. 194, § 524; L. '69, p. 172, § 684; L. '73, p. 176, § 632; L. '77, p. 151, § 747; Cd. '81, §§ 21, 742; 2 H. C., §§ 151, 793.]

See supra, § 189, necessary parties.
See last section and notes.

Method of bringing in new parties: See Wash. 586; Zeimantz v. Blake, 39 Wash. 2 Remington's Digest, p. 2203, § 44; 6; Collins v. Kinnear, 37 Wash. 453. Cherry v. Western Wash. etc. Co., 11

§ 198. (4842.) Substitution and Interpleader.

A defendant against whom an action is pending upon a contract, or for specific real or personal property, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, may apply to the court for an order to substitute such person in his place, and discharge him from liability to either party on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct; and the court may in its discretion make the order. [L. '54, p. 132, § 12; L. '69, p. 7, § 22; Cd. '81, § 22; H. C., § 152.]

See the next three sections.

Cited in 9 Wash. 474; 15 Wash. 281; 16 Wash. 130; 42 Wash. 167.

Actions of interpleader: See 2 Remington's Digest, pp. 1558, 1559, §§ 1-5; Carstens v. Gustin, 19 Wash. 403; Belond v. Rayburn, 38 Wash. 406; Pierson v. Peirce, 42 Wash. 164; Zilke v. Woodley, 36 Wash. 84.

Facts pleaded held to constitute a proper case for an interpleader under this section: Marx v. Parker, 9 Wash. 473. Court may order third party to intervene upon application of either party: Moore v. Gilmore, 16 Wash. 123.

The provisions of this section do not furnish an exclusive remedy: See Wolverton v. Glasscock, 15 Wash. 279, 281.

§ 199. (4843.) Actions to Determine Conflicting Claims to Property.

Anyone having in his possession, or under his control, any property or money, or being indebted, where more than one person claims to be the owner of, entitled to, interested in, or to have a lien on such property, money or indebtedness, or any part thereof, may commence an action in the superior court against all or any of such persons, and have their rights, claims, interest, or liens adjudged, determined, and adjusted in such action. [L. '90, p. 93, § 1; 2 H. C., § 153.]

See last section and notes.
See notes to § 196, supra.

Cited in 14 Wash. 182, 642; 15 Wash. 333; 29 Wash. 520, 521; 30 Wash. 565; 36 Wash. 88; 41 Wash. 215; 44 Wash. 359.

Sufficiency of complaint and claims under this and the next two sections: See 2

Remington's Digest, p. 1558, § 1; Daulton v. Stuart, 30 Wash. 562. Power to determine any controversy. See 2 Remington's Digest, p. 1559, § 5; Seattle v. Turner, 29 Wash. 515.

§ 200. (4844.) Plaintiff may Disclaim and Deposit Property.

In all actions commenced under the preceding section, the plaintiff may disclaim any interest in the money, property, or indebtedness, and deposit with the clerk of the court the full amount of such money or indebtedness, or other property, and he shall not be liable for any costs accruing in said action. And the clerks of the various courts shall receive and file such complaint, and all other officers shall execute the necessary processes to carry out the pur-

poses of this section, and also sections 199 and 201, of this code, free from all charge to said plaintiff, and the court, in its discretion, shall determine the liability for costs of the action. [L. '90, p. 93, § 2; 2 H. C., § 154.]

See notes to § 199.

Cited in 14 Wash. 182, 642; 44 Wash. 359.

§ 201. (4845.) Court may Protect Interest of Claimants.

Either of the defendants may set up or show any claim or lien he may have to such property, money, or indebtedness, or any part thereof, and the superior right, title, or lien, whether legal or equitable, shall prevail. The court, or judge thereof, may make all necessary orders, during the pendency of said action, for the preservation and protection of the rights, interests, or liens of the several parties. [L. '90, p. 94, § 3; 2 H. C., § 155.]

See notes to § 199.

§ 202. (4846.) Intervention.

Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by a complaint setting forth the grounds upon which the intervention rests, filed by leave of the court or judge on the ex parte motion of the party desiring to intervene. [L. '77, p. 7, § 23; Cd. '81, § 23; 2 H. C., § 156.]

Cited in 4 Wash. 605; 7 Wash. 79; 13 Wash. 4; 21 Wash. 168; 23 Wash. 31; 25 Wash. 51; 32 Wash. 166; 36 Wash. 418; 47 Wash. 384.

As to intervention in general, see 2 Remington's Digest, pp. 2201-2203, §§ 32-40.

As to right to intervene, see *Bissell v. Taylor*, 7 Wash. 324.

Under this section, a creditor who has attached certain property of his debtor cannot intervene in opposition to the appointment of a receiver, in an action brought by other creditors against the same debtor: *State ex rel. Arthur v. Superior Court*, 7 Wash. 77.

A contract creditor, without judgment or other lien, cannot intervene in a foreclosure suit: *Thompson v. Huron L. Co.*, 4 Wash. 600. Where a receiver has been appointed for an insolvent corporation, it is not error to refuse to permit an intervenor to file an amended cross-complaint setting up fraud on the part of the corporation in the execution of a mortgage: *Biddle Purchasing Co. v. Port Townsend Steel, W. & Nail Co.*, 16 Wash. 681. Upon an action to foreclose a mortgage upon leasehold estates held by an insolvent corporation, and the appointment of a receiver for the corporation, the lessors of

the property in question, who had claims against the corporation and had commenced an action to forfeit one of the leases for nonpayment of rent, in which the receiver had intervened, are not entitled to intervene in the foreclosure suit, and defend against the notes and mortgage as fraudulent, as they are simple contract creditors of the corporation without interest in the subject matter of, and unaffected by, the foreclosure suit, they not having reduced their claims to judgment or proved the same before the receiver: *Hindman v. Colvin*, 47 Wash. 382. A mortgagee has the right to intervene in a suit in which the mortgagor is a party defendant, and the mortgaged property attached, for the purpose of having the mortgage lien declared prior to that of the attachment, and to have the property attached subjected to its payment: *Langert v. Brown*, 3 W. T. 102.

A complaint in intervention is in time although not filed until after a motion is made in the principal cause for default against the defendant: *Thompson v. Huron L. Co.*, supra.

Intervention, as we have it, is a peculiar proceeding, and should not be extended so as to take the place of equity suits, which furnish ample remedy in most cases: *Id.*

A mere general or contract creditor has not such a direct and immediate interest as entitles him to intervene in an action against an administrator for the recovery of real estate: *Churchill v. Stephenson*, 14 Wash. 620.

A bare service of the complaint, which was not filed until after final judgment, is not a compliance with the statute, and does not make the party an intervener or party to the proceedings, and demurring to such complaint does not waive the objection: *Wiseman v. Eastman*, 21 Wash. 163.

A third party has no right to intervene in an action merely because defendant is asserting an adverse claim to such third party's property as well as to that of plaintiff, when the rights attempted to be set up by means of the intervention affect entirely different property from that involved in the plaintiff's action: *McNamara v. Crystal Min. Co.*, 23 Wash. 26.

Under this section, the receiver of an insolvent bank is entitled to intervene in an action by the trustee of a pledgee of such insolvent bank, and the fact that the bank, or its receiver, has another legal remedy for the enforcement of its claims is immaterial: *Muhlenberg v. Tacoma*, 25 Wash. 36.

A taxpayer in a school district whose children attend the school has no such interest in the matter in litigation as entitles him to intervene in an action brought against the district by the publisher of text-books under a contract with the state board: *Westland Pub. Co. v. Royal*, 36 Wash. 399.

An intervener cannot ask for the rescission of a contract of conveyance of land in another county because of the fraud of a third party: *Boardman v. Hager*, 24 Wash. 487.

§ 203. (4847.) Practice in Intervention.

When leave is given to intervene, a copy of the intervener's complaint shall be served upon the parties to the action or proceedings who have not appeared, or publication of a notice of the intervention containing a brief statement of the nature of the intervener's demand shall be made in all cases where there are absent or nonresident defendants. The notice shall be published in the same manner and for the same length of time as prescribed by law for publication of summons. And the complaint shall also be served upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint. The court shall determine upon the rights of the intervener at the same time the action is decided, and if the claim of the party intervening is not sustained, he shall pay all costs incurred by the intervention: Provided, that no intervention shall be cause for delay in the trial of an action between the original parties thereto. [L. '77, p. 7, § 24; Cd. '81, § 24; 2 H. C., § 157.]

See notes to previous section.

Cited in 4 Wash. 606; 13 Wash. 4.

See *Biddle Purchasing Co. v. Port Townsend Steel, W. & Nail Co.*, 16 Wash.

681, as to rights of intervener where a receiver has been appointed for an insolvent corporation.

CHAPTER V.

VENUE OF ACTIONS.

§ 204. (4852.) Action to be Commenced Where Subject is Situated.

Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated:—

1. For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title or for any injuries to real property;

2. All questions involving the rights to the possession or title to any specific article of personal property; in which last mentioned class of cases damages may also be awarded for the detention and for injury to such per-

sonal property. [L. '54, p. 133, § 13; L. '60, p. 7, § 15; L. '69, p. 12, § 48; L. '77, p. 11, § 48; Cd. '81, § 47; 2 H. C., § 158.]

See *supra*, § 32, venue of actions in certain cases.

See *infra*, § 1610, specific performance of contract of deceased.

Cited in 2 Wash. 120, 121; 3 Wash. 517; 4 Wash. 656, 657; 5 Wash. 641; 6 Wash. 347; 13 Wash. 608; 16 Wash. 400; 18 Wash. 3; 23 Wash. 578.

See 2 Remington's Digest, pp. 2843, 2844, §§ 1-4.

The word "district," as used in this section in the Code of 1881, refers only to districts composed of two or more counties joined for judicial purposes, where sessions of court were held in but one of the counties: *McLeod v. Ellis*, 2 Wash. 117.

All actions for the causes mentioned in this section must be commenced in the county in which the subject of the action lies, and the court of no other county has jurisdiction: *Wood v. Mastick*, 2 W. T. 64. But court has jurisdiction to incidentally try title to land in another county on trial of another title in the proper county: *Carkeek v. Boston Nat. Bank*, 16 Wash. 399. Two mortgages securing the same debt, but covering lands in different counties, may be foreclosed in either county: *Commercial Nat. Bank of Seattle v. Johnson*, 16 Wash. 536.

Subdivision 1 of this section authorizes a mortgagee, whose mortgage covers several disconnected tracts of land in different counties, to foreclose his mortgage as to all of them, by a single suit, in any county where one tract is situated: *Stevens v. Ferry*, 48 Fed. 7.

This section refers to a peculiar class of actions which were always local; §§ 205, 207 and 208, *infra*, include only actions which were always transitory; § 208 does not apply to actions enumerated in this section: *McLeod v. Ellis*, *supra*.

Municipal corporations are subject to suit only in the county in which they are situated: *North Yakima v. Superior Court*, 4 Wash. 655.

A suit seeking to enjoin the application of special funds of a municipal corporation is a local action within the provision involving the right to the possession or title to any specific article of personal property: *Id.*

Suits purely local in their nature must be commenced in the proper county, otherwise they will be dismissed on motion for want of jurisdiction: *Id.*; see *Wood v. Mastick*, *supra*.

In an action to recover specific personal property, the venue is jurisdictional, and a complaint is fatally defective which fails to allege that the property, or a part thereof at the time of the commencement of the action was in the county in which the action is brought: *Stiles v. James*, 2 W. T. 194. But a trial amendment to

the complaint to show the venue in replevin is within the discretion of trial court: *Standard Furniture Co. v. Anderson*, 38 Wash. 582.

An action praying judgment upon a promissory note and seeking to foreclose a pledge of promissory notes and certificates of corporate stock, delivered as collateral security, is a transitory one, and must be brought in the county in which the defendant resides, or in which he may be served with process: *State v. Superior Court*, 13 Wash. 607.

Proceedings instituted by a third party claiming property seized by the sheriff under attachment according to § 573, *infra*, is a new and independent action, and must be placed on the trial docket of the county where the property was seized; the court of no other county has jurisdiction of the subject matter of the action: *State v. Superior Court*, 5 Wash. 639, affirming *McLeod v. Ellis*, *supra*.

Actions for injuries to real property, being local in their nature, must be tried in the county where the property lies: *McLeod v. Ellis*, *supra*.

An action to enforce a resulting trust in lands of which a decedent died seised, and in a judgment recovered by him, may be brought in the county in which the land lies, and in which the judgment was rendered, although decedent died and his estate was administered upon, in another county: *Reese v. Murnan*, 5 Wash. 373.

An action to enforce a logger's lien (§ 1172, *infra*) is properly brought in the county in which the logs were cut and the lien notice filed, regardless of the fact that the logs were in another county: *Overbeck v. Calligan*, 6 Wash. 342.

An action for the specific performance of a contract to convey land is a transitory one, and need not be brought in the county where the land is situated: *Morgan v. Bell*, 3 Wash. 554.

An action in which the plaintiff seeks to compel the performance of a contract to convey an undivided interest in certain lands, to have several conveyances made by some of the defendants to others set aside, and for a partition of the lands, and, if specific performance cannot be decreed, asking that the moneys advanced thereon be declared a lien upon the lands, renders the action a local one under the statutes of this state: *State v. Superior Court*, 13 Wash. 187.

An action to rescind a contract for the removal of standing timber is local, and a change of venue to the county of defendant's residence is properly denied: *Seymour v. LaFurgey*, 47 Wash. 450.

§ 205. (4853.) Actions to be Tried Where Cause Arose.

Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose:—

1. For the recovery of a penalty or forfeiture imposed by statute;
2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do anything touching the duties of such officer. [Cf. L. '54, p. 33, § 14; L. '60, p. 7, § 16; L. '69, p. 12, § 49; L. '77, p. 11, § 49; Cd. '81, § 48; 2 H. C., § 159.]

See notes to previous section.

Cited in 2 Wash. 120; 18 Wash. 3.

§ 206. (4854.*) Venue of Actions Against Private Corporations.

An action against a corporation may be brought in any county where the corporation transacts business or transacted business at the time the cause of action arose; or in any county where the corporation has an office for the transaction of business or any person resides upon whom process may be served against such corporation, unless otherwise provided in this code. [L. '09, p. 69, § 1. Cf. L. '54, p. 220, § 494; L. '60, p. 101, § 488; L. '69, p. 13, § 50; L. '77, p. 11, § 50; Cd. '81, § 49; 2 H. C., § 160.]

See notes to last section.

See infra, §§ 226-228, manner of service on corporations.

Cited in 4 Wash. 658; 10 Wash. 149, 150; 14 Wash. 205; 23 Wash. 519; 24 Wash. 303; 40 Wash. 447; 42 Wash. 453; 43 Wash. 375; 48 Wash. 148.

Municipal corporations are not subject to the provisions of this section, but are governed by the rule of the common law: *North Yakima v. Superior Court*, 4 Wash. 655, 658.

See 1 Remington's Digest, p. 651, § 153; *Knoff v. Puget Sound Co-op. Co.*, 1 Wash. 57; *Zindorf v. Western American Co.*, 26 Wash. 695; *Hammel v. Fidelity Mutual Aid Assn.*, 42 Wash. 448; *Carkeek v. Boston Nat. Bank*, 16 Wash. 399.

If the action is brought against a corporation in the wrong county, the court has no jurisdiction to render judgment, as §§ 207 and 208 have no application to actions against corporations, such actions being governed solely by the provisions of this section: *McMaster v. Thresher Co.*, 10 Wash. 147.

This section is applicable to original actions and does not relate to garnishment proceedings: *Title Guarantee & T. Co. v. Seattle Theater Co.*, 23 Wash. 517.

Under this section service of process issued out of the superior court of Clarke county upon a purser and a wharfinger in

the employ of a foreign corporation is sufficient, where the company was operating a line of steamers on the Columbia river, which, under the charge of the purser, received and discharged freight and passengers at Vancouver, landing regularly at the wharf there for that purpose, and hence making the wharf an office in this state for the transaction of such business: *Sievers v. Dalles etc. Navigation Co.*, 24 Wash. 302.

A citizen of another state may maintain an action against a nonresident corporation, where no unfair advantage is sought and defendant has property in this state: *Hunter v. Wenatchee Land Co.*, 36 Wash. 541.

Where an action was commenced against a corporation in the wrong county, in which it had no agent or place of business, the fact that another proper party defendant was served in another county and defaulted does not confer jurisdiction over the corporation, when it is not made to appear that the consenting co-defendant was a resident of the county in which the action was brought: *Whitman v. United States Fidelity & Guaranty Co.*, 49 Wash. 150.

§ 207. (4855.) Venue in Cases not Before Specified.

In all other cases the action must be tried in the county in which the defendants, or some of them, reside at the time of the commencement of the action, or may be served with process, subject, however, to the power of the court to change the place of trial, as provided in the next two succeeding

sections. [Cf. L. '54, p. 133, § 15; L. '60, p. 7, § 17; L. '69, p. 13, § 51; L. '75, p. 5, § 6; L. '77, p. 11, § 51; Cd. '81, § 50; L. '91, p. 71, § 1; 2 H. C., § 161.]

See next two succeeding sections and notes.

Cited in 5 Wash. 291; 10 Wash. 149, 150; 13 Wash. 608; 14 Wash. 116; 18 Wash. 3.

See 2 Remington's Digest, p. 2844, §§ 8, 9.

This section provides for two classes of defendants, namely, all those having a place of residence in same county within the state, and all those who are not residents of the state: *Kennedy v. Derrickson*, 5 Wash. 289.

By virtue of this section a resident of any county is given the right to have actions against him tried in his home county, even although he may be served in another county: *Id.*, 291.

The right to have the case tried in the county of his residence is an absolute one, subject only to certain exceptions: *State v. Superior Court*, 9 Wash. 668.

A judge, although having more than one county in his judicial district, cannot try an application for alimony except in the county where the divorce suit was instituted: *State ex rel. Clark v. Neal*, 19 Wash. 642.

An action for the enforcement of a trust, and an accounting thereunder, is a

transitory one, irrespective of the fact that the action will take effect upon real property: *State v. Superior Court*, 7 Wash. 306.

The fact that certain persons named as defendants are proper, but not necessary, parties will not deprive the principal defendant in a transitory action from obtaining a transfer to the county of his residence for trial: *Id.*

A defendant in a divorce case is not entitled to have the case removed to the county in which he resides: *Bachelor v. Bachelor*, 30 Wash. 639.

ACTIONS, TRANSITORY.—An action to recover unpaid purchase money due upon a conveyance of real estate is a transitory one, and cannot be made local by the prayer of the complaint that the sum due be declared a first lien on the premises and that they be sold to satisfy the same, since, in the absence of a reservation of a vendor's lien by agreement between the parties, such lien is not recognized in this state: *Smith v. Allen*, 18 Wash. 1.

§ 208. (4856.) Proceeding When Action Commenced in Wrong County.

If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and demurs or answers, files an affidavit of merits, and demands that the trial be had in the proper county. [Cf. L. '75, p. 5, § 7; L. '77, p. 11, § 51; Cd. '81, § 50; L. '91, p. 78, § 1; 2 H. C., § 162.]

See note to next section.

See notes to last section.

See *supra*, § 204, when action to be commenced.

This section does not apply to actions enumerated in § 204, *supra*.

Cited in 5 Wash. 291, 519, 521; 10 Wash. 149, 150; 15 Wash. 367; 26 Wash. 404; 45 Wash. 29.

See 2 Remington's Digest, pp. 2846, 2847, §§ 16, 20, 23.

The provisions of this section apply only to transitory actions, and not to such as are local in their nature, hence actions for injuries to real property must be tried in the county where the property is situated: *McLeod v. Ellis*, 2 Wash. 117.

But see *Carkeek v. Boston Nat. Bank*, 16 Wash. 399.

If a defendant file an affidavit required by this section the court of the county in which the action is brought is without jurisdiction to try the cause, and a writ of prohibition will lie if the trial be attempted: *State v. Superior Court*, 5 Wash. 518; *North Yakima v. Superior Court*, 4 Wash. 655, 661; *Campbell v. Superior Court*, 7 Wash. 306; *Allen v. Superior Court*, 9 Wash. 668. Overruled in *State*

ex rel. Miller v. Superior Court, 40 Wash. 555. See, also, *State ex rel. LaFurgey*, 47 Wash. 154; *State ex rel. Martin v. Hinkle*, 47 Wash. 156, holding remedy is by appeal; see 2 Remington's Digest, p. 2847, § 24.

The fact that a defendant, at the time of filing his affidavit, makes demand for a bill of particulars instead of demurring or answering, is held a substantial compliance with the statute: *State v. Superior Court*, *supra*.

A motion for change of venue is not waived by failure to renew it after the filing of an amended complaint: *Kennedy v. Derrickson*, 5 Wash. 289.

Objection to the jurisdiction of the court, after its refusal to grant a change of venue to the county of defendant's residence, is waived by a general appearance asking leave to file a demurrer, also by motion to vacate a default judgment, and also by a motion for a new trial on

the ground of accident and surprise: *Seaton v. Cook*, 45 Wash. 27.

A party entitled to a change of venue under this section, because sued in a county other than that of his residence, does not, after having made proper demand for change, waive his right thereto by failing to appear at the time a ruling is had upon his application: *State v. Superior Court*, 15 Wash. 366.

Where it appears from defendant's affidavit of merits for removal of a cause that he is entitled to file an answer which will raise issues for trial, the affidavit is sufficient: *Allen v. Superior Court*, supra.

The application for transfer, made by all the defendants who had been served at the time, is not objectionable because

of the fact, before its determination, another defendant is served, but has failed to join therein: *Id.*

Where a motion for transfer has been made, upon a sufficient affidavit, the failure of applicant to appear at the time set for hearing of the motion affords no ground for denying the same: *Id.*

Where all the defendants live in another county it is a matter of right to have their motion for change of venue granted: *Smith v. Allen*, 18 Wash. 1. A motion for change of venue is too late if interposed at close of plaintiff's case, notwithstanding the case as to the only resident defendant was then dismissed, there being no showing that he was made a party in bad faith: *Rector v. Thompson*, 26 Wash. 400.

§ 209. (4857.) Grounds Authorizing Change of Venue.

The court may, on motion, in the following cases, change the place of trial, when it appears by affidavit or other satisfactory proof,—

1. That the county designated in the complaint is not the proper county; or
2. That there is reason to believe that an impartial trial cannot be had therein; or
3. That the convenience of witnesses or the ends of justice would be forwarded by the change; or

4. That from any cause the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity within the third degree; when he has been of counsel for either party in the action or proceeding. [Cf. L. '54, p. 134, § 16; L. '69, p. 13, § 52; L. '75, p. 6, § 8; L. '77, p. 12, § 52; Cd. '81, § 51; 2 H. C., § 163.]

See *infra*, §§ 2018, 2019, change of venue in criminal cases.

Cited in 2 Wash. 120; 3 Wash. 695; 10 Wash. 149; 19 Wash. 13; 40 Wash. 446.

As to grounds for change in venue, see 2 Remington's Digest, pp. 2845-2847, §§ 10-24.

A change of place of trial, on account of local prejudice, rests solely in the discretion of the court. It may, of its own motion, examine as to public feeling, and properly make inquiry of the jurors touching the same: *Ward v. Moorey*, 1 W. T. 104.

This section should be liberally construed so far as same pertains to an impartial trial, convenience and justice: *State ex rel. Wyman, Partridge & Co. v. Superior Court*, 40 Wash. 443.

A motion for a change of venue on the ground that the convenience of witnesses and ends of justice would be forwarded thereby is addressed to the discretion of the court, and where such discretion has not been abused, the order of the court

denying the motion will not be disturbed: *State v. Superior Court*, 9 Wash. 673. See, also, *State v. Straub*, 16 Wash. 111.

Although a judge may be disqualified under subdivision 4 of this section, he is, nevertheless, authorized to grant a change of venue, and may approve an agreement of the parties for the appointment of a judge pro tempore: *State v. Sachs*, 3 Wash. 691.

Where the judge is interested financially in the result of a case, although it may not render him legally responsible, and is biased in favor of one of the parties, his failure to grant a change of venue is an abuse of discretion: *Burnett v. Ashmore*, 5 Wash. 163.

A judge is disqualified if he has prejudged the case: *State ex rel. Barnard v. Board*, 19 Wash. 8. But the interest of a county does not disqualify the county commissioners from determining a contest over the establishing of a drain: *O'Connell v. Baker*, 35 Wash. 376.

§ 210. (4858.) To What Venue Changed—Only One Allowed.

If a motion for a change of the place of trial be allowed, the change shall be made to the county where the action ought to have been commenced, if it

be for the cause mentioned in subdivision one of the last preceding section, and in other cases to the most convenient county where the cause alleged does not exist. Neither party shall be entitled to more than one change of the place of trial, except for causes not in existence when the first change was allowed. [L. '69, p. 14, § 53; L. '77, p. 12, § 53; Cd. '81, § 52; 2 H. C., § 164.]

§ 211. (4859.) Change to Newly Created County.

Any party in a civil action pending in the superior court in a county out of whose limits a new county, in whole or in part, has been created, may file with the clerk of such superior court an affidavit setting forth that he is a resident of such newly created county, and that the venue of such action is transitory, or that the venue of such action is local, and that it ought properly to be tried in such newly created county; and thereupon the clerk shall make out a transcript of the proceedings already had in such action in such superior court, and certify it under the seal of the court, and transmit such transcript, together with the papers on file in his office connected with such action, to the clerk of the superior court of such newly created county, wherein it shall be proceeded with as in other cases. [Cf. L. '54, p. 377, § 2; L. '69, p. 14, § 54; L. '77, p. 12, § 54; Cd. '81, § 53; L. '91, p. 72, § 2; 2 H. C., § 165.]

§ 215. (4860.) Transmission of Record on Change—Costs.

When an order is made transferring an action or proceeding for trial, the clerk of the court must transmit the pleadings and papers therein to the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made, except in the cases mentioned in subdivision one, section 209, in which case the plaintiff shall pay costs of transfer. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein. [L. '69, p. 14, §§ 55, 56; L. '75, p. 7, § 10; L. '77, p. 12, § 55; Cd. '81, § 54; 2 H. C., § 166.]

See notes to § 208, *supra*.

Cited in 25 Wash. 348.

Under this section, an information is amendable by the prosecuting attorney,

on leave of the court of another county to which the prosecution has been transferred: State v. Lyts, 25 Wash. 347.

§ 216. (4861.) Change by Stipulation.

Notwithstanding the provisions of section 209, all the parties to the action by stipulation in writing or by consent in open court entered in the records may agree that the place of trial be changed to any county of the state, and thereupon the court must order the change agreed upon. [L. '77, p. 13, § 56; Cd. '81, § 55; 2 H. C., § 167.]

As to sufficient stipulation showing parties had agreed to change of venue, see Kane v. Kane, 35 Wash. 517.

§ 217. (4862.) Effect of Neglect of Moving Party.

If such papers be not transmitted to the clerk of the proper court within the time prescribed in the order allowing the change, and the delay be caused by the act or omission of the party procuring the change, the adverse party, on motion to the court or judge thereof, may have the order vacated, and thereafter no other change of the place of trial shall be allowed to such party. [Cf.

L. '54, p. 135, § 21; L. '69, p. 15, § 57; L. '77, p. 13, § 57; Cd. '81, § 56; 2 H. C., § 168.]

See notes to § 208, *supra*.

§ 218. (4863.) When Change Deemed Complete.

Upon the filing of the papers with the clerk of the court to which the cause is transferred, the change of venue shall be deemed complete, and thereafter the action shall proceed as though it had been commenced in that court. [L. '54, p. 135, § 22; L. '69, p. 15, § 58; L. '77, p. 13, § 58; Cd. '81, § 57; 2 H. C., § 169.]

§ 219. (4864.) Clerk must Certify Entries with Transcript.

The clerk of the court must also transmit with the original papers, where an order is made changing the place of trial, a certified transcript of all record entries up to and including the order for change. [L. '77, p. 13, § 59; Cd. '81, § 58; 2 H. C., § 170.]

CHAPTER VI.

MANNER OF COMMENCING ACTIONS.

§ 220. (4869.) Service of Summons.

Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as hereinafter provided, or by filing a complaint with the county clerk as clerk of the court: Provided, that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. [L. '93, p. 407, § 1; L. '95, p. 170, § 1.]

See generally for legislation on this subject: L. '54, pp. 135-138; L. '57, pp. 8-10; L. '59, pp. 8-11; L. '63, pp. 90-93; L. '69, pp. 5-19; L. '71, pp. 16-21; L. '73, pp. 16-21; L. '77, pp. 13-17; Cd. '81, §§ 59-72; L. '88, pp. 24-28; L. '91, pp. 99-102; 2 H. C., §§ 171-183.

See *infra*, § 647, and notes, attachments.

See *infra*, § 817 et seq., complaint and summons in forcible entry and detainer.

Cited in 10 Wash. 449; 12 Wash. 686; 16 Wash. 629; 20 Wash. 397; 21 Wash. 106; 27 Wash. 249, 330, 346; 31 Wash. 319; 30 Wash. 621; 34 Wash. 544; 35 Wash. 111; 40 Wash. 522; 44 Wash. 284.

See 2 Remington's Digest, pp. 2357-2359, §§ 1-10.

This chapter as enacted in the Laws of 1893 does not violate the constitutional inhibition against more than one subject being embraced in the bill: *McMaster v. Thresher Co.*, 10 Wash. 147; *Merritt v. Corey*, 22 Wash. 444.

Under the Laws of 1888, page 24, jurisdiction could be obtained of the person of defendant by service upon him of the summons prescribed in the act and without the service of the complaint in the action, its filing with the clerk being sufficient: *Baldwin v. Baer*, 10 Wash. 414, following *Spokane Falls v. Curry*, 2 Wash. 541.

Summons filed in "superior court of Pierce county," requiring defendant to

appear in "superior court of the state of Washington for the county of Pierce, holding terms at Tacoma," is not a prejudicial variance: *Ralph v. Lomer*, 3 Wash. 401.

As to effect of repeal of law governing commencement of actions, see *City of Seattle v. O'Connell*, 16 Wash. 625.

Service by publication must be commenced within ninety days after filing complaint, and a second publication after that time upon quashing the first is not sufficient: *Denning Inv. Co. v. Ely*, 21 Wash. 102. See, also, *Fuhrman v. Power*, 43 Wash. 533. But where part of the defendants are residents and are served personally, it is not essential that publication as to nonresidents be commenced within ninety days, if there is no unreasonable delay: *Johnston v. Gerry*, 34 Wash. 524.

Where a complaint is filed in the office of the clerk of the court within five days after service of summons, the service of a copy of the complaint may be omitted:

Mounts v. Goranson, 29 Wash. 261. A judgment is not void for want of jurisdiction because of the failure to file the complaint: Snohomish Land Co. v. Blood, 40 Wash. 626; In re Sullivan's Estate, 40 Wash. 202. As to sufficiency of filing, see Snohomish Land Co. v. Blood, 40 Wash. 626.

§ 221. (4870.) Summons, How Issued.

The summons must be subscribed by the plaintiff or his attorney, and directed to the defendant requiring him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified in which there is a postoffice, within twenty days after the service of the summons, exclusive of the day of service. [L. '93, p. 407, § 2.]

See references to last section.

Cited in 31 Wash. 345; 35 Wash. 280.

The act of 1893, embraced in this chapter, repeals and supersedes all former laws on the subject, and fixes the time for answer in response to summons as twenty days in all cases: McMaster v. Thresher Co., 10 Wash. 147. See, also, Merritt v. Corey, 22 Wash. 444.

Nonresident attorneys may issue summons if admitted to the bar of this state and provided the summons specifies a place in this state where the answer may be served: See Wagnitz v. Ritter, 31 Wash. 343.

§ 222. (4871.) Contents of Summons.

The summons shall also contain,—

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant;
2. A direction to the defendants summoning them to appear within twenty days after service of the summons, exclusive of the day of service, and defend the action;
3. A notice that, in case of failure so to do, judgment will be rendered against them, according to the demand of the complaint. It shall be subscribed by the plaintiff, or his attorney, with the addition of his postoffice address, at which the papers in the action may be served on him by mail. There may, at the option of the plaintiff, be added at the foot, when the complaint is not served with the summons, and the only relief sought is the recovery of the money, whether upon tort or contract, a brief notice specifying the sum to be demanded by the complaint. [L. '93, p. 407, § 3.]

See references to § 220, supra.

Cited in 10 Wash. 148; 31 Wash. 348.
See 2 Remington's Digest, p. 2358, §§ 7-10; Ralph v. Lomer, 3 Wash. 401; Gravelle

v. Canadian etc. Co., 42 Wash. 457; De Corvet v. Dolan, 7 Wash. 365; Goore v. Goore, 24 Wash. 139.

§ 223. (4872.) Form of Summons.

Such summons shall be substantially in the following form:—

— COURT, — COUNTY.

A B, Plaintiff,

vs.

C D, Defendant.

The state of Washington, —, to the said —, defendant: You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered

against you, according to the demand of the complaint, which will be filed with the clerk of said court, or a copy of which is herewith served upon you.

E F, Plaintiff's Attorney.

P. O. Address, — County, Wash.

[L. '93, p. 407, § 4.]

See references to §§ 220, 222, *supra*.

Cited in 31 Wash. 345; 35 Wash. 280.

A summons in substantial compliance with this form is good as against a gen-

eral objection, first raised on appeal: *Wagnitz v. Ritter*, 31 Wash. 343.

§ 224. (4873.) Summons to be Accompanied by Copy of Complaint, When.

A copy of the complaint must be served upon the defendant with the summons unless the complaint itself be filed in the office of the clerk of the superior court of the county in which the action is commenced within five days after service of such summons, in which case the service of the copy may be omitted; but the summons in such case must notify the defendant that the complaint will be filed with the clerk of said court; and if the defendant appear within ten days after the service of the summons, the plaintiff must serve a copy of the complaint on the defendant or his attorney within ten days after the notice of such appearance, and the defendant shall have at least ten days thereafter to answer the same; and no judgment shall be entered against him for want of an answer in such case till the expiration of the time.

[L. '93, p. 408, § 5.]

See references to § 220, *supra*.

See *supra*, § 61 et seq., legal holidays.

Cited in 27 Wash. 330; 29 Wash. 264, 701.

See 2 Remington's Digest, p. 2360, § 17; *Spokane Falls v. Curry*, 2 Wash. 541; *Baldwin v. Baer*, 10 Wash. 414; *Munch v. McLaren*, 9 Wash. 676.

Where a summons and complaint had been served and the summons was quashed, the serving of an alias summons and notice that complaint had been filed is sufficient: *Mounts v. Goranson*, 29 Wash. 261.

§ 225. (4874.) Who Shall Serve Summons—Exception.

In all cases, except when service is made by publication, as hereinafter provided, the summons shall be served by the sheriff of the county wherein the service is made or by his deputy, or by any person over twenty-one years of age, who is competent to be a witness in the action, other than the plaintiff.

[L. '93, p. 408, § 6.]

See references to § 220, *supra*.

Cited in 27 Wash. 173; 44 Wash. 306.

See 2 Remington's Digest, p. 2359, §§ 13, 14.

Where the sheriff is disqualified, a writ of garnishment may be served by a private person: *Russell v. Millett*, 20 Wash. 212.

Under this section, an individual who acts in place of the sheriff in making service of summons, has no more power than the sheriff to modify the written terms of summons, unless authorized by the plaintiff: *Washington Mill Co. v. Marks*, 27 Wash. 170.

§ 226. (4875.) Manner of Service of Summons.

The summons shall be served by delivering a copy thereof, as follows:—

1. If the action be against any county in this state, to the county auditor;
2. If against any town or incorporated city in the state, to the mayor thereof;
3. If against a school district, to the clerk thereof;
4. If against a railroad corporation, to any station, freight, ticket or other agent thereof within this state;

5. If against a corporation owning or operating sleeping cars, or hotel cars, to any person having charge of any of its cars or any agent found within the state;

6. If against an insurance company, to any agent authorized by such company to solicit insurance within this state;

7. If against a company or corporation doing any express business, to any agent authorized by said company or corporation to receive and deliver express matters and collect pay therefor within this state;

8. If the suit be against a company or corporation other than those designated in the preceding subdivisions of this section, to the president or other head of the company or corporation, secretary, cashier or managing agent thereof;

9. If the suit be against a foreign corporation or nonresident joint stock company or association doing business within this state, to any agent, cashier or secretary thereof;

10. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, guardian, or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed, if such there be;

11. If against any person for whom a guardian has been appointed for any cause, then to such guardian;

12. In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein. Service made in the modes provided in this section shall be taken and held to be personal service;

13. Whenever any domestic or foreign corporation, which has been doing business in this state, has been placed in the hands of a receiver and the receiver is in possession of any of the property or assets of such corporation, service of all process upon such corporation may be made upon the receiver thereof. [L. '93, p. 408, § 7; L. '97, p. 284, § 1.]

See references to § 220, *supra*.

See *infra*, notes to § 3720.

See notes to preceding section.

Cited in 9 Wash. 667; 14 Wash. 205; 24 Wash. 304; 27 Wash. 330; 29 Wash. 701; 34 Wash. 16; 41 Wash. 501, 504; 42 Wash. 450; 43 Wash. 374, 375; 51 Wash. 210.

See 2 Remington's Digest, pp. 2359-2361, §§ 15-21.

Under subdivision 8 of this section, service of summons upon the agent of a domestic corporation in charge of a branch store of his principal is not sufficient: *Osborne v. Columbia etc. Corp.*, 9 Wash. 666; and the fact that defendant corporation had knowledge of the pendency of the suit will not dispense with the necessity for proper service: *Id.* See, also, *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431.

But after general appearance party is in court for all purposes: *French v. Ajax Oil & Development Co.*, 44 Wash. 308.

Under 2 Hill's Code, § 173, in order to obtain jurisdiction of a school district, service of process must be had on the clerk of the district; service on an individual

member of the board is not sufficient: *Downs v. Board of Directors*, 4 Wash. 309.

Although a defendant may acknowledge service of process upon him in writing, the court will not take judicial notice of his signature, and, in the absence of any appearance by him, proof must be made of its genuineness: *Id.* And after appearance, judicial notice of defendant's acceptance of service of notices will be taken without proof of genuineness of signature of defendant: *Tischner v. Rutledge*, 35 Wash. 285. See, also, *Neff v. Neff*, 32 Wash. 82. Service on an infant is valid although not specifying her Christian name, if the record shows she was the only person to whom summons could refer: *Gravelle v. Canadian etc. Mtg. & T. Co.*, 42 Wash. 457.

Service on a mayor and council binds their successors in office: *Waldron v. Snohomish*, 41 Wash. 566.

Service of one copy of summons upon the father, in an action in which his

three minor children were defendants, was sufficient, where a copy was left with each of the minors, since the object of the service is notice, and one copy served on the father would answer that purpose as well as an increased number of copies: *Morrison v. Morrison*, 25 Wash. 467.

Subdivisions 7 and 8 of above section have no application to partnerships: *Coughlin v. Pinkerton*, 41 Wash. 500.

As to service by leaving copy of summons at residence of defendant, see *Powell v. Nolan*, 27 Wash. 318; *Northwestern & P. H. Bank v. Ridpath*, 29 Wash. 687.

§ 227. (4876.) Service of Summons on Corporation.

Whenever any corporation, created by the laws of this state, or late territory of Washington, does not have an officer in this state upon whom legal service of process can be made, an action or proceeding against such corporation may be commenced in any county where the cause of action may arise, or said corporation may have property, and service may be made upon such corporation by depositing a copy of the summons, writ, or other process, in the office of the secretary of state, which shall be taken, deemed and treated as personal service on such corporation: Provided, a copy of said summons, writ, or other process, shall be deposited in the postoffice, postage paid, directed to the secretary or other proper officer of such corporation, at the place where the main business of such corporation is transacted, when such place of business is known to the plaintiff, and be published at least once a week for six weeks in some newspaper printed and published at the seat of government of this state, before such service shall be deemed perfect. [L. '93, p. 409, § 8.]

See references to § 220, *supra*.

See *supra*, § 206, venue of actions against corporations.

See note to preceding section.

Service of summons upon an officer of a foreign corporation, who is temporarily present in the state, will not confer jurisdiction over the corporation, when the latter has never done any business in the state, nor maintained an office for that purpose nor appointed an officer or agent

in the state for any purpose whatever: *Carstens v. Leidigh*, 18 Wash. 450.

Service on a soliciting agent of a foreign railway is not service on the company: *Rich v. Chicago B. & Q. R. Co.*, 34 Wash. 14.

§ 228. (4877.) Service of Summons by Publication.

When the defendant cannot be found within the state, (of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county, is *prima facie* evidence), and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or cannot be found therein, and that he has deposited a copy of the summons and complaint in the postoffice, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his attorney in either of the following cases:—

1. When the defendant is a foreign corporation, and has property within the state;

2. When the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent;

3. When the defendant is not a resident of the state, but has property therein and the court has jurisdiction of the subject of the action;

4. When the action is for divorce in the cases prescribed by law;
5. When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly, or partly, in excluding the defendant from any interest or lien therein;
6. When the action is to foreclose, satisfy, or redeem from a mortgage, or to enforce a lien of any kind on real estate in the county where the action is brought, or satisfy or redeem from the same;
7. When the action is against any corporation, whether private or municipal, organized under the laws of this state and the proper officers on whom to make service do not exist or cannot be found. [L. '93, p. 410, § 9.]

See references to § 220, *supra*.
See *infra*, § 3720, and notes.

Cited in 24 Wash. 142; 29 Wash. 701, 702, 728; 31 Wash. 514; 32 Wash. 151, 174; 34 Wash. 296; 36 Wash. 544, 545; 41 Wash. 102; 43 Wash. 470.

See 2 Remington's Digest, pp. 2361-2363, §§ 22-30.

Under the Laws of 1877, page 15, § 65, an affidavit stating that defendant resides out of the territory is sufficient to authorize service by publication: *De Corvet v. Dolan*, 7 Wash. 365.

Jurisdiction, when service by publication, dependent upon a strict compliance with the terms of the statute: *State v. Superior Ct.*, 6 Wash. 352.

Affidavit for publication is jurisdictional, but need not state residence: *Goore v. Goore*, 24 Wash. 139. No judicial determination or order of court is required: *Id.*

And the affidavit is sufficient if it states conclusions: *Id.* See, also, *Mosley v. Donnell*, 42 Wash. 518.

It is immaterial that a sheriff's return of "not found" was dated prior to the commencement of the action: *Allen v. Peterson*, 38 Wash. 599.

Affidavits held sufficient: See *Kahn v. Thorpe*, 43 Wash. 463; *Bardon v. Hughes*, 45 Wash. 627.

Constructive service by publication is sufficient to give validity to a sale of cattle impounded in accordance with an ordinance of a city: *Shook v. Sexton*, 37 Wash. 509.

Where plaintiff knew a nonresident defendant's postoffice address, service by publication without mailing a copy of the summons confers no jurisdiction, although plaintiff made affidavit that he did not know defendant's "residence"; and the judgment is properly vacated for fraud: *Noble v. Aune*, 50 Wash. 73.

This section applies to tax foreclosures, under § 9255, *infra*: *Williams v. Pittock*,

35 Wash. 271; *Bailey v. Hood*, 38 Wash. 394.

A summons for publication requiring the defendant to appear within sixty days after a specified date is "substantially" in the form prescribed by this section, the omission of reference to the first publication being immaterial where the date thereof itself is given: *Stubbs v. Continental Timber Co.*, 49 Wash. 431.

Service by publication in condemnation proceedings against nonresidents is authorized: *Moynahan v. Superior Court*, 42 Wash. 172; *State ex rel. Thomas v. Superior Court*, 42 Wash. 521. In divorce cases it is not necessary that the affidavit for publication describe the property involved: *Goore v. Goore*, 24 Wash. 139. An affidavit for publication stating that affiant is one of the attorneys of plaintiff will be presumed as stating the truth if not negatived by the record, even if affiant's name is not signed to the complaint as attorney in the case: *Swanson v. Hoyle*, 32 Wash. 169.

The publication of summons, in a foreclosure proceeding prior to filing the affidavit, is a mere irregularity, and is insufficient on a collateral attack to warrant any finding against the validity of the decree: *Tilton v. O'Shea*, 31 Wash. 513.

A garnishee cannot object that judgment was rendered against the principal defendant, who was out of the state, on service by publication: *Holford v. Trewella*, 36 Wash. 654.

Presumption as to validity of service by publication by recital in judgment: See *Christofferson v. Pfennig*, 16 Wash. 491.

Subdivision 4 of this section authorizes summons by publication in actions for annulment of the marriage: *Piper v. Piper*, 46 Wash. 371.

§ 229. Process Against "Unknown Heirs."

When the heirs of any deceased person are proper parties defendant to any action relating to real property in this state, and when the names and residences of such heirs are unknown, such heirs may be proceeded against un-

der the name and title of "The unknown heirs" of the deceased. [L. '03, p. 277, § 1.]

See *infra*, § 239, unknown parties in condemnation proceedings.
See *infra*, § 306, defendant designated by fictitious name.

§ 230. Affidavit as to Unknown Heirs—Publication of Summons.

Upon presenting an affidavit to the court or judge, showing to his satisfaction that the heirs of such deceased person are proper parties to the action, and that their names and residences cannot with use of reasonable diligence be ascertained, such court or judge may grant an order that service of the summons in such action be made on such "Unknown heirs" by publication thereof in the same manner as in actions against nonresident defendants. [L. '03, p. 278, § 2.]

§ 231. Title of Cause—Unknown Claimants—Service of Summons.

In any action brought to determine any adverse claim, estate, lien, or interest in real property, or to quiet title to real property, the plaintiff may include as a defendant in such action, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien, or interest in the lands in controversy, the following, viz.: "Also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein." And service of summons may be had upon all such unknown persons or parties defendant by publication as provided by law in case of nonresident defendants. [L. '03, p. 278, § 3.]

§ 232. Judgment—Rights of Unknown Heirs and Parties.

All such unknown heirs of deceased persons, and all such unknown persons or parties, so served by publication as in the preceding section of this act, provided, shall have the same rights as are provided by law in case of all other defendants upon whom service is made by publication, and the action shall proceed against such unknown heirs, or unknown persons or parties, in the same manner as against defendants, who are named, upon whom service is made by publication, and with like effect; and any such unknown heirs or unknown persons or parties who have or claim any right, estate, lien, or interest in the said real property in controversy, at the time of the commencement of the action, duly served as aforesaid, shall be bound and concluded by the judgment in such action, if the same is in favor of the plaintiff therein as effectually as if the action was brought against such defendant by his or her name and constructive service of summons obtained: Provided, however, That such judgments shall not bind such unknown heirs, or unknown persons or parties, defendant, unless the plaintiff shall file a notice of *lis pendens* in the office of the auditor of each county in which said real estate is located, in the manner provided by law, before commencing the publication of said summons. [L. '03, p. 278, § 4.]

§ 233. (4878.) Manner of Publication and Form of Summons.

The publication shall be made in a newspaper printed and published in the county where the action is brought (and if there be no newspaper in the county, then in a newspaper printed and published in an adjoining county,

and if there is no such newspaper in an adjoining county, then in a newspaper printed and published at the capital of the state) once a week for six consecutive weeks: Provided, that publication of summons shall not be had until after the filing of the complaint, and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid. The summons must be subscribed by the plaintiff or his attorney or attorneys. The summons shall contain the date of the first publication, and shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons; and said summons for publication shall also contain a brief statement of the object of the action. Said summons for publication shall be substantially as follows:—

In the superior court of the state of Washington for the county of _____
_____, Plaintiff,
vs. No. _____
_____, Defendant.

The state of Washington to the said (naming the defendant or defendants to be served by publication):

You are hereby summoned to appear within sixty days after the date of the first publication of this summons, to wit, within sixty days after the — day of —, 1 —, and defend the above entitled action in the above entitled court, and answer the complaint of the plaintiff, and serve a copy of your answer upon the undersigned attorneys for plaintiff—, at his (or their) office below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which has been filed with the clerk of said court. (Insert here a brief statement of the object of the action.)

Plaintiff's Attorneys.
P. O. address —
County —
Washington.

[L. '93, p. 411, § 10; L. '95, p. 171, § 2.]

See references to § 220, *supra*.

See *infra*, § 239, publication in case of eminent domain.

See *infra*, § 240, selection of newspaper, etc.

See *infra*, § 253, weekly publication.

Cited in 32 Wash. 503, 507; 34 Wash. 457; 35 Wash. 279; 41 Wash. 101; 44 Wash. 107; 46 Wash. 480; 49 Wash. 433.

See 2 Remington's Digest, pp. 2362, 2363, §§ 28-30; *Montgomery v. Manning*, 1 W. T. 434; *State ex rel. Boyd v. Superior Court*, 6 Wash. 352; *Denning Inv. Co. v. Ely*, 21 Wash. 102; *Tilton v. O'Shea*, 31 Wash. 513; *Johnston v. Gerry*, 34 Wash. 254; *Fuhrman v. Power*, 43 Wash. 533.

As to manner of procedure if law regarding publication of summons is changed during time a summons is being published, see *Woodham v. Anderson*, 32 Wash. 500.

In a divorce summons by publication it is sufficient to state generally as to the relief demanded regarding property of the parties: See *Goore v. Goore*, 24 Wash. 139.

A summons requiring the defendant to appear within sixty days after the service of the summons does not comply with this section and is void: *Thompson v. Robbins*, 32 Wash. 149; *Smith v. White*, 32 Wash. 414; *Woodham v. Anderson*, 32 Wash. 500; *Young v. Droz*, 38 Wash. 648; *Dolan v. Jones*, 37 Wash. 176; *Sturgiss v. Dart*, 23 Wash. 244; *Stoll v. Griffith*, 41 Wash. 37; *Owen v. Owen*, 41 Wash. 642; *Bauer v. Widholm*, 49 Wash. 310; *Silverstone v. Totten*, 50 Wash. 447; *Bartels v. Christensen*, 46 Wash. 478.

Under this and the following section a nonresident defendant is not entitled to have a default set aside, and to defend as a matter of right at any time before judgment, except upon sufficient cause shown: *Strunz v. Hood*, 44 Wash. 99.

A summons is sufficiently "subscribed" although the signature is printed: *Warner v. Miner*, 41 Wash. 98.

A summons is void, if it fails to state the year of the date of the first publication: *McLean v. Lester*, 48 Wash. 213.

§ 234. (4879.) Personal Service Out of State.

Personal service on the defendant out of the state shall be equivalent to service by publication, and the summons upon the defendant out of the state shall contain the same as personal summons within the state, except it shall require the defendant to appear and answer within sixty days after such personal service out of the state. [L. '93, p. 411, § 11; L. '95, p. 172, § 3.]

See references to § 220, *supra*.

Cited in 29 Wash. 728; 36 Wash. 545; 41 Wash. 414; 42 Wash. 427.

See 2 Remington's Digest, p. 2363, § 31.

Under this section no affidavit as required for publication of summons is necessary where the court has assumed control of the property of the parties within this state: *Jennings v. Rocky Bar Gold Min. Co.*, 29 Wash. 726.

The service on defendant outside of the state of a summons in the statutory form

is not defective by reason of the clause requiring defendant to appear in twenty days if served in state: *Lawyer Land Co. v. Steel*, 41 Wash. 411.

Under Laws 1905, page 86, personal service on a defendant outside of state is authorized in condemnation proceedings: *State ex rel. Thomas v. Superior Court*, 42 Wash. 521.

§ 235. (4880.) If No Personal Service, Who may Appear—Opening Default.

If the summons is not served personally on the defendant in the cases provided in the last two sections, he or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action and, except in an action for divorce, the defendant or his representative may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just; and if the defense is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs. [L. '93, p. 411, § 12.]

See notes to § 233, *supra*.

See references to § 220, *supra*.

This section by inadvertence says "last two sections," when it should refer to the last three sections.

See *infra*, § 303, relief from judgments.

See *infra*, § 411, judgment by default.

See *infra*, § 464, vacating judgments.

Cited in 23 Wash. 248; 24 Wash. 534; 32 Wash. 152, 174, 496; 33 Wash. 321; 34 Wash. 294; 35 Wash. 281; 39 Wash. 375; 40 Wash. 275; 41 Wash. 106; 43 Wash. 469.

Opening default where there was no personal service: See 2 Remington's Digest, pp. 1587, 1588, §§ 37-40; *Mettler v. Mettler*, 32 Wash. 494; *Twigg v. James*, 37 Wash. 434; *Jordan v. Hutchinson*, 39 Wash. 373; *Warner v. Miner*, 41 Wash. 98; *Moody v. Reichow*, 38 Wash. 303; *State ex rel. Boyd v. Superior Court*, 6

Wash. 352; *Montgomery v. Manning*, 1 W. T. 434.

Under this section, a nonresident defendant, served by publication in a tax lien foreclosure, is not entitled to the vacation of a default judgment within one year as a matter of right, but good cause must be shown: *Whitney v. Knowlton*, 33 Wash. 319.

Default divorce decree on service by publication cannot be set aside on that ground alone: See *Metler v. Metler*, 32 Wash. 494.

§ 236. (4881.) Service on Joint Defendants.

When the action is against two or more defendants and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows:—

1. If the action is against the defendants jointly indebted upon a contract, he may proceed against the defendants served unless the court otherwise directs; and if he recovers judgment it may be entered against all the defendants thus jointly indebted so far only as it may be enforced against the joint property of all and the separate property of the defendants served;

2. If the action is against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants;

3. Though all the defendants may have been served with the summons, judgment may be taken against any of them severally, when the plaintiff would be entitled to judgment against such defendants if the action had been against them alone. [L. '93, p. 411, § 13.]

See references to § 220, *supra*.

Compare § 177, 2 Hill's Code, which is omitted as repealed by this section.

See *supra*, § 192, and notes, actions against persons severally liable.

See *infra*, § 407, judgments in actions against several defendants.

See *infra*, § 411, judgment by default.

See *infra*, § 436, summons after judgment entered against one joint debtor.

Cited in 27 Wash. 108.

The subsequent appearance of another defendant after issues joined and the case set for trial as to some of the defendants, upon whom prior service had been had, will not entitle the latter, under this

section, to have the case delayed for the making up of issues as to the defendant subsequently appearing: *National Bank v. Galland*, 14 Wash. 502.

Joint debtors, service on: See *Livingston v. Lovgren*, 27 Wash. 102.

§ 237. (4882.) Proof of Service.

Proof of service shall be as follows:—

1. If served by the sheriff or his deputy, the return of such sheriff or his deputy indorsed upon or attached to the summons;

2. If by any other person, his affidavit thereof indorsed upon or attached to the summons; or

3. In case of publication, the affidavit of the printer, publisher, foreman, principal clerk or business manager of the newspaper showing the same, together with a printed copy of the summons as published; or

4. The written admission of the defendant;

5. In case of personal service out of the state, the affidavit of the person making the service, sworn to before a notary public, with a seal attached, or a clerk of a court of record. In case of service otherwise than by publication, the return, admission or affidavit must state the time, place and manner of service. [L. '93, p. 412, § 14.]

See references to § 220, *supra*.

See notes to § 404, *infra*.

Cited in 27 Wash. 330, 347; 29 Wash. 701, 702.

See 2 Remington's Digest, pp. 2363-2365, §§ 32-43.

Under the law of 1871, civil practice act, § 66, the sheriff was authorized, in ejectment, to serve the subpoena on the defendant to answer the complaint, and his certificate as to the facts of such service was sufficient proof: *Parker v. Dacres*, 1 Wash. 190.

No waiver of first service is shown by fact that defendant refused to accept service in writing from a private party, and thereafter service was made by the coroner: *Russell v. Millett*, 20 Wash. 212.

As to what must be shown by sheriff's return of service on a foreign corporation doing business in this state, see *Cunningham v. Spokane Hydraulic Co.*, 18 Wash. 524.

As to sufficiency of return of service on board of county commissioners, see *State Savings Bank v. Davis*, 22 Wash. 406.

A return of service which recites that service was made on defendant by leaving a copy with father of defendant at his usual place of residence is insufficient: *Mitchell, Lewis & Staver Co. v. O'Neil*, 16 Wash. 108.

An affidavit attached to an original summons reciting that defendant was served

by delivering to his wife at his usual place of residence copy of complaint and summons is insufficient to give court jurisdiction over him: *Powell v. Nolan*, 27 Wash. 318.

Proof of service is sufficient, although made in two affidavits, one showing service on defendants, and the other showing qualifications of party making the service: *State ex rel. Thomas v. Superior Court*, 42 Wash. 521.

The return of service on a summons that it was left at the usual abode of defendant does not import that he had another residence elsewhere: *Northwestern & P. H. Bank v. Ridpath*, 29 Wash. 687.

The statements in a sheriff's return reciting facts not within his knowledge are not conclusive: *Mitchell, Lewis & Staver Co. v. O'Neil*, supra.

The return of sheriff that he made service by leaving copy with a person of suitable age at the residence of defendant, is subject to attack upon the question of residence: *Krutz v. Isaacs*, 25 Wash. 566.

Court should not set aside service prima facie sufficient except upon clear and convincing proof: *Northwestern & P. H. Bank v. Ridpath*, supra.

Although the document purporting to be an affidavit is not sworn to, it will be presumed nevertheless that service was made and that the court had jurisdiction: *Boyle v. Superior Court*, 19 Wash. 128.

An attorney cannot accept service of an original process for his client except under special authority: *Ashcraft v. Powers*, 22 Wash. 440.

The irregularity of service on holiday is waived by an acceptance of service: *McClellan v. Gaston*, 31 Wash. 515.

Proof of service of summons by affidavit must show that the person making the service was twenty-one years of age at the time the service was made, and proof that he was of age when the affidavit was made is insufficient: *French v. Ajax Oil & Development Co.*, 44 Wash. 305.

§ 238. (4883.) Jurisdiction Acquired, When.

From the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings. A voluntary appearance of a defendant is equivalent to a personal service of the summons upon him. [L. '93, p. 412, § 15; L. '95, p. 172, § 4.]

See references to § 220, supra, and preceding section.

Cited in 16 Wash. 631; 22 Wash. 443.

See 2 Remington's Digest, p. 2366, § 48.

A general appearance cures defects in service: *Mulholland v. Washington Match*

Co., 35 Wash. 315; *McClellan v. Gaston*, 18 Wash. 472. See, also, *Filley v. Murphy*, 30 Wash. 1.

§ 239. (4884.) Publication of Notice in Exercise of Eminent Domain.

If a party having or claiming a share or interest in or lien upon any property sought to be appropriated for public use be unknown, and such fact be made to appear by affidavit filed in the office of the clerk of the court, the notice required by law in such cases may be served by publication as in the case of nonresident owners, and such notice shall be directed by name to every owner of a share or interest in or lien upon the property sought to be so appropriated, and generally to all persons unknown having or claiming an interest or estate in the property or any portion thereof, and all such unknown parties shall in all papers and proceedings be designated as "unknown owners," and shall be bound by the provisions and be entitled to the benefits of the judgment the same as if they had been known and duly named. [L. '95, p. 352, § 1.]

See supra, § 233, manner of publication.

See infra, § 891 et seq., eminent domain.

§ 240. (4885.) Selection of Newspaper—Evidence of Payment.

In any suit or proceeding, in any court of this state, requiring a legal publication, said publication shall be made in any newspaper, of general circulation in the county, designated by the party or his attorney, at whose in-

stance the said publication is made. A tender of a receipt from the publisher of the said newspaper, as full payment for said publication shall be accepted by the sheriff, or court, as payment in lieu of the cash payment of fees for same. [L. '93, p. 62, § 1.]

See *supra*, § 233, manner of publication.

See *infra*, § 253, weekly publication.

Publication may be made in a paper owned by the plaintiff: *Callison v. Smith*, 44 Wash. 202.

§ 241. (4886.) Appearance, What Constitutes.

A defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance. After appearance a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notice or papers in the ordinary proceedings in an action need not be made upon him. Every such appearance made in an action shall be deemed a general appearance, unless the defendant in making the same states that the same is a special appearance. [Cf. 2 H. C., § 181; L. '93, p. 412, § 16.]

See references to § 220, *supra*.

Cited in 15 Wash. 592; 16 Wash. 631; 21 Wash. 107; 22 Wash. 443; 27 Wash. 655; 29 Wash. 564; 31 Wash. 167; 32 Wash. 505; 33 Wash. 556; 37 Wash. 560; 43 Wash. 440; 52 Wash. 14.

See 1 Remington's Digest, pp. 260-262, §§ 1-9.

Under this section a defendant must be held to have appeared when he has entered into a written stipulation agreeing to the transfer of a cause to another county for trial: *Jones v. Wolverton*, 15 Wash. 590; *Cornell Univ. v. Denny Hotel Co.*, 15 Wash. 433.

One who joins in signing a stipulation with the other parties in the action in effect authenticates the signature of the others, and is not in a position to dispute them and insist on the courts requiring proof of any of the signatures: *Jones v. Wolverton*, *supra*.

Acceptance of service of summons and complaint by an attorney for defendant and the indorsement thereon of appearance constitutes an appearance within the meaning of § 181, 2 Hill's Code: *Cornell Univ. v. Denny Hotel Co.*, *supra*.

Notice of motion to publish depositions is not necessary, as § 822 of 2 Hill's Code, requiring notice of motions to the adverse party, is not applicable to motions which cannot be contested: *Mendenhall v. Kratz*, 14 Wash. 453.

Where a notice of appeal under the act of 1883, not given in open court, was enter-

tained by the judge without the preliminary notice required by § 822, 2 Hill's Code, the appeal should be dismissed: *Parker v. Dacres* 3 W. T. 12.

Under this section it is held that it is sufficient to give three days' notice of a motion to vacate a judgment taken through mistake, inadvertence, surprise or excusable neglect: See *Spokane & Idaho Lumber Co. v. Stanley*, 25 Wash. 653.

Appearance of defendant, subsequent proceedings: See *Norris v. Campbell*, 27 Wash. 654; *Walters v. Field*, 29 Wash. 558.

Want of service of process, objected to by special appearance, is cured by a subsequent appearance to move to vacate a default judgment and for leave to answer on the merits: *French v. Ajax Oil & Development Co.*, 44 Wash. 305.

A special appearance to object to the jurisdiction for want of service of process is rendered general by asking for the dismissal of the action for reasons relating to the merits, and waives the question of due service: *Bain v. Thoms*, 44 Wash. 382.

A voluntary answer constitutes a general appearance and waives service of process: *Calhoun v. Nelson*, 47 Wash. 617.

An answer reciting that "now comes the defendant" and alleging facts as a "full and complete and affirmative defense," constitutes a general appearance: *Springfield Shingle Co. v. Edgecomb Mill Co.*, 52 Wash. 620.

§ 242. (4886a.) Notice—Service by Mail, etc.

When a party to an action has appeared in the same, he shall be entitled to at least three days' notice of any trial, hearing, motion, application, sale or proceeding therein; which notice shall be in writing specifying the time and place where the same will be had or made, and which shall be served on him or his attorney, but if neither such party nor his attorney reside in the county in

which the action or proceeding is pending or where such application or motion is made, then service by mail may be had on such party or his attorney by mailing to either of them a copy of such notice, properly addressed with postage thereon fully prepaid, at least ten days before the time appointed for such hearing, application or sale. [Cd. '81, § 2140; 2 H. C., § 822; L. '97, p. 282, § 1.]

Cited in 14 Wash. 457; 18 Wash. 209; 25 Wash. 656; 31 Wash. 167; 32 Wash. 94; 51 Wash. 474.

This section is not applicable to motions

which cannot be contested: *Mendenhall v. Kratz*, 14 Wash. 453. And it is not applicable to proceedings after judgment: *Galler v. McMahon*, 51 Wash. 473.

§ 243. (4887.) Actions Affecting Title to Real Estate—*Lis Pendens*.

In an action affecting the title to real property the plaintiff, at the time of filing the complaint, or at any time afterwards, or whenever a writ of attachment of property shall be issued, or at any time afterwards, the plaintiff or a defendant, when he sets up an affirmative cause of action in his answer, and demands substantive relief at the time of filing his answer, or at any time afterwards, if the same be intended to affect real property, may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of filing such notice: Provided, however, that such notice shall be of no avail unless it shall be followed by the first publication of the summons, or by the personal service thereof on a defendant within sixty days after such filing. And the court in which the said action was commenced may, in its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be made by an indorsement to that effect on the margin of the record. [L. '93, p. 412, § 17.]

See references to § 220, *supra*.

Cited in 10 Wash. 450; 16 Wash. 663; 18 Wash. 86; 24 Wash. 406; 29 Wash. 678; 38 Wash. 206, 207; 44 Wash. 622; 47 Wash. 92, 93.

Lis pendens, in general: See 2 Remington's Digest, pp. 1748-1750, §§ 1-10; *May v. Sutherlin*, 41 Wash. 609.

As to actions in which notice is authorized, see *Washington Dredge & Imp. Co. v. Kinnear*, 24 Wash. 405; *King v. Branscheid*, 32 Wash. 634.

As to form, see *Eldridge v. Stenger*, 19 Wash. 697.

As to filing and recording, see *Bigelow v. Brewer*, 29 Wash. 670; *Sawyer v. Vermont Loan & T. Co.*, 41 Wash. 524.

As to operation and effect, see *Spokane v. Amsterdamsch Trustees etc.*, 18 Wash. 81; *Johnson v. Irwin*, 16 Wash. 652; *Nason v. Northwestern Mill & P. Co.*, 17 Wash. 142; *Payson v. Jacobs*, 38 Wash. 203; *Hyde v. Heaton*, 43 Wash. 433.

As to persons bound by judgment or decree, see *Dow v. Ballard*, 28 Wash. 87.

This section applies to condemnation proceedings, and subsequent purchasers are bound by the proceedings: *Portland and Seattle R. Co. v. Ladd*, 47 Wash. 88.

The filing of a *lis pendens*, in an action to foreclose a street assessment lien, and the subsequent judgment and sale, cuts off any interest of the parties to the action,

and also of one claiming under a party by an unrecorded assignment of a sheriff's certificate of sale, whether the purchaser at the foreclosure sale had notice of such assignment or not, when such assignment was inferior to the lien foreclosed; hence a quit-claim deed from such party or assignee, made after judgment, conveys no title: *Wright v. Jessup*, 44 Wash. 618.

A judgment of the superior court being a lien upon real property of the judgment

debtor in the county, from the date of its entry, under § 445, *infra*, a judgment of foreclosure of a mortgage is constructive notice of the sale and proceedings thereunder, without the filing of any notice of *lis pendens* or certificate of sale in the recorder's office; and subsequent purchasers from the mortgagor take an inferior title regardless of the fact of their taking possession and making improvements in good faith: *Young v. Davis*, 50 Wash. 504.

§ 244. (4888.) Notice, Upon Whom Served.

Notices shall be in writing; and notices and other papers may be served on the party or attorney in the manner prescribed in the next three sections where not otherwise provided by statute. [L. '93, p. 413, § 18.]

Section 797 of 2 Hill's Code omitted as superseded by this and the following sections.
See *infra*, § 249, limitations on this section.

Cited in 24 Wash. 668.

§ 245. (4889.) Manner of Making Service of Notice.

The services may be personal or by delivery to the party or attorney on whom service is required to be made, or it may be as follows:—

1. If upon an attorney, it may be made during his absence from his office by leaving the papers with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it between the hours of six in the morning and nine in the evening in a conspicuous place in the office; or, if it is not open to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion;

2. If upon a party, it may be made by leaving the papers at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion. [L. '93, p. 413, § 19.]

See *infra*, § 249, limitations on this section.
See *infra*, § 1218, service of subpoena.

Cited in 25 Wash. 155; 27 Wash. 331.
See 2 Remington's Digest, p. 1976, § 3;
Rogers v. Trumbull, 31 Wash. 656.

As to service of notice, see *State Savings Bank v. Davis*, 22 Wash. 407.

Service of proposed statement of facts upon a clerk sufficient, when: See *Times Printing Co. v. Seattle*, 25 Wash. 149.

§ 246. (4890.) Service by Mail, When may be Made.

Service by mail may be made when the person making the service and the person on whom it is to be made reside in different places between which there is a regular communication by mail. [L. '93, p. 414, § 20.]

See *infra*, § 249, limitations on this section.

Cited in 7 Wash. 470; 24 Wash. 612.

§ 247. (4891.) Service by Mail, Manner of.

In case of service by mail, the papers shall be deposited in the postoffice, addressed to the person on whom it is served, at his place of residence, and the postage paid; and in such case the time of service shall be double that required in case of personal service. [L. '93, p. 414, § 21.]

See *infra*, § 249, limitations on this section.
See *infra*, note to § 252.

Cited in 19 Wash. 319; 24 Wash. 612; 26 Wash. 366.

§ 248. (4892.) Service When No Attorney Appears.

Where a plaintiff or defendant who has appeared resides out of the state and has no attorney in the action, the service may be made by mail if his residence is known; if not known, on the clerk for him. But where a party, whether resident or nonresident, has an attorney in the action, the service of papers shall be upon the attorney instead of the party. But if the attorney shall have removed from the state, such service may be made upon him personally either within or without the state, or by mail to him at his place of residence, if known, and if not known, then by mail upon the party, if his residence is known, whether within or without the state. And if the residence of neither the party or attorney are known, the service may be made upon the clerk for the attorney. [L. '93, p. 414, § 22.]

See next section, limitation on this section.

§ 249. (4893.) Not Applicable to Service of Summons, etc.

The provisions of the four preceding sections do not apply to the service of a summons or other process, or of any paper to bring a party into contempt. [L. '93, p. 414, § 23.]

See *infra*, §§ 1049-1062, contempts and punishment thereof.

As the above section inferentially forbids service of summons by mail, a service by mail upon the statutory agent of a foreign corporation is insufficient: *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431.

§ 250. (4894.) Effect of Imperfect Paper—Amendments.

A notice or other paper is valid and effectual though the title of the action in which it is made is omitted, or it is defective either in respect to the court or parties, if it intelligently refers to such action or proceedings; and in furtherance of justice upon proper terms, any other defect or error in any notice or other paper or proceeding may be amended by the court, and any mischance, omission or defect relieved within one year thereafter; and the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice of paper filed or served, or may, on such terms as are just, permit the same to be done or supplied after the time therefor has expired, except that the time for bringing a writ of error or appeal shall in no case be enlarged, or a party permitted to bring such writ of error or appeal after the time therefor has expired. [L. '93, p. 414, § 24.]

See *infra*, § 303, amendments to pleadings.

See *infra*, § 307, what defects may be disregarded.

Cited in 12 Wash. 100; 15 Wash. 127; 26 Wash. 2; 51 Wash. 474.

This section does not relate to nor govern proceedings subsequent to entry of judgment, as the title of the act indicates that it is merely "an act to provide for manner of commencing civil actions in the superior courts, and bringing the same to trial": *National Bank v. Seattle Pickle etc. Wks.*, 15 Wash. 126.

Under this section, a notice of an application to extend the time for filing a proposed

statement of facts is sufficient to confer jurisdiction when given at 3 o'clock on the preceding afternoon: *Galler v. McMahon*, 51 Wash. 473.

Under this section a court may extend time in which to file motion for new trial after time fixed by statute has expired: *Bailey v. Drake*, 12 Wash. 99. See, also, *Leavenworth v. Billings*, 26 Wash. 1; *McAllister v. Seattle Brew. etc. Co.*, 44 Wash. 179; *Kreielsheimer v. Nelson*, 31 Wash. 400.

§ 251. (4895.) Assessment of Damages.

A defendant who has appeared may, without answering, demand in writing an assessment of damages, of the amount which the plaintiff is entitled to

recover, and thereupon such assessment shall be had or any such amount ascertained in such manner as the court on application may direct, and judgment entered by the clerk for the amount so assessed or ascertained. [L. '93, p. 415, § 25.]

§ 252. (4896.) Computation of Time.

The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day falls on a Sunday it shall be excluded. [L. '93, p. 415, § 26.]

See supra, § 150, and notes, computation of time generally.

See supra, §§ 241, 242, defendant entitled to notice, when.

Cited in 10 Wash. 310; 25 Wash. 657; 27 Wash. 151; 32 Wash. 212.

See 2 Remington's Digest, pp. 2721, 2722, §§ 1-5; Hale v. Finch, 1 W. T. 517; Spokane & I. L. Co. v. Stanley, 25 Wash. 653; Perkins v. Jennings, 27 Wash. 145; Martin v. Sunset Tel. & Tel. Co., 18 Wash. 260; Kubillus v. Ewert, 40 Wash. 38; Goetzinger v. Rosenfeld, 16 Wash. 392.

If the day for filing a statement of facts and serving a notice thereof expired on Sunday, that day is excluded by statute, and such action had on the following day is sufficient: Bank of Shelton v. Willey, 7 Wash. 535, 537; see Spokane v. Brown, 3 Wash. 84, 86. See, also, Rogers v. Trumbull, 32 Wash. 211.

Notice to counsel on day following the expiration of time limit for an act to be done as required by statute is sufficient,

when parties reside in different cities and the notice is deposited in the mail in sufficient time to have reached the party to be served within the time prescribed by statute: Bank of Shelton v. Willey, supra. See supra, §§ 246, 247.

Under subdivision 1 of § 516, 2 Hill's Code, requiring the redemptioner to give two days' notice to the purchaser of his intention to apply to sheriff to redeem, notice given on the fourth of the month of intention to apply on the sixth is sufficient: Scott v. Patterson, 1 Wash. 487, 490.

Notice given on May 20th for settlement of a statement of facts on May 31st is a full ten days' notice, and the fact that a legal holiday intervened will not extend the time: Thompson v. Huron Lumber Co., 5 Wash. 527.

§ 253. (4897.) Weekly Publication, How Made.

The publication of legal notices required by law, or by an order of a judge or court, to be published in a newspaper once in each week for a specified number of weeks, shall be made on the day of each week in which such newspaper is published. [L. '93, p. 415, § 27.]

See supra, § 233, publication and form of summons.

See supra, § 240, selection of newspaper, etc.

As to mode, sufficiency, time, etc., of publication, see 2 Remington's Digest, p. 2362, §§ 29, 30; State ex rel. Boyd v. Superior

Court, 6 Wash. 352; and notes to preceding sections.

§ 254. (4898.) Service of Writ by Telegraph.

Any writ or order in any civil suit or proceeding, and all the papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ or order or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect in all respects, as the original thereof might be, if delivered to him, and the officer or person serving or executing the same shall have the same authority, and be subject to the same liabilities, as if the said copy were the original. The original, when a writ or order, shall also be filed in the court from which it was issued, and a certified copy thereof shall be preserved in the telegraph office from which it was sent; in sending it, either the original or certified copy may be used by the operator for that purpose. [L. '66, p. 69, § 17; Cd. '81, § 2358; 1 H. C., § 1558.]

See infra, § 9308, notice by telegraph, effect of.

CHAPTER VII.

PLEADINGS.

§ 255. (4903.) Rules to Determine Sufficiency.

All the forms of pleadings heretofore existing in civil actions inconsistent with the provisions of this code are abolished, and hereafter the forms of pleading and the rule by which the sufficiency of the pleadings is to be determined shall be as herein prescribed. [Cf. L. '54, p. 138, § 36; L. '69, p. 17, § 71; Cd. '81, § 73; 2 H. C., § 185.]

See *supra*, § 153, form of action.

See *infra*, § 296, joinder of causes.

Cited in 3 Wash. 203, 587, 588; 5 Wash. 662; 17 Wash. 5; 24 Wash. 329; 27 Wash. 396; 43 Wash. 221.

See 1 Remington's Digest, p. 31, § 12; *Id.*, vol. 2, p. 2253, § 2.

Fictions are abolished, and presumptions are not to be pleaded as facts, but the facts themselves must be stated: *Distler v. Dabney*, 3 Wash. 200, 203.

Under the provisions of this section, and § 258, requiring the complaint to contain a plain and concise statement of facts, a complaint for money had and received will not support an action for the recovery of money paid by plaintiff to defendant on a contract for the conveyance of land, the right of recovery being based on defendant's default in complying with its conditions: *Distler v. Dabney*, *supra*.

The only distinction observed by the Code of 1881 as to the form of civil actions was that in equitable actions "The complaint shall be addressed to the judge," etc.; otherwise the pleadings are the same:

Wash. Iron Wks. Co. v. Jensen, 3 Wash. 584, 588.

The statute, § 1940, Code of 1881, providing that liens on vessels shall be enforced in a civil action, means the civil action provided by the code, and such actions are properly brought on the equity side of the court: *Id.*, 586.

But few of the common-law forms are demurrable, but most are obnoxious to motions, and none are so concise as contemplated by the code: *Renton v. St. Louis*, 1 W. T. 215.

Common-law forms are abolished: *Newberg v. Farmer*, 1 W. T. 182; *Renton v. St. Louis*, 1 W. T. 215; *Garrison v. Cheeney*, 1 W. T. 489; *State ex rel. Hawes v. Brewer*, 39 Wash. 65.

Distinctions between legal and equitable proceedings are abolished: *State ex rel. Holgate v. Superior Court*, 21 Wash. 33.

Technical refinements of the common law are abolished: *First Nat. Bank of Pullman v. Young*, 20 Wash. 337.

§ 256. (4904.) What Pleadings There shall be.

The only pleadings on the part of the plaintiff shall be,—

1. The complaint;
2. The demurrer;
3. The reply.

And on the part of the defendant,—

1. The demurrer;
2. The answer. [L. '54, p. 139, § 37; L. '69, p. 20, § 72; Cd. '81, § 74; 2 H. C., § 186.]

Cited in 3 Wash. 587, 588; 27 Wash. 397; 29 Wash. 532.

§ 257. (4905.) First Pleading—Complaint.

The first pleading on the part of the plaintiff shall be the complaint. [L. '54, p. 139, § 38; Cd. '81, § 75; 2 H. C., § 187.]

Cited in 29 Wash. 532.

§ 258. (4906.) What Complaint shall Contain.

The complaint shall contain,—

1. The title of cause, specifying the name of the court, the name of the county in which the action is brought, and the name of the parties to the action, plaintiff and defendant;

2. A plain and concise statement of facts, constituting the cause of action, without unnecessary repetition;

3. A demand for the relief which plaintiff claims; if the recovery of money or damages be demanded, the amount thereof shall be stated. [Cf. L. '54, p. 139, § 39; L. '77, p. 17, § 76; Cd. '81, § 76; L. '91, p. 106, § 1; 2 H. C., § 188.]

See infra, § 284, pleading instruments in writing and accounts.

See infra, § 285, rule of liberal construction.

See infra, § 287, pleading judgments of inferior courts.

See infra, § 288, pleading conditions precedent.

See infra, § 289, pleading a private statute.

See infra, § 290, pleading corporate existence of city.

See infra, § 291, pleading ordinances.

See infra, § 292, requisites in libel and slander.

See infra, § 305, when pleading may be stricken.

See infra, § 296, joinder of causes.

See infra, § 298, definition of material allegations.

See infra, notes to § 1116, complaint in actions to foreclose mortgages.

See infra, § 707, notes, complaint in replevin.

See infra, § 785, complaint in actions to quiet title, and ejectment.

Cited in 3 Wash. 271; 9 Wash. 549; 23 Wash. 606; 27 Wash. 407, 409.

See 2 Remington's Digest, pp. 2258-2260, §§ 23-34.

A complaint cannot be amended so as to substitute entirely new parties plaintiff: *Leibman v. McGraw*, 3 Wash. 520, 522.

Under our system of code pleading but few of the common-law forms will be found demurrable, most are obnoxious to motions, and none are so concise as our system contemplates: *Renton v. Peter St. Louis*, 1 W. T. 215.

Contrast between the rigid rules of the common law and code pleading pointed out: *Id.*

As to designation of unknown party by fictitious name, see infra, § 306.

SUBDIVISION ONE—FORMAL REQUISITES.—What may be considered surplusage in stating the name of the court: *Nickles v. Griffen*, 1 W. T. 374.

The title of an action can only be considered as a description of the parties, and cannot be relied upon as an allegation of the fact to aid the pleading: *Tolmie v. Dean*, 1 W. T. 46, 50.

Failure to allege the corporate character of defendant in a complaint is waived by defendant pleading a counterclaim, as though it were in fact a corporation: *Frost v. Ainslie L. Co.*, 3 Wash. 241; *Sengfelder v. Mut. Life Ins. Co.*, 5 Wash. 121.

A complaint against a private corporation, upon a contract made with it, without any averment of its incorporation, or that defendant is a member of the company, is bad on demurrer: *Tolmie v. Dean*, supra.

In an action to enforce a mechanic's lien, which makes the assignee of the estate of the person to whom the materials were furnished a party, and without describing him as assignee, merely alleging that he has some interest in the premises, does not make such assignee a party except in his personal capacity: *Quimby v. Slipper*, 7 Wash. 475.

Where immediately following the name of the defendant in the title of the cause the word "receiver" is added without being preceded by the word "as," the former word must be deemed mere descriptio personae: *Vasele v. Grant St. Elec. R. Co.*, 16 Wash. 602.

Only facts, and not conclusions of law should be pleaded: See 2 Remington's Digest, p. 2254, §§ 5, 6; *Parrish v. Reed*, 2 Wash. 491; *Ritchie v. Carpenter*, 2 Wash. 512; *Baker-Boyer Nat. Bank v. Hughson*, 5 Wash. 100; *Lake v. Steinbach*, 5 Wash. 659; *State ex rel. Whitney v. Friars*, 10 Wash. 348; *Bay View Brewing Co. v. Grubb*, 24 Wash. 163; *Carlson v. County Commissioners*, 38 Wash. 616. Neither conclusions nor probative facts should be pleaded, but the allegation of a fact will not be affected by the addition of conclusions or redundant matter: *Brummett v. Campbell*, 32 Wash. 358.

A conclusion of law is not admitted by a demurrer: *MacMartin v. Stevens*, 37 Wash. 616.

The complaint in an action to foreclose a logger's lien is not demurrable on the ground that it does not allege, except as a conclusion of law, that anything was due the plaintiff, when it states that "under the terms and conditions of the said contract defendants became indebted to the plaintiff in the sum of \$303.87": *Mason v. McGee*, 15 Wash. 272.

SUBDIVISION TWO — REQUISITES IN PLEADING FACTS: See 2 Remington's Digest, p. 2258, §§ 26, 27. This subdivision requires a "plain and concise statement of facts," and not their legal effect, or the legal conclusions inferred from them, with the view of informing the defendant of the exact nature of the claim against him, and the facts relied on to establish it, so that he can intelligently and directly answer the same: *Distler v. Dabney*, 3 Wash. 200, 203; *P. S. I. Co. v. Worthington*, 2 W. T. 472; *First Nat. Bank of Pullman v. Young*, 20 Wash. 337; *Grant v. Walsh*, 36 Wash. 190.

The essential facts must be alleged in the pleading: *Tolmie v. Dean*, supra.

Facts should be stated positively and in traversable form; this, however, does not necessarily prohibit the statement of a fact on "information and belief," but sufficient facts having been stated as existing, an allegation that the pleader states them "on information and belief" will be treated as surplusage: *Warburton v. Ralph*, 9 Wash. 537.

In construing pleadings as against a demurrer, the office of which is to raise a substantial issue of law, evidentiary facts and even inferences from averments amounting to mere conclusions of law, will be considered in favor of the pleading: *Chambers v. Hoover*, 3 W. T. 107, 110; *Isaacs v. Holland*, 4 Wash. 54.

A complaint must be measured by facts stated, and it is not necessary to name the particular action or label the form: *Casey v. Oakes*, 17 Wash. 409; *Dunlap v. Rauch*, 24 Wash. 620.

Where a plaintiff sets forth facts constituting a cause of action entitling him to some relief, he is not to be turned out of court because he has misconceived the nature of his remedial right: *Damon v. Leque*, 14 Wash. 253; *Watson v. Glover*, 21 Wash. 677; *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132; *Yarwood v. Johnson*, 29 Wash. 643; *Brown v. Calloway*, 34 Wash. 175; *McKay v. Calderwood*, 37 Wash. 194; *Lawrence v. Halverson*, 41 Wash. 534.

Defenses need not be anticipated in the complaint: See 2 Remington's Digest, p. 2259, § 31; *Johnson v. Bellingham Bay Imp. Co.*, 13 Wash. 455; *Randall v. Hoquiam*, 30 Wash. 435; *Malloy v. Benway*, 34 Wash. 315; *State v. Davis*, 43 Wash. 116.

Under the liberal rule as to construction of pleadings required by our statutes, it is sufficient, in an action founded on a written instrument, to attach the instrument to the complaint as an exhibit and make sufficient reference thereto in the complaint to put the defendants on inquiry as to its contents: *Hays v. Dennis*, 11 Wash. 360.

In pleading the articles of incorporation and by-laws of a corporation it is sufficient to plead them in substance and legal effect without setting them out in haec verba: *Seal v. Cameron*, 24 Wash. 62. In the absence of a demurrer to the complaint, the pleading will be liberally construed upon attack after judgment: *Montesano v. Blair*, 12 Wash. 188; following *Town of Elma v. Carney*, 4 Wash. 418. And upon such attack for want of facts to state a cause of action, it must be most liberally construed and the judgment sustained, if by any reasonable intendment it can be: *Mosher v. Bruhn*, 15 Wash. 332; *Johnson v. Leonhard*, 1 Wash. 564; *Lyen v. Bond*, 3 W. T. 407.

Where a complaint sets forth two causes of action without separately stating them,

it is not error to refuse to strike out portions of the complaint, when the two causes could be properly joined, but the proper remedy is a motion to require plaintiff to separately state his several causes of action: *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648.

Where one of two causes of action, which had been joined in one complaint, has been held insufficient on appeal, it is error, upon a retrial of the cause upon the same complaint, after reversal, to permit the introduction of evidence supporting the cause of action which has been ruled upon adversely by the appellate court: *Id.*

Although the refusal of the court to compel plaintiff, on motion, to elect between two causes of action pleaded in his complaint may be error, it is not prejudicial if the election be made by plaintiff at the opening of the trial: *Van Hook v. Burns*, 10 Wash. 22.

Where a complaint sets forth facts tending to show a liability both in tort and on contract, such recital is not open to objection on the ground of stating more than one cause of action, when such facts all relate to a single transaction and are relied upon as the basis of a single cause of action: *Barto v. Nix*, 15 Wash. 563.

Although a complaint may be subject to attack by motion or demurrer on the ground that it does not allege facts sufficient to state a cause of action, yet, if the objection thereto is not raised until after answer, the complaint will be held sufficient, if the facts stated will justify a recovery upon any theory upon which a right can be founded: *Blumenthal v. Pac. Meat Co.*, 12 Wash. 331.

Where money is owing to plaintiff from defendants, demand before suit for amount due is unnecessary: *Chappell v. Woods*, 9 Wash. 134.

And in an action to recover for work performed at the special instance and request of defendant, no allegation of demand is necessary, when there is no allegation showing that the action was based upon a mutual current account: *Robertson v. Woolley*, 12 Wash. 326.

A complaint alleging facts, which, if true, would establish fraud as a conclusion of law, sufficiently alleges fraud without a further specification thereof: *Andrews v. King Co.*, 1 Wash. 46.

If plaintiff has pleaded no excuse for tender he cannot urge the uselessness of complying with the obligation on his part: *Underwood v. Tew*, 7 Wash. 297.

LAWS OF ANOTHER STATE must be pleaded and proven as any other fact, and the court will not take judicial notice of them: See 2 Remington's Digest, p. 2637, § 93; *Daniel v. Pressler*, 3 Wash. 636; *Gunderson v. Gunderson*, 25 Wash. 459; *Stewart's Estate, In re*, 26 Wash. 32; *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411; *Lowry v. Moore*, 16 Wash. 476. For an

exception to this rule, see *Cunningham v. Spokane Hyd. etc. Co.*, 20 Wash. 450.

Nonpayment is an affirmative matter, which must be pleaded and proved: *Bethel v. Robinson*, 4 Wash. 446; *National Bank v. Western Iron & Steel Co.*, 14 Wash. 162.

An item of special damage, which, though recoverable, is not alleged in the complaint, cannot be included in the judgment: *Sheehan v. Levy*, 1 Wash. 149; see 148 U. S. 345; see *Kaufman v. Tacoma, Olympia etc. Ry. Co.*, 11 Wash. 632.

If a complaint be faulty in other respects than as made by the code demurrable, such defects may be reached by motion: *Renton v. Peter St. Louis*, 1 W. T. 215. If any part of a complaint is good, it will stand as against a general demurrer: *McCartney v. Glassford*, 1 Wash. 579.

A complaint showing on its face that the demand for which suit is brought is barred by the statute of limitations, is bad on demurrer: *Wilt v. Buchtel*, 2 W. T. 417; see *infra*, § 259, subd. 7; also a complaint on a contract of sale which fails to show either a sale or a tender: *Hawley v. Kenoyer*, 1 W. T. 609.

When an amended complaint is filed, any error of the court in ruling upon the original complaint is thereby waived: *Bell v. Waudy*, 4 Wash. 743.

Amendment on trial: See notes to § 339, *infra*.

If a complaint is sufficient to support a judgment, and no objections have been taken to its sufficiency in the court below, it cannot be attacked for the first time on appeal: *U. S. v. Small*, 3 W. T. 478.

Where evidence is introduced upon the trial without objection covering defects in the complaint they will be treated as cured: *Livesley v. O'Brien*, 3 Wash. 546, 553; *Waldron v. Home Mut. Ins. Co.*, 9 Wash. 534.

COMPLAINTS IN ACTIONS GENERALLY—ON CONTRACTS FOR PAYMENT OF MONEY.—In an action by a payee of a note against the maker, a complaint alleging that the payee assigned the note to a certain bank as security, and that the bank, though requested thereto, refuses to bring suit thereon after its maturity, fails to state a cause of action: *Davis v. Erickson*, 3 Wash. 654.

An allegation that representations were false and fraudulent and by reason thereof the maker of the note in controversy was induced to execute and deliver the same, does not show want of consideration, but at most is merely the expression of an opinion: *National Bank v. Hughson*, 5 Wash. 100.

In an action on promissory notes by an indorsee thereof, the complaint is sufficient as against general demurrer attacking an averment of ownership in plaintiff, which is alleged as follows: "That for value and before maturity, Alexander A. Munson indorsed said notes by writing across the back of each before delivery

the name 'Alexander A. Munson.' That plaintiff is now the owner and holder of said notes and mortgage": *Osborne & Co. v. Stevens*, 15 Wash. 478.

In an action to recover from a bank the value of a note and mortgage assigned to it as collateral security, the complaint is proof against a general demurrer when it sets out the execution of the note and mortgage to plaintiff, with a description of the property mortgaged, and alleges that the note and mortgage were assigned to defendant in trust, according to the terms of a contract accepted by the defendant, whereby defendant should collect said note and out of the proceeds pay certain indebtedness of the plaintiff to itself and others, and deliver the balance of the moneys collected thereunder to plaintiff; that on a certain day, in violation of said contract, and without plaintiff's consent the defendant sold and assigned said note and mortgage and converted the same to its own use, refusing upon demand either to return the note and mortgage or to pay over to plaintiff the amount as due thereunder: *Howard v. Seattle Nat. Bank*, 10 Wash. 280.

Although a city charter may require that warrants for the payment of money be signed by the mayor and clerk of the city, a complaint upon a city warrant signed by an acting mayor is not demurrable for the reason that it fails to allege the proceedings of the city council by virtue of which the acting mayor came to occupy such position, as such facts are matters of evidence and not of pleading: *Stephens v. Spokane*, 11 Wash. 41.

In an action upon a contract which recognizes the right of the parties to make assignments, a complaint setting up the contract is not demurrable for the reason that the action is by and against different parties than those named in the contract, when the complaint shows their interest through assignment: *Van Horne v. Watrous*, 10 Wash. 525.

Error in the description of the name of the obligee in a bond is not material, when the obligor has not been misled; and recovery may be had thereon when the complaint of the obligee alleges the execution and delivery of the bond to itself, and then sets out the bond in full: *P.-I. Pub. Co. v. Harris*, 11 Wash. 500.

In an action upon an instrument executed by an attorney in fact, which is made a part of the complaint, it is sufficient to allege the execution by the principal without setting out that the agent had been constituted attorney for the purpose of its execution: *Richmond v. Voorhees*, 10 Wash. 316.

A complaint setting up a contract is not demurrable for the reason that the action is by and against different parties than those named in the contract, when the complaint shows their interest through assignment: *Van Horne v. Watrous*, 10 Wash. 525.

In an action by a corporation upon an unpaid stock subscription, the complaint is not demurrable on the ground that it fails to allege that the capital stock of the corporation had all been subscribed, when the complaint otherwise alleges that plaintiff is and has been a duly organized and existing corporation, during all the time referred to in the complaint: *McKay v. Elwood*, 12 Wash. 579.

In an action upon an account for merchandise sold and delivered between certain dates, in which the complaint nowhere alleges any accounting between the parties, the plaintiff cannot, without amendment, substitute on the trial a cause of action upon an account stated, and thus deprive defendant of the right to disprove the sale and delivery of the goods: *Wilson v. Waldron*, 12 Wash. 149.

Where plaintiff in an action for goods sold and delivered admits an extension of time of payment in complaint, he is estopped to say that such extension is void for want of consideration, and defendant is entitled to judgment of dismissal on the ground that the action is prematurely brought: *Rockford Shoe Co. v. Jacob*, 6 Wash. 421.

An action for money had and received cannot be maintained for the breach of a contract, although such contract was invalid for the reason that it was a lease of community lands executed by husband alone: *Dietz v. Winehill*, 6 Wash. 109.

If the complaint in an action for price of logs alleges that defendant took possession of them, it is sufficient, although other allegations may show that plaintiff was not in the actual possession thereof at time of sale: *Tingley v. Fairhaven L. Co.*, 9 Wash. 34.

In an action brought for an accounting for proceeds of logs, complaint held to state no cause of action: *Runyan v. Russell*, 3 Wash. 665.

In an action upon an assignment of an account for a sum due, and for a further sum to be earned in the future, the complaint is not demurrable because founded on a claim not in existence at time of assignment, but is good for sum due at that time: *Rice v. Yakima etc. Ry. Co.*, 4 Wash. 724.

A complaint alleging that defendant took charge of plaintiff's hogs, agreeing to deliver them to a designated purchaser upon payment of the purchase price, and that he allowed such purchaser to dispose of part of the hogs without such payment, and himself disposed of the remainder and converted the proceeds, is sufficient, without objection to the pleading before trial, to sustain the verdict: *Lyen v. Bond*, 3 W. T. 407, 15 Wash. 332.

A complaint for the recovery of commissions on land sales, alleging that the property was placed in plaintiff's hands, that a purchaser was found by plaintiff at price named, and bargain completed, but neglects to allege communication of facts

to defendant, or that defendant carried out the arrangement made, or refused so to do, after notice, is insufficient: *Penter v. Straight*, 1 Wash. 365.

In an action to recover for services in doing the county printing, a complaint is demurrable for want of facts, when it does not allege that the work was done by plaintiff or that he had any interest in the newspaper in which the official notices were published: *Rathbun v. Thurston Co.*, 8 Wash. 238.

That there was an agreement between a railway company and contractors engaged in constructing its roadbed, to transport the latter's employees, is sufficiently shown by an allegation in the complaint that there was an "arrangement" between them to that effect, when it is clear from the other allegations of the complaint that the word was used in the sense of an agreement or contract: *Boyle v. G. N. R. Co.*, 13 Wash. 383.

FOR RECOVERY OF DAMAGES.—In an action against a railway company for personal injuries, an averment in the complaint that a certain firm were constructing a portion of its roadbed, when taken in connection with the further allegation that plaintiff was working for said firm as a common laborer, is sufficient to show that the firm were independent contractors of the railway company: *Boyle v. Gt. N. R. Co.*, 15 Wash. 383.

In an action for damages for personal injuries the complaint states a sufficient cause of action in the absence of a demurrer, when it alleges that plaintiff was injured by the collapse of a trap-door in the floor of the car, under plaintiff's weight, and that the collapse and falling in of the trap-door were caused by the negligence of defendant in failing to properly secure, adjust and fasten said trap-door, and that the injury to plaintiff was without any fault or negligence on her part: *Washington v. Spokane St. R. Co.*, 13 Wash. 9.

Where the complaint contains an allegation that plaintiff has been compelled to pay a certain sum for medical treatment and nursing, evidence thereof is admissible, without being pleaded as a distinct cause of action: *N. P. Ry. Co. v. Hess*, 2 Wash. 383.

Where the only allegation of negligence, in a complaint for injuries received as the result of a collision with a street-car, are that defendant "carelessly and negligently ran one of its cars along said street at a high rate of speed, and negligently and carelessly omitted while approaching plaintiff to give any signal by ringing the bell, or otherwise, of the approach of said car," it is error for the court to try the case upon the theory that general negligence had been alleged: *Redford v. Spokane St. Ry. Co.*, 9 Wash. 55.

It is not necessary in an action for injuries received on a public highway of a city, through the negligence of a private

party, to allege and prove the incorporation of such city, since by § 1261 et seq., Gen. Stats., its streets are public highways: *Carroll v. Centralia Water Co.*, 5 Wash. 613.

In an action against the sheriff for wrongfully seizing and selling a stock of goods mortgaged to secure an indebtedness, it is not necessary to allege their value at the time of taking, where no element of special damage is claimed; but in the absence of an allegation of special damage the mortgagee is entitled to recover his debt, and interest, not in excess of the value of the goods at the time of their taking, and, in order to support a judgment in such case, there must be evidence of the value of the goods seized: *Sheehan v. Levy*, 1 Wash. 149; *Id.*, 3 Wash. 420.

A complaint in an action for damages for false representations in the particular case held to state a cause of action: *Gates v. Moldstad*, 14 Wash. 419.

ON POLICY OF INSURANCE: See 2 Remington's Digest, p. 1544, §§ 112-115. A complaint on a policy of insurance for certain amounts upon a stock of goods, safe and store fixtures, alleging loss of the "whole of said stock and fixtures," is sufficient to admit proof of the loss of the safe as included in the term "fixtures," the formal proof of loss showing that claim was made for the safe: *Pencil v. Home Ins. Co.*, 3 Wash. 485; but a complaint that does not set out the policy sued on, nor show proof of loss, ownership of the property, or value thereof, does not state sufficient facts, although it does allege that notice of the fire was given defendant, and that plaintiff was damaged by the fire in a certain sum: *Emigh v. State Ins. Co.*, 3 Wash. 122.

In an action on a fire insurance policy the omission by plaintiff of allegations showing his insurable interest in the building at the time of loss and value of the property destroyed are cured by admission of evidence thereon without objection, and by the verdict: *Waldron v. Home Mut. Ins. Co.*, 9 Wash. 634.

FOR MALICIOUS PROSECUTION: See 2 Remington's Digest, p. 1771, § 10; *Kerstetter v. Thomas*, 36 Wash. 620. In an action for damages for malicious arrest and prosecution, if the complaint fail to show a favorable termination for plaintiff of proceedings upon which arrest was made, it is insufficient: *Ferguson v. Tobey*, 1 W. T. 275.

A complaint for malicious prosecution against two defendants alleging that they jointly "procured the arrest of plaintiff on a false charge," and "that in procuring the arrest and prosecution of the plaintiff the defendants acted maliciously and without probable cause," sufficiently charges a joint responsibility: *Jones v. Jenkins*, 3 Wash. 17.

CHARGING NUISANCE.—A complaint charging numerous proprietors of saloons and gambling houses with maintaining a

public and private nuisance without naming or locating any particular house, or designating wherein it is a nuisance, is fatal on demurrer: *N. P. Ry. Co. v. Whalen*, 3 W. T. 452. See, also, *Grantham v. Gilson*, 41 Wash. 125.

ON CONTRACTS FOR CONVEYANCE OF LANDS.—A complaint in an action to enforce the specific performance of a contract to convey land is not demurrable on the ground that the contract was signed by an agent, when the question of agency does not appear on the face of the complaint itself: *Wooding v. Crain*, 10 Wash. 35. See, also, *Boston Clothing Co. v. Solberg*, 28 Wash. 262.

A complaint for specific performance of a contract to convey certain land which sets out a written memorandum thereof, indefinite and defective in the elements necessary to perfect a contract, and alleges that by mutual mistake of the parties thereto the contract agreed to and which was intended to have been embodied in said writing provided for the sale of "one acre, to be taken in a square form out of the northwest corner" of a certain lot, for which the buyer was to pay "one dollar in cash at this date," etc., is sufficient: *Vail v. Tillman*, 2 Wash. 476.

In an action for specific performance of contract to convey lands complaint in the particular case held sufficient to entitle plaintiff to equitable relief: *Sayward v. Gardner*, 5 Wash. 247. Where held not sufficient: See *O'Connor v. Jackson*, 23 Wash. 224.

Under a contract by which defendant was to convey to plaintiff certain lands, to be paid for in wheat, and plaintiff delivered the wheat, but afterward rescinded the contract, on account of defect in defendant's title, the proper form of pleading, under the code, in an action to recover the value of the wheat, is the common count in assumpsit for goods sold and delivered, omitting all reference to the original contract: *Ankeny v. Clark*, 1 Wash. 550; contra, see *Dissler v. Dabney*, 3 Wash. 200; *Osten v. Winehill*, 10 Wash. 333.

In an action against three defendants for the purchase price of land, a complaint alleging a deed therefor executed to one defendant at the request of the other two, who were the real purchasers; that the grantee in the deed executed a note secured by mortgage on the land to secure deferred payments, and that the other two defendants at the same time and as a part of the same transaction, executed a bond or guaranty for payment of said sum, states a cause of action against all defendants: *Hanna v. Savage*, 7 Wash. 414.

An allegation in a complaint that plaintiff was the owner of certain property at the date he contracted to sell it to defendant is immaterial if he was the owner and able to make delivery when time of performance arrived: *Kleeb v. Bard*, 7 Wash. 41.

In an action by a vendee to rescind a contract for the conveyance of land, on the ground of failure of title of the vendors, the complaint does not sufficiently allege defect of title when it states that the grantors "were not seised in fee or possessed of the right to sell and convey" the premises in controversy: *Decker v. Schultze*, 11 Wash. 47.

Where a contract of sale of land has been made by two persons, an allegation in a complaint for rescission of the contract by the purchaser that one of the vendors fraudulently misrepresented the title is insufficient, in the absence of allegations showing agency of the vendor making the misrepresentations for the other vendor: *Webb v. Stephenson*, 11 Wash. 342.

The object of a complaint being to establish title under the donation act, if it fails to show compliance with § 12 of that act, requiring an affidavit from claimant as a condition precedent to acquiring title, it fails to state a cause of action: *Shockley v. Brown*, 1 W. T. 463.

An allegation in a complaint for the recovery of lands that the ancestor of plaintiffs died seised and possessed of the property is a sufficient allegation of the possession of plaintiffs, as when seisin is once shown it will be presumed to continue until allegation and proof of adverse possession in someone else: *Balch v. Smith*, 4 Wash. 497.

Averments as to title to and possession of property involved: See *Freytag v. Northern Pac. R. Co.*, 1 Wash. 214; *Hankle v. Denison*, 34 Wash. 51.

In an action by a vendee for the specific performance of a contract to convey real estate "conditional on furnishing a good title," a complaint sufficiently alleges title in the vendor, as against a general demurrer, where it shows a tax title which the vendee is willing to accept: *Newell v. Lamping*, 45 Wash. 304.

TO SET ASIDE FRAUDULENT CONVEYANCES: See 1 Remington's Digest, p. 1307, §§ 76-79. In an action to set aside a conveyance of certain lands as being in fraud of creditors, an allegation in the complaint setting forth that plaintiff had obtained judgment and issued execution against the defendant, that "the said execution had been returned by the sheriff wholly unsatisfied and that the defendant has no other property out of which the plaintiff could make said judgment," is sufficient to render the complaint proof against demurrer on the ground that it fails to show by distinct averment that the debtor had no other property at the time the conveyance was made: *Cook v. Tibbals*, 12 Wash. 207. See, also, *Allen v. Chambers*, 18 Wash. 341; *Reed v. Loney*, 22 Wash. 433; *Bates v. Drake*, 28 Wash. 447; *Rohrer v. Snyder*, 29 Wash. 199.

The rule requiring matters constituting fraud to be pleaded is sufficiently complied with, in an action to set aside an alleged fraudulent conveyance, when the complaint

alleges that "at the time said deed was executed by the said John A. Shoudy and M. E. Shoudy to the said Dexter Shoudy, the said John A. Shoudy and M. E. Shoudy were wholly insolvent and unable to pay their debts; that the said Dexter Shoudy is a son of said John A. Shoudy and M. E. Shoudy, and plaintiff avers that said deed was so executed by the said John A. Shoudy and the said M. E. Shoudy to said Dexter Shoudy without any consideration therefor; that no money or thing of value was paid or to be paid for said premises, but that such conveyance was made for the sole purpose of hindering, delaying and defrauding the creditors of the said John A. Shoudy and M. E. Shoudy, and particularly the plaintiff herein, and for the purpose of placing said property beyond the reach of the creditors of said John A. Shoudy and M. E. Shoudy, and for no other purpose whatever": *Murray v. Shoudy*, 13 Wash. 33.

A complaint charging that the owner of land, in order to effect a sale thereof to plaintiff, had conspired with another for the purpose of defrauding plaintiff by agreeing that the co-conspirator should represent and pretend to plaintiff that the purchase price of such land was more than the price actually placed thereon between the conspirators, does not state a cause of action against such land owner, when it does not show that he derived any benefit from such misrepresentation, nor that he said or did anything to lead plaintiff to enter into the contract: *Kennah v. Huston*, 15 Wash. 275.

In an action seeking to subject land fraudulently conveyed to the lien of a judgment, the complaint sufficiently states that the defendant had no other property out of which the execution could be satisfied, when it alleges that there was a return of nulla bona on the execution issued, and that the property attempted to be conveyed was all the property owned by the judgment debtor: *O'Leary v. Duvall*, 10 Wash. 666.

A complaint asking equitable relief in behalf of a creditor, to subject property to the payment of his debts, is insufficient unless it allege that he has reduced his claim to judgment, or in some other manner obtained a lien upon the specific property sought to be reached, although it be alleged that the debt cannot be collected by the ordinary process of law: *Thompson v. Caton*, 3 W. T. 31.

TO SET ASIDE A JUDGMENT.—An independent action will not lie to set aside a judgment rendered in a former suit between the same parties, when the action is based upon error of the court in setting aside a verdict in such suit: *Davis v. Fields*, 9 Wash. 78.

TO ADJUDGE DEFICIENCY JUDGMENT A PRIOR LIEN.—In an action to have a deficiency judgment adjudged as a prior lien on other realty of the mortgagee defendants, upon which an unsecured cred-

itor had obtained a judgment lien, the complaint is demurrable when it fails to state that the mortgagee defendants were insolvent, or that any execution had been issued against them for the deficiency upon the foreclosure judgment and returned unsatisfied: *Howard v. Devol*, 15 Wash. 270.

IN INTERPLEADER.—A complaint in an action of interpleader is sufficient, especially when first objected to after judgment, when it alleges that plaintiff was indebted to a certain firm, that it had been garnisheed by two creditors of said firm, one of whom had obtained a judgment against plaintiff, but that the other garnishing claimant is assailing such judgment as void, that plaintiff is willing to pay the money due the principal debtor to the party entitled thereto and offers to pay said money into court to be applied as the court shall determine: *Id.*

SUBDIVISION THREE—DEMAND—AMOUNT: See 2 Remington's Digest, p. 2260, § 331. A claim for relief, as set forth in the complaint, cannot be in any manner enlarged in the reply to defendant's answer: *Bell v. Waudby*, 4 Wash. 743.

A complaint is not demurrable because the prayer for judgment is for a larger amount than is warranted by the facts: *Howard v. Seattle Nat. Bank*, 10 Wash. 280.

Where a complaint states a contract and a breach, nominal damages will be presumed: *Johnson v. Cook*, 24 Wash. 474.

The relief to which plaintiff is entitled, in an action in which there is no answer, cannot exceed what is demanded in the complaint: *Bank of Cal. v. Dyer*, 14 Wash. 279.

The prayer for relief is unimportant in determining the rights of the parties or the jurisdiction of the court: See *Howard v. Seattle Nat. Bank*, 10 Wash. 280; *Smith v. Allen*, 18 Wash. 1. Except where there is no answer: *Bank of California v. Dyer*, 14 Wash. 279. Under a prayer for general relief the court may give any special relief to which the parties are entitled: *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132; *Yarwood v. Johnson*, 29 Wash. 643; *MacKay v. Smith*, 27 Wash. 442.

In an action to recover upon a contract to pay the value of a wharf five years after its erection, an allegation that it cost a certain sum, "which was its value in the contemplation of the parties," is not sufficient allegation of value: *Hart Lumber Co. v. Everett Land Co.*, 20 Wash. 71.

In an action to recover damages, an allegation of the damages sustained, together with a prayer for judgment thereon, is sufficient as an allegation of the nonpayment of the damages: *Belt v. Washington Water P. Co.*, 24 Wash. 387.

The amount alleged in the ad damnum clause in a complaint and for which judgment is prayed, although in excess of the sum of \$200, will not authorize an appeal to the supreme court, when it is evident from the pleadings that the original amount in controversy is less than \$200: *Doty v. Krutz*, 13 Wash. 169.

The fact that in an action for specific performance of a contract to convey land the complaint contained an alternative prayer for damages in case performance cannot be had, will not deprive a court of equity of jurisdiction of the action (*Morgan v. Bell*, 3 Wash. 554, distinguished): *Konnerup v. Frandsen*, 8 Wash. 551.

§ 259. (4907.) Grounds of Demurrer of Defendant.

The defendant may demur to the complaint when it shall appear upon the face thereof either,—

1. That the court has no jurisdiction of the person of the defendant or of the subject matter of the action;
2. That the plaintiff has no legal capacity to sue; or
3. That there is another action pending between the same parties for the same cause; or
4. That there is a defect of parties, plaintiff or defendant; or
5. That several causes of action have been improperly united;
6. That the complaint does not state facts sufficient to constitute a cause of action;
7. That the action has not been commenced within the time limited by law. [Cf. L. '54, p. 139, § 40; Cd. '81, § 77; L. '86, p. 75, § 1; L. '91, p. 106, § 2; 2 H. C., § 189.]

See next section, grounds of, how specified.

See *infra*, § 276, grounds of demurrer of plaintiff.

See *infra*, § 305, when pleading may be stricken.

See notes to last section.

See *supra*, § 155, manner of pleading statute of limitations.

Cited in 4 Wash. 810; 12 Wash. 598; 17 Wash. 479; 29 Wash. 532; 31 Wash. 36; 34 Wash. 576; 19 Wash. 665; 27 Wash. 86; 28 Wash. 433; 42 Wash. 88; 51 Wash. 634, 635.

See 2 Remington's Digest, pp. 2271-2276, §§ 75-98.

DEMURRER GENERALLY.—A demurrer under our statute is neither the general nor special demurrer of the common law; but a new creation applicable only in the instances expressed in the statute: *Renton v. St. Louis*, 1 W. T. 215.

It is said in *Lafleur v. Douglas*, 1 W. T. 185, that if the complaint is defective, a special demurrer to the defective portion is the proper proceeding. (This rule is true, under the present practice, if the term "special demurrer" be confined to a demurrer to an entire count.) It is held in *Lowman v. West*, 8 Wash. 355, that a demurrer does not lie to a single paragraph of a complaint unless it purports to present a complete cause of action.

A demurrer admits all facts properly pleaded: *Barnett v. Ashmore*, 5 Wash. 163, 166.

The grounds of a demurrer must be distinctly specified, but the right to demur is lost by answering, and even the objections that can be taken advantage of at any stage of the proceedings must be availed of by some other method: *Renton v. St. Louis*, supra.

If a demurrer is sustained opportunity should be given to amend, if the pleading is amendable; this is especially so, since honest endeavor may be secured by imposition of terms: *Id.*

Appearance and filing of a demurrer cures defects in service of process: *Williams v. Miller*, 1 W. T. 88.

Where the defendant demurs to a complaint and the court orders it amended, the order is in effect a sustaining of the demurrer: *Id.*

A demurrer avails nothing where it is dropped from the calendar because no one appears to prosecute it: *Livesley v. O'Brien*, 3 Wash. 546.

The filing by plaintiff of a motion to dismiss his action, after the sustaining of a demurrer to the complaint, is a waiver of any error made in ruling on the demurrer: *Lowman v. West*, 7 Wash. 407.

It is error to deny plaintiff's motion for dismissal of his action, and grant defendant's motion therefor, after sustaining a demurrer to complaint; such error will be presumed prejudicial unless the contrary affirmatively appears: *Id.*

The filing of an amendatory demurrer is within the discretion of the trial court: *Roche v. Spokane County*, 22 Wash. 121; *McClaine v. Fairchild*, 23 Wash. 758.

After a general demurrer has been overruled, defendant cannot subsequently interpose a special demurrer for misjoinder of causes of action: *Burrows v. McCalley*, 17 Wash. 269.

Objections to the sufficiency of the complaint are waived and cannot be considered when the demurrer is withdrawn and not prosecuted: *Mosher v. Bruhn*, 15 Wash. 332; *Hardin v. Mullen*, 16 Wash. 647; *Watson v. Kent*, 35 Wash. 21; *Healy v.*

King County, 37 Wash. 184. See, also, *Criswell v. Directors School Dist. No. 24*, 34 Wash. 420.

A demurrer to a complaint is waived by answering to the merits: *Budlong v. Budlong*, 48 Wash. 645.

A general demurrer to a pleading is an admission of the truth of the facts alleged: *Soule v. Seattle*, 6 Wash. 315; *Brookman v. State Ins. Co.*, 15 Wash. 29; but see *Olympia Waterworks v. Gelbach*, 16 Wash. 482; *Franklin Sav. Bank v. Moran*, 29 Wash. 200.

And will not raise the question that complaint fails to allege the incorporation of plaintiff: *Sly v. Mining Co.*, 28 Wash. 485.

A conclusion of law is not admitted by demurrer: *MacMartin v. Stevens*, 37 Wash. 616; *Hester v. Thompson*, 35 Wash. 119.

Under a general demurrer objections cannot be raised which are made grounds for special demurrer: See 2 Remington's Digest, p. 2274, §§ 88-92; *Rice v. Yakima & Pac. Coast R. Co.*, 4 Wash. 724; *Sly v. Palo Alto Gold Min. Co.*, 28 Wash. 485; *Birmingham v. Cheetham*, 19 Wash. 657; *James v. James*, 35 Wash. 655; *Marvin v. Yates*, 26 Wash. 50; *Ames v. Kinnear*, 42 Wash. 80.

The objection that an allegation of the complaint is merely a conclusion of law cannot be urged on the ground that the complaint does not state facts sufficient to constitute a cause of action: *Livingstone v. Lovgren*, 27 Wash. 102.

A general demurrer for want of sufficient facts, where there are two causes of action, is properly overruled where the second cause of action is properly stated: *Meals v. De Soto Placer Min. Co.*, 33 Wash. 302; *Marvin v. Yates*, 26 Wash. 51.

A complaint which separately states two causes of action is good as against a general demurrer if either cause contains facts sufficient to constitute a cause of action: *Hindle v. Holcomb*, 34 Wash. 336.

If a portion of a complaint is defective, such defect must be reached by special demurrer, and not by a general demurrer to the whole complaint: *Lafleur v. Douglass*, 1 W. T. 185; *Bellingham Bay Imp. Co. v. Fairhaven etc. R. Co.*, 17 Wash. 371; *Weiser v. Holzman*, 33 Wash. 87. See, also, *Harris v. Halverson*, 23 Wash. 779.

Objections to a complaint cannot be made by a demurrer on terms or objections at the trial: See Remington's Digest, p. 2275, § 93; *Greene v. Finnell*, 22 Wash. 186; *Hindle v. Holcomb*, 34 Wash. 336; *Zeimantz v. Blake*, 39 Wash. 6.

Objections to defects in pleadings cannot be raised by objection to any evidence at the trial: *Erickson v. McLellan & Co.*, 46 Wash. 661.

IMPROPER JOINDER OF CAUSES: See 2 Remington's Digest, p. 2272, § 82; *Id.*, p. 2274, § 90. A complaint improperly joining causes of action for mandamus and for injunction, will be proof against a demurrer for misjoinder if it states a good

cause of action for injunction, and shows no ground for mandamus, although the causes be not separately stated: *Times Pub. Co. v. Everett*, 9 Wash. 518.

If two causes of action are improperly joined, the failure of the court to pass upon a demurrer on that ground is not cured by sustaining a demurrer to one of the paragraphs for want of sufficient facts: *Penter v. Straight*, 1 Wash. 365.

A complaint against the maker of a note on his written undertaking, and also against another party on a verbal promise to pay the same note, is not demurrable on the ground of improperly uniting two causes of action: *Gilmore v. Skookum Box Factory*, 20 Wash. 703.

The objection that a bill of particulars filed by plaintiff amplifies the claim set up in his complaint into two causes of action improperly united would not render the complaint itself demurrable: *Dudley v. Duval*, 29 Wash. 528.

Where two causes of action are improperly joined, and a demurrer on that ground is sustained, a plaintiff whose complaint stated a good cause of action cannot complain of the dismissal of the action upon sustaining the demurrer, when he elected not to amend his complaint: *Johnson v. Seattle Elec. Co.*, 39 Wash. 211.

ANOTHER ACTION PENDING: See 2 *Remington's Digest*, p. 2272, § 79. The pendency of another suit between the same parties for the same cause of action cannot be raised by demurrer unless the fact appears on the face of the complaint: *Jackson v. McAuley*, 13 Wash. 298; *Lowman v. West*, 8 Wash. 355.

Under this and § 261, giving the defendant the right by demurrer, or answer, to raise the defense that there is another action pending between the same parties for the same cause, the objection may be interposed by the plaintiff to defendant's counterclaim, inasmuch as to such pleading the plaintiff occupies the position of a defendant: *Caine v. Seattle & Northern Ry. Co.*, 12 Wash. 596.

A complaint to recover on certain warrants is demurrable as not constituting a cause of action where it appears therefrom that the invalidity of the same warrants had been determined in a prior action in which the present plaintiff was a party defendant: *Seattle Nat. Bank v. School Dist.*, 20 Wash. 368.

DEFECT OF PARTIES, ETC.: See 2 *Remington's Digest*, pp. 2204-2207, §§ 51-63.

If a defect of parties is not raised by answer or demurrer, the court cannot dismiss the action except upon the refusal or neglect of plaintiff to bring in the necessary parties, after being so ordered, as provided in §§ 261, 263, 408, subdivision 5; *Harrington v. Miller*, 4 Wash. 808.

Where a defect of parties plaintiff has not been raised in the court below by demurrer or answer, objection thereto is waived, and cannot be urged on appeal: *Hannegan v. Roth*, 12 Wash. 695.

While a court will not proceed to final judgment in the absence of a necessary party, it will not dismiss the action on account of the nonjoinder of such party, but will retain it until all necessary parties are brought in, after which it will proceed to judgment on the merits: *Id.*

A misjoinder of parties defendant furnishes no ground for reversal of a judgment where the cause was dismissed as to a defendant claimed to have been improperly joined: *Jackson v. McAuley*, 13 Wash. 298.

If a person is joined as party plaintiff in an action by an amended complaint, after the answer had averred such party had an interest in the controversy, defendants cannot afterward, on appeal, raise the objection that such additional party is not a party in interest: *Shepard v. Hill*, 6 Wash. 605.

A demurrer for defect of parties or misjoinder of causes of action is bad when it does not point out the defect or misjoinder: *Lowman v. West*, 8 Wash. 355.

INSUFFICIENCY OF FACTS PLEADED: See 2 *Remington's Digest*, p. 2271, § 76. Where enough facts are stated in a complaint to constitute a cause of action, but are not alleged with sufficient particularity, the defendant's remedy is not by demurrer, but by motion to make the complaint more definite and certain: *Fares v. Gleason*, 14 Wash. 657.

Although the allegations of a pleading be not as full and complete as they might be, they should be held sufficient when not attacked by motion or demurrer, if sufficient in other respects: *Bell v. Waudby*, 4 Wash. 743, 747; and while a complaint may be opened to attack by motion, it may yet be invincible against a general demurrer: *Howard v. Seattle Nat. Bank*, 10 Wash. 280, 283; *Duryee v. Friars*, 18 Wash. 55; *Gehres v. Orlowski*, 36 Wash. 156.

Objection to a complaint for insufficiency of facts cannot be raised by motion to dismiss, but only by demurrer or objection to admission of evidence: *Wilkeson Coal & Coke Co. v. Driver*, 9 Wash. 177.

In construing a pleading, as against a demurrer, the office of which is to raise a substantial issue of law, evidentiary facts, and even inferences from averments amounting to mere conclusions of law, will be considered in favor of the pleading: *Chambers v. Hoover*, 3 W. T. 107.

Where the objection that the complaint does not state a cause of action has been raised in the lower court by demurrer, and the demurrer has been subsequently waived, the defendant cannot raise the objection of insufficiency of the complaint on appeal, as § 263, permitting the defendant to raise the objection at any stage of the proceedings that the complaint does not state a cause of action has no application to cases where the point has been once raised in the lower court by demurrer and then abandoned: *Mosher v. Bruhn*, 15 Wash. 332.

Demurrer does not lie for generality of statement or want of particularity: *Renton v. St. Louis*, 1 W. T. 215; *Chambers v. Hoover*, 3 W. T. 107; *Isaacs v. Holland*, 4 Wash. 54; *Oregon R. & Nav. Co. v. Dacres*, 1 Wash. 195; *Green v. Tidball*, 26 Wash. 338; *Wiest v. Coal Creek R. Co.*, 42 Wash. 176; *Allen v. Baxter*, 42 Wash. 434; *Watson v. Glover*, 21 Wash. 677.

Want of definiteness in an answer must be taken advantage of by motion and not by demurrer: *Schaad v. Robinson*, 50 Wash. 283.

Conclusions of law are not ground for demurrer: See 2 *Remington's Digest*, p. 2272, § 77; *Chambers v. Hoover*, 3 W. T. 107; *Isaacs v. Holland*, 4 Wash. 54; *Harris v. Halverson*, 23 Wash. 779.

Where triable issues of fact are presented by the complaint, answer and reply, it is error to sustain a demurrer to the reply, and dismiss the action: *Davis v. Old-acres*, 3 W. T. 593.

A complaint is not demurrable because the prayer is for a larger amount than is warranted by the facts: *Howard v. Seattle Nat. Bank*, 10 Wash. 280.

Where several lien claimants join in one action whose claims are of the same character, and the claim of each plaintiff is separately pleaded, it is error to sustain a general demurrer to the complaint for want of sufficient facts, if any of the causes are well pleaded: *Chevret v. M. & L. Co.*, 4 Wash. 721.

In an action upon an assignment of an account due, and a further sum to be earned in future, the complaint is good against a general demurrer on the cause of action for the sum due: *Rice v. Yakima & P. Ry. Co.*, 4 Wash. 724.

A complaint against a corporation on a contract made with it, without averment of its corporate existence, is bad on demurrer: *Tomlie v. Dean*, 1 W. T. 46.

A court of equity will sustain a demurrer to a complaint to vacate a judgment at law, unless facts justifying the action appear on its face: *Wingard v. Jameson*, 2 W. T. 402.

A complaint in an equitable action for return of a conveyance duly executed and placed in escrow, before final proof on government lands conveyed, and which defendant had wrongfully obtained and had recorded, is good against demurrer, as plaintiff had a special interest in the escrow, and an action at law would not afford an adequate remedy: *Paxton v. Danforth's Admr.*, 1 Wash. 120, 124.

A complaint for the death of an employee is demurrable, when it shows that

the peril to which he was exposed by his employment, and which resulted in his death, was such as could have been easily seen and appreciated by him: *Bullivant v. Spokane*, 14 Wash. 577.

In an action upon a forthcoming bond which provided that it should not become effective unless the superior court gave possession to the principal of the property then in the hands of a receiver, the complaint is demurrable as not stating a cause of action, when it fails to allege that the property had been delivered to the principal, although the complaint may recite an order of the court stating that the principal was in possession of the property: *Larson v. Winder*, 14 Wash. 647.

A demurrer to a complaint on the ground that it does not state a cause of action should not be sustained, where the complaint states facts sufficient to entitle the plaintiffs to the foreclosure of a mortgage against the defendants, who were subsequent execution purchasers of the property but had not been made parties to the original foreclosure proceedings, although the prayer in the present action is to quiet the title based upon the decree of foreclosure in the former action: *Damon v. Leque*, 14 Wash. 253.

In a complaint on a contract to freight produce to a certain point, part performance alleged, and refusal of defendants to permit plaintiff to complete contract, or to perform on their part, and damages asked for breach. Held, that, there being no allegation of payment on the part performed, it would be assumed that suit was brought for that as well as for the unperformed portion, and hence the demurrer was properly overruled to the complaint. If any part of the complaint is good it will stand against a general demurrer: *McCartney v. Glassford*, 1 Wash. 579.

ACTION BARRED: See 2 *Remington's Digest*, p. 2274, § 91. If it appear on the face of the complaint that the statute of limitations has run against the claim pleaded, advantage may be taken by demurrer: *Wilt v. Buchtel*, 2 W. T. 417. (The statute of limitations was not a specific ground of demurrer at the time this decision was rendered; under present statute if not raised by demurrer it will be waived, where the bar of the statute appears on the face of the complaint.)

Demurrer for want of facts does not raise the question of the statute of limitations: *Board of Church Erection Fund v. First Pres. Church*, 19 Wash. 455; *George v. Butler*, 26 Wash. 456; *Joergenson v. Joergenson*, 28 Wash. 477.

§ 260. (4908.) Grounds of Demurrer, How Specified.

The demurrer may specify the grounds of objection in the statutory language of the last preceding section, or the grounds may be distinctly specified; it may be taken to the whole complaint, or to any one of the alleged

causes of action stated therein. [Cf. L. '54, p. 139, § 41; L. '77, p. 18, § 78; Cd. '81, § 78; 2 H. C., § 190.]

See notes to last section.

Cited in 27 Wash. 86.

§ 261. (4909.) Objections, When to be Taken by Answer.

When any of the matters enumerated in section 259 do not appear upon the face of the complaint, the objection may be taken by answer. [L. '54, p. 139, § 42; Cd. '81, § 79; 2 H. C., § 191.]

See supra, § 259, notes, grounds of demurrer.

See infra, § 263 and notes, what constitutes waiver of objection.

Cited in 4 Wash. 810; 12 Wash. 598; 31 Wash. 36; 34 Wash. 433; 51 Wash. 635.

If a defect of parties is not raised by answer or demurrer, the court cannot dis-

miss the action except when plaintiff refuses or neglects to bring in the necessary parties: *Harrington v. Miller*, 4 Wash. 808.

§ 262. (4910.) Proceedings When Complaint is Amended.

If the complaint be amended, a copy thereof shall be served on the defendant or his attorney, and the defendant shall answer the same within such time as may be prescribed by the court; and if he omit to do so, the plaintiff may proceed to obtain judgment as in other cases of failure to answer. [L. '69, p. 20, § 78; Cd. '81, § 80; 2 H. C., § 192.]

See infra, § 411, judgment for want of answer.

See *Sengenfelder v. Hill*, 16 Wash. 355.

§ 263. (4911.) Objections not Taken Deemed Waived.

If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the superior or supreme court. [L. '54, p. 139, § 43; Cd. '81, § 81; 2 H. C., § 193.]

Cited in 1 Wash. 500; 3 Wash. 411; 4 Wash. 810; 12 Wash. 697; 15 Wash. 335; 16 Wash. 76; 19 Wash. 616; 27 Wash. 86; 28 Wash. 492; 31 Wash. 36; 34 Wash. 433; 35 Wash. 24; 39 Wash. 54; 43 Wash. 519-521; 47 Wash. 421, 687; 51 Wash. 635.

Waiver of defects and objections: See 2 *Remington's Digest*, pp. 2305-2307, §§ 192-199.

The language of this section does not justify the interposition of a demurrer after an answer; if during the proper stage of pleading defendant has failed to demur, he must wait for his opportunity to make his objection in another form: *Renton v. St. Louis*, 1 W. T. 215, 220; *Weatherwax Lum. Co. v. Ray*, 38 Wash. 545.

An objection to the complaint that it does not state facts sufficient to constitute a cause of action is not waived by failure to demur: *Lyen v. Bond*, 3 W. T. 407.

While it is true that such an objection is not waived by not demurring, yet if defendant answers and goes to trial upon the merits, the complaint should be strongly construed against him, and the verdict sus-

tained, if by any reasonable intendment it can be upheld: *Id.*, 410.

In applying the provisions of this section, in case of objections raised for the first time in the appellate court, the objections are not looked upon as the court below would have considered them upon demurrer. The rule of construction of pleadings after verdict obtains, that every reasonable intendment comes to the aid of the pleading, while before verdict it is strictly construed as against the pleader: *Coats v. W. C. F. & M. Ins. Co.*, 4 Wash. 375, 377.

As to whether a demurrer for want of sufficient facts is waived by filing an answer, see 2 *Remington's Digest*, p. 2307, § 199; *Jones v. St. Paul etc. R. Co.*, 16 Wash. 25; *O'Toole v. Faulkner*, 29 Wash. 544; *State ex rel. Atty. Gen. v. Gas Co.*, 28 Wash. 488; and *Wappenstein v. Aberdeen*, 39 Wash. 189.

Objections are considered waived if the facts stated will justify a recovery upon any theory upon which a right can be founded: *Blumenthal v. Pacific Meat Co.*, 12 Wash. 331; *State ex rel. Abernethy v.*

Moss, 13 Wash. 42; Wappenstein v. Aberdeen, 39 Wash. 189; County of Island v. Babcock, 17 Wash. 438.

An order overruling a demurrer to a complaint for want of sufficient facts, followed by an answer, does not preclude the court from sustaining defendant's objection to any evidence at the trial on the ground that the complaint does not state sufficient facts, and that the evidence offered was insufficient to warrant a decree, where, under the most liberal rules of construction, the defect in the complaint and cause of action was one of substance which could not be cured by amendment: O'Day v. Ambaum, 47 Wash. 684.

A motion for a nonsuit on the ground that the complaint failed to state a cause of action was properly denied, where there was no demurrer and the defect had been cured by the admission of proof without objection: State ex rel. Jenkins v. Equitable Indemnity Assn., 18 Wash. 514.

After interposing a demurrer on the ground that a certain party was a necessary party plaintiff, the defendants, after such party had been brought in as a party plaintiff, are estopped to claim the original complaint fails to state any cause of action as to such party: Harrington v. Gordon, 42 Wash. 692; Gleason v. Tacoma Hotel Co., 16 Wash. 412.

On plaintiff's motion for judgment on the pleading the answer should be liberally construed: Townsend v. Price, 19 Wash. 415; but it is proper to allow judgment for the amount admitted due by answer: Ach v. Carter, 21 Wash. 140.

Where the complaint is sufficient and the answer contains no legal defense, judgment on the pleadings is properly entered for the plaintiff: Morris v. Healy Lum. Co., 33 Wash. 451.

Where no objection is made in the court below, either by demurrer or answer, to an alleged defect of parties plaintiff, it cannot be raised in the appellate court for the first time: Ralph v. Lomer, 3 Wash. 401.

The objection of defect of parties is waived, if not raised by answer or demurrer: Harrington v. Miller, 4 Wash. 808; First Nat. Bank v. Hamor, 49 Fed. 45.

If a demurrer is interposed, but dropped from the calendar for want of prosecution, the defect is waived, when cured by action had at the trial: Livesley v. O'Brien, 3 Wash. 546. And the objection that the complaint does not state a cause of action, first raised by demurrer, is waived by the withdrawal of the demurrer and answering on the merits, and cannot be subsequently raised by an objection to any evidence: Watson v. Kent, 35 Wash. 21; Healy v. King County, 37 Wash. 184. Where evidence outside the pleadings is taken without objection to the form of the pleading, the defect should be disregarded and the pleading ordered amended: Galliher v. Cadwell, 3 W. T. 501; Johnson v. Bellingham Bay Imp. Co., 13 Wash. 455. The objection that the complaint does not allege defend-

ant's negligence as the proximate cause of plaintiff's injury cannot be raised for the first time on appeal, when the evidence sufficiently connects the one as the proximate cause of the other, thereby warranting the court in deeming the complaint amended to correspond therewith: Selby v. Vancouver Water Works Co., 32 Wash. 522.

Although a complaint fail to state a cause of action, if that objection be not assigned in appellant's brief, and is not presented until oral argument on appeal, the supreme court will ignore the point: Francioli v. Brue, 4 Wash. 124.

In an action to recover damages for wrongful attachment a denial of that paragraph of plaintiff's complaint alleging them constitutes a negative pregnant, which, if not cured by the evidence, entitled plaintiff to judgment in the whole amount asked for: Cole v. Noerdlinger, 22 Wash. 51.

A judgment upon the pleadings in an action upon a mutual and open account is properly restricted to the amount admitted in the answer to be due: Griffith v. Maxwell, 25 Wash. 658.

Where a defendant did not raise the objection, either by demurrer or answer, that the action was barred by the statute of limitations, until after trial and judgment and the case came back for retrial after reversal on appeal, the objection must be deemed as waived: Bay View Brewing Co. v. Grubb, 31 Wash. 34.

A failure to properly traverse original pleadings is immaterial where amended pleadings were filed by both parties: Ward v. Ward, 14 Wash. 640.

Where a case is tried upon an agreed statement of facts, objections to the pleadings may be eliminated from the case on appeal: Clambey v. Corliss, 41 Wash. 327.

An objection that the court has no jurisdiction, first raised by demurrer, is not waived by failing to except to the order overruling the demurrer, where the answer expressly reserved the point and at the trial the evidence was objected to for the same reason: West v. Martin, 47 Wash. 417.

Objection to the jurisdiction of the subject matter is not waived by a general appearance: Id.

Leave to sue a receiver is jurisdictional, and cannot be waived by him, and under this section the question may be raised at any stage of the case either in the lower or appellate court: Brown v. Rauch, 1 Wash. 497. Overruled in High v. Shelton S. W. R. Co., 20 Wash. 16.

If a complaint on a policy of fire insurance is insufficient because it fails to show what other insurance was upon the property burned, the objection cannot, in the absence of the record showing the facts in evidence on the trial, be raised for the first time in the appellate court: Coats v. West Coast F. etc. Co., 4 Wash. 375.

A complaint which shows a contract for sale and transfer of soldiers' additional homestead scrip, seeking a money judg-

ment thereon, without stating facts to exonerate plaintiffs from blame, fails to state facts sufficient to constitute a cause of action, advantage of which may be taken for the first time in the appellate court: *McIntosh v. Renton*, 2 W. T. 121; *Sears v. Williams*, 9 Wash. 428.

A motion by defendant to open a default judgment entered, not made on a

special appearance, as well as a subsequent answer, waives objections theretofore made to the jurisdiction of the person: *Sayward v. Carlson*, 1 Wash. 29.

After overruling a demurrer to a complaint, and answer over by the defendants, it is discretionary to permit a renewal of the demurrer: *Blalock v. Condon*, 51 Wash. 604.

§ 264. (4912.) What Answer Shall Contain.

The answer of the defendant must contain,—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition. [Cf. L. '54, p. 139, § 44; L. '69, p. 21, § 80; L. '77, p. 18, § 82; Cd. '81, § 82, 2 H. C., § 194.]

See next section, definition of counterclaim.

See supra, § 258, and notes, complaint.

See supra, § 259, and notes, demurrer of defendant.

See infra, § 273, joinder of defenses.

See infra, § 273, what may be set forth in answer.

See infra, § 293, answer in justification and mitigation.

See infra, § 297, material allegations not controverted are admitted.

See infra, § 305, when pleading may be stricken.

Cited in 3 Wash. 720; 5 Wash. 662; 6 Wash. 246; 7 Wash. 230; 9 Wash. 463; 11 Wash. 574; 12 Wash. 693; 18 Wash. 99; 32 Wash. 653; 48 Wash. 446.

See 2 Remington's Digest, pp. 2261-2268, §§ 35-64.

DENIALS: *Id.*, pp. 2264, 2265, §§ 50-53. An answer denying "generally each and every allegation" of the complaint, is a good general denial, and defendant may introduce competent evidence under such plea: *Renter v. Straight*, 1 Wash. 365.

Admissibility of evidence under general denial in action for malicious prosecution: See *Kellogg v. Scheuerman*, 18 Wash. 294.

A paragraph of an answer denying the allegation of a specific paragraph of the complaint is sufficient; so also an answer to a paragraph of a complaint alleging several distinct matters "that whether the matters and things set forth are true or false, defendant has no knowledge or information sufficient thereof to form a belief, and therefore denies the same": *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630.

An allegation in an answer that defendant "has no knowledge or information sufficient to form a belief" is a sufficient denial to put in issue the allegations of the paragraph of complaint to which it is addressed: *Colby v. Spokane*, 12 Wash. 690.

But where the complaint avers an agreement between plaintiff and defendant, a denial of information or knowledge sufficient to form a belief as to the facts alleged is not sufficient to raise any issue of fact, as the presumption is that the defendant has positive knowledge whether or not the averment is true: *Raymond v. Johnson*, 17 Wash. 232.

A denial of sufficient knowledge or information to form a belief as to the allegations of a complaint that the plaintiff, at request of a firm composed of one defendant and the intestate of the other defendant, executed a written guaranty in their behalf, and an affirmative defense that, if the guaranty was executed, its execution was for the purpose of defrauding the firm or one of the members thereof, may be included in the same answer, as they are not necessarily inconsistent defenses: *Corbitt v. Harrington*, 14 Wash. 197.

An answer which states that it "does not deny or admit" the allegations of plaintiff's complaint does not constitute a general or specific denial, and is insufficient: *Lake v. Steinbach*, 5 Wash. 650. And where the answer does not deny the facts stated in a paragraph of the complaint, but controverts the conclusion drawn by the pleader from the facts stated, it fails to traverse any material fact: *Id.*

Although the denial may not be as specific as good pleading requires, for the reason that defendants "say that they deny each and every allegation," yet where there is no motion to make the same more specific, and it appears from the answer as a whole what allegations are denied and what are admitted, the denial is sufficient: *Town of Denver v. Spokane Falls*, 7 Wash. 226.

If the answer, as a whole, sets up a semblance of defense, its sufficiency cannot be determined on a motion to strike it out as irrelevant: *Hatch v. Tacoma etc. Ry. Co.*, 6 Wash. 1, 7; followed in *Silsby v. Tacoma etc. Ry. Co.*, 6 Wash. 295.

Although an answer may be defective, if it can be gathered therefrom that an issue is tendered upon a material matter, it is error to render judgment upon the pleadings in plaintiff's favor: *Rourk v. Miller*, 3 Wash. 73.

A denial, on information and belief, as to the filing of a lien notice in the county auditor's office, is insufficient: *Sumpter v. Burnham*, 51 Wash. 599.

SUFFICIENCY OF DENIALS, AS TO PARTICULAR ALLEGATIONS.—In a negligence case, in which defendant pleads a general denial, and also plaintiff's contributory negligence, and there is no motion to make the answer more specific, evidence of plaintiff's intoxication, as the cause of the injury received by him, is admissible: *Carter v. Seattle*, 19 Wash. 597.

The denial in an answer of an allegation in the complaint that plaintiffs have no adequate remedy at law tenders no issue of fact: *Abbott v. Gaches*, 20 Wash. 517.

The interposition of a sworn answer denying all the equities of plaintiffs' complaint, which entitles them to the appointment of a receiver pendente lite, will not raise a prima facie case in favor of defendants, unless such answer is full and responsive to all the material allegations of the complaint: *Cameron v. Groveland Imp. Co.*, 20 Wash. 169; *Roberts v. Center*, 26 Wash. 435; *Sherman v. Sweeny*, 29 Wash. 321.

A denial of a contract is not aided by setting up another version of the contract: *Puget Sound Iron Co. v. Worthington*, 2 W. T. 472; *Trumbull v. Jackman*, 9 Wash. 524; *Peterson v. Seattle Traction Co.*, 23 Wash. 615.

Affirmative defenses which are mere denials add nothing to the general denial: *Johnston v. McCart*, 24 Wash. 19; *Adams v. Casey*, 39 Wash. 37.

In an action to quiet title to property levied upon as that of the community and claimed by the plaintiff as her separate property, an answer affirmatively alleging that the same was community property, amounts to no more than a denial and requires no reply: *Dueber v. Wolfe*, 47 Wash. 634.

An insufficient plea of confession and avoidance is in effect a mere denial: *Roberts v. Center*, 26 Wash. 435.

In an action of unlawful detainer, an answer that defendants were holding under a different lease from that alleged in the complaint is only an argumentative denial, and adds nothing to a general denial in the answer: *Ryan v. Lambert*, 49 Wash. 649.

In an action upon a written guaranty of a note, which was denied by the answer, an affirmative answer admitting an indorsement in blank and alleging that the written guaranty was thereafter fraudulently stamped on the note and setting forth the fraudulent means whereby the indorsement in blank was secured and the previous fraud perpetrated on the defend-

ant, adds nothing to the denials of the answer, and it is error to submit the affirmative defense to the jury, no affirmative relief having been asked: *O'Connor v. Slatter*, 48 Wash. 493.

NEGATIVE PREGNANT: See 2 Remington's Digest, p. 2265, § 55. An answer reiterating the words of a complaint "that whether said warrant came into the hands of plaintiff as alleged, this defendant has no knowledge or information sufficient to form a belief, and he therefore denies the same," constitutes a negative pregnant: *National Bank v. Meerwaldt*, 8 Wash. 630.

A denial "in manner and form" admits the allegation of the complaint: *Seattle v. Buzby*, 2 W. T. 25.

A simple denial that fifty dollars is a reasonable attorney's fee admits that any sum less than fifty dollars is a reasonable attorney's fee: *Proulx v. S. & P. M. Co.*, 6 Wash. 478, 484.

The traverse of an affidavit for attachment denying that defendant "is about to assign, secrete and dispose of his property with intent to hinder and delay creditors" is a negative pregnant, and raises no issue: *Hansen v. Doherty*, 1 Wash. 461.

A denial of having received the particular amount alleged to be due plaintiff is worthless, and tenders no issue; and in the absence of other matters of defense, plaintiff would be entitled to judgment on the pleadings: *Dillon v. Spokane Co.*, 3 W. T. 498.

An allegation in an answer that "each and every of four separate causes of action set forth in the complaint did not accrue within six years," contains a negative pregnant, and it is error to grant judgment for failure to deny the same: *Gammon v. Dyke*, 2 W. T. 266; distinguished in *Penter v. Straight*, supra. See, also, *Columbia Nat. Bank v. Western Iron and Steel Co.*, 14 Wash. 162; *Cole v. Noerdlinger*, 22 Wash. 51. As to the present force of the rule in this state relating to negative pregnant, see *O'Brien v. Seattle Ice Co.*, 43 Wash. 217.

GENERAL DENIALS IN PARTICULAR CASES.—A plea of general denial does not admit the corporate existence of a plaintiff, where that is a necessary allegation of the complaint; such denials are intended to put plaintiff to his proof as to every allegation material to his cause of action: *Town of Denver v. Spokane Falls*, supra.

In an action upon a contract against a corporation, an insufficient denial of the complaint admits that the person shown to have made the contract sued on was the authorized agent of the corporation: *Frost v. Ainslie L. Co.*, 8 Wash. 241.

If the gist of the complaint is that the master has injured the servant and the proof shows the injury to have been caused by a fellow-servant, defendant may move for a nonsuit, without having pleaded any other defense than the general denial: *Sayward v. Carlson*, 1 Wash. 29.

In an action on a judgment of another state, an answer which denies the jurisdiction of the court which granted it, and that the cause of action ever existed, states mere conclusions of law, and is an insufficient plea to the jurisdiction: *Ritchie v. Carpenter*, 2 Wash. 512, 522; see *Aultman v. Mills*, 9 Wash. 68.

In a complaint upon a promissory note alleging that the payees had, "for value received, duly delivered, transferred and assigned said promissory note to plaintiffs, who are now the owners and holders thereof," an issue of ownership is tendered by a general denial: *Tullis v. Shannon*, 3 Wash. 716.

Where the allegations of a complaint in an action upon a bond sufficiently set forth that it was founded on a good consideration, an averment in the answer that "the bond was wholly and absolutely without any consideration" amounts merely to a denial, and not to new matter requiring a reply: *Frank v. Jenkins*, 11 Wash. 611.

An allegation in an answer that representations were false and fraudulent, regarding sale of lands, and that by reason thereof defendants were induced to execute and deliver the notes sued on, without stating wherein such representations were false, is the mere expression of an opinion and tenders no issue: *National Bank v. Hughson*, 5 Wash. 100.

An answer setting up a conditional contract for conveyance of lands, but failing to show an offer to reconvey or surrender the premises held by vendee, is bad on demurrer: *Kenworthy v. Merritt*, 2 W. T. 155.

AFFIRMATIVE DEFENSES: See 2 Remington's Digest, pp. 2267, 2268, § 59. The defendant must, in his answer, deny the matters alleged, or must state new matter in avoidance, or by way of counterclaim: *Puget Sound Iron Co. v. Worthington*, 2 W. T. 472.

An affirmative defense is subject to the same rules as the case of a plaintiff who has the affirmative of an issue: *Wadhams v. Page*, 6 Wash. 103, 107.

A defendant is required to set forth his matter of defense specifically, and with the same precision and accuracy which are required of a plaintiff, when alleging new matter: *Meeker v. Wren*, 1 W. T. 73; *Roeder v. Brown*, 1 W. T. 112.

Affirmative matter in an answer, which, in effect, amounts to nothing more than a denial of the allegations of the complaint, and a reply thereto, adds nothing to the issue already formed by defendant's general denial, and if defendant denies making the contract alleged, it is irrelevant to the cause to set forth a contract he admits he did make: *P. S. I. Co. v. Worthington*, supra; cited in *Trumbull v. Jackman*, 9 Wash. 527. See *Distler v. Dabney*, 3 Wash. 200; *Osten v. Winehill*, 10 Wash. 33.

An answer alleging "that more than six years have elapsed since the cause of action on said judgment accrued," simply

states the conclusion necessarily inferred from the facts alleged in the complaint and is not new matter requiring a reply: *Lake v. Steinbach*, supra.

Where an affirmative defense is pleaded, it is error to instruct the jury that "if you believe from the evidence that all the material allegations of the complaint have been proven by a preponderance of the evidence, then you will find for the plaintiff," since it, in effect, ignores the defense pleaded: *Dignan v. Spurr*, 3 Wash. 309.

In an action by a creditor against a retiring partner to recover a partnership debt, an answer alleging that the creditor had agreed to look to the other partner for payment is an affirmative defense, and, as such, must be supported by a preponderance of the evidence: *Wadhams v. Page*, 1 Wash. 420.

In an action of forcible entry and detainer, an answer alleging that the defendant had been in the quiet possession of the premises for more than a year preceding the filing of the complaint, but which fails to allege that defendant's estate therein had not ended, is insufficient under § 1836 of the Code of 1881: *Bellingham Bay etc. Ry. Co. v. Strand*, 1 Wash. 133.

In an action to foreclose a purchase money mortgage, given for land which grantor covenanted to own in fee simple, but to which he had neither legal nor equitable title, the mortgagor may set off his expenses and outlay in defending and compromising a suit in ejectment in which plaintiff has shown a good cause of action, as a constructive eviction is thereby established: *Potvin v. Blasher*, 9 Wash. 460.

In an action of ejectment, when plaintiff pleads title by virtue of a certificate of purchase from a receiver of public money of the United States, defendant may properly plead, by way of inducement, a certain state of facts, by reason of which the commissioner of the general land office caused such certificate to be canceled: *Hays v. Parker*, 2 W. T. 198.

In an action to recover for services in doing the county printing the allegations of the answer that plaintiff had sold his paper in which he contracted to do the printing and had refused to perform his contract, by reason of which defendant had contracted with another to do the printing for which plaintiff now sues, state a good defense: *Rathbun v. Thurston Co.*, 8 Wash. 238.

In an action to recover rent under a lease, an answer substantially alleging that it was conceded by all the parties that the lease was void, that defendants surrendered the premises to plaintiffs, that a new agreement was made to occupy at a fair and reasonable rental, and that defendants reentered thereunder, is not obnoxious to demurrer, but the frivolous and redundant matter therein and its uncertainty can only be reached by a motion to strike out or to make more certain: *Isaacs v. Holland*, 4 Wash. 54.

An answer must contain allegations of all facts, which, when plaintiff's case is established, the defendant must prove in order to defeat a recovery: *Bruce v. Foley*, 18 Wash. 96.

An answer as a whole admits that a sum was received by defendants as a loan, where, in an action for money loaned, the answer admits that a portion was to be regarded as a loan, and the claim is then made that the other portion was to be applied upon a board bill due from plaintiff to defendant, and which thereby paid the board bill, leaving nothing further due thereon, and a further clause in the answer alleges that no part of the board bill had been paid and that the same is now due and owing, thereby neutralizing the claim that only part of the money was a loan: *Hendelman v. Kahan*, 50 Wash. 247.

The objection that an action was prematurely brought must be pleaded to be available, and cannot be raised for the first time on motion for new trial: *Leo Kee v. Wah Sing Chong*, 31 Wash. 678.

NEW MATTERS HELD AFFIRMATIVE DEFENSES.—Any new matter or relation, the truth of which is essential to the pleader's case: *McKenzie v. Oregon Imp. Co.*, 5 Wash. 409. Illegal contract: *Maitland v. Zanga*, 14 Wash. 92. Statute of limitations, when not appearing on face of the complaint: *Damon v. Leque*, 17 Wash. 573. Want of consideration, for the execution of a promissory note: *Griffith v. Wright*, 21 Wash. 494.

In an action in this state upon a promissory note executed in Oregon on a loan made there, an answer alleging that under § 3587, Oregon Statutes, such note is usurious, is demurrable, as the only effect of the Oregon statute would be to prevent the collection of interest in excess of ten per centum: *McDaniel v. Pressler*, 3 Wash. 636.

In an action upon a policy of insurance issued by a company incorporated in this state upon property in the state of New York, the allegations of the answer in the particular case held to state a good defense: *Wood v. Cascade Fire etc. Ins. Co.*, 8 Wash. 427.

SPECIAL DEFENSES—ESTOPPEL: See 1 Remington's Digest, p. 1104, § 65. An estoppel must be specially pleaded to be available as a defense: *Walker v. Baxter*, 6 Wash. 244; *Jacobs v. National Bank*, 15 Wash. 358. Facts of the particular case held insufficient as a plea of estoppel: *Walker v. Baxter*, supra; *Huggins v. Milwaukee Brew. Co.*, 10 Wash. 579; *Interstate Sav. & L. Assn. v. Knapp*, 20 Wash. 255; *Gay v. Havermale*, 27 Wash. 390.

Matter by way of estoppel is available as a defense in an action at law as well as in equity: *Sweeney v. Pacific Coast Elevator Co.*, 14 Wash. 562.

Failure of defendants to deny liability, and their taking of a joint receipt for sum paid, will not operate as an estoppel on the ground that they led plaintiff, the

assignee of the original contractor, to believe that they had jointly contracted, or were jointly liable, when plaintiff before bringing suit sought to hold but one of defendants liable: *Pacific Cable etc. Co. v. McNatt*, 2 Wash. 216.

PAYMENT: See 2 Remington's Digest, p. 2234, § 21. When payment is not pleaded it cannot be proved under a plea of general denial of the allegations of the complaint: *Maney v. Hart*, 11 Wash. 67; *Spokane M. & L. Co. v. McChesney*, 1 Wash. 609; *Richards v. Jefferson*, 20 Wash. 160.

USURY.—Usury must be pleaded when relied on as a defense: *Brundage v. Burke*, 11 Wash. 679.

RES JUDICATA.—The plea of res judicata is not available as a defense where the parties to the action are not the same as in the one in which the judgment sought to be set up was rendered: *De Mattos v. Jordan*, 15 Wash. 378.

A valid judgment for plaintiff finally negatives every defense that might and should have been raised against the action, for the purpose of every subsequent suit between the same parties or their privies in reference to the same subject matter: *Isensee v. Austin*, 15 Wash. 352.

The assignees of a contract are barred by the rule of res judicata from maintaining a suit to be subrogated to the rights of the mortgagee in a certain mortgage, which they had agreed to pay in part consideration of their contract, by reason of overpayments on such contract, when judgment has already been obtained against their assignors canceling the contract for nonperformance, and such rights as the assignees now claim would have been available as a defense by their assignors in the former action: *Isensee v. Austin*, supra; following *Wilkes v. Davis*, 8 Wash. 112, which lays down the rule of res judicata.

A judgment in a former suit on an express contract is not a bar to a second suit on a quantum meruit for the same services, when it takes different evidence to establish the two causes of action: *Buddress v. Schaffer*, 12 Wash. 310.

In a suit upon a contractor's bond the defense of res judicata cannot be set up by reason of the fact that in a prior action one of the sureties had recovered judgment against the obligee for moneys advanced to pay laborers upon the obligee's promise to refund: *De Mattos v. Jordan*, 15 Wash. 378.

An item for services between certain dates, which the jury are instructed not to allow, but upon which evidence was given and which does not constitute a separate cause of action, cannot, after final judgment in the case for the remainder of the claim sued upon, be recovered in a subsequent action: *Stern v. Wash. Nat. Bank*, 14 Wash. 511.

One against whom a judgment is obtained for part only of the items claimed

is not obliged to see that the judgment recites anything about the items rejected, in order to plead the judgment as a bar to a subsequent action on such item: *Id.*

Where judgment in an action for damages for breach of contract was sought, *res judicata* cannot be pleaded to an action on certain promissory notes which were given as consideration for the contract: *Allen v. Wall*, 7 Wash. 316.

The plea of *res judicata* applies, as a general doctrine, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belongs to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time: *Sayward v. Thayer*, 9 Wash. 22; followed in *State v. Gloyd*, 14 Wash. 5, 7.

Where an electric light company has secured a restraining order prohibiting a city from interfering with it while stretching certain wires, which had been torn down the night before by the city officials, a subsequent action by the city seeking to restrain the company from replacing its wires involves identical issues and is subject to a plea in abatement: *Tacoma v. Commercial etc. Power Co.*, 15 Wash. 515.

A bankrupt who has been discharged can plead the discharge in defense of a claim that a debt was incurred in obtaining property by false pretenses, where the debt was a provable debt, and the same issue was raised by the creditor on proving the debt in the bankruptcy court in order to defeat the discharge, and the discharge was granted notwithstanding the claim of fraud: *Johnson v. Joslyn*, 45 Wash. 310.

FORBEARANCE.—A promise to forbear to sue for a definite time, where the promise is based upon a sufficient consideration, may be pleaded in bar to an action: *Staver & Walker v. Missimer*, 6 Wash. 173.

An accepted order upon a third person for the payment of a debt not due is sufficient consideration of forbearance: *Id.*

ULTRA VIRES.—If a banking corporation has received and retained the benefits of a transaction, it cannot set up the plea of *ultra vires*: *Tootle v. First Nat. Bank*, 6 Wash. 181.

ANOTHER ACTION PENDING: See 2 Remington's Digest, p. 2264, § 47. Where a plea of another action pending has been interposed, a reply that, subsequent to the filing of the plea, the suit whose pendency was alleged had been dismissed, is good against demurrer: *Boyle v. G. N. Ry. Co.*, 13 Wash. 383.

The fact that a stay of proceedings of a cause in a court of this state has been granted on motion instead of answer setting up the pendency of an action in another state involving the same subject matter is not ground for reversal: *State v. Superior Court*, 14 Wash. 686; citing *Neufelder v. No. British etc. Ins. Co.*, 10

Wash. 393; *Neufelder v. German-Am. Ins. Co.*, 6 Wash. 336.

The pendency of a creditor's bill in another state which seeks to subject to the claims of the creditors the proceeds of an insurance policy, upon which an assignee of the assured had instituted an action in this state, will not constitute a ground for stay of proceedings here, when the assignee has not been made a party to the action in the foreign court, even though it is averred in the pleadings therein that the assignment was invalid because of fraud: *State v. Superior Court*, 14 Wash. 686.

Notice by the defendant in an action in this state to the plaintiff that the debt claimed by plaintiff is the subject of another action in a foreign state against the same defendant imposes no obligation on plaintiff to appear in the foreign court and defend the action there: *Id.* See, also, *State ex rel. Bank v. Tallman*, 29 Wash. 411.

TENDER OF DEED.—Where a complaint for the rescission of a contract for the sale of land alleges that the complainants are willing to complete the contract, if the court finds a good, marketable title could be made to them, an answer by the defendants offering to make a deed either by the executor or by a commissioner, as the court shall decree, constitutes a sufficient tender of a deed, under the issue as made by the complaint: *Hyde v. Hiller*, 10 Wash. 586.

ACCORD AND SATISFACTION.—Failure to allege payment or tender in plea of accord and satisfaction in the particular case held fatal: *Rogers v. Spokane*, 9 Wash. 168.

As to what constitutes an accord and satisfaction for breach of a covenant of warranty, see *Reichel v. Jeffrey*, 9 Wash. 250.

STATUTE OF LIMITATIONS.—In order to take advantage of the statute of limitations, the fact that a defendant was a nonresident of the state at the time the cause of action against him accrued must be affirmatively alleged in his answer, in the absence of such averment in the complaint, in order to rebut the presumption of residence within the state: *Lake v. Steinbach*, 5 Wash. 659.

NONJOINDER.—If the defect of nonjoinder of a codebtor in a contract or judgment does not appear on the face of the complaint, advantage of the omission can only be taken by plea in abatement, and a defendant who fails to so plead is deemed to have waived the objection: *First Nat. Bank v. Hamor* (Wash.), 49 Fed. 45. See, *supra*, § 263.

INCONSISTENT DEFENSES: See 2 Remington's Digest, pp. 2262, 2263, §§ 42-44. A plea of want of consideration in an answer is inconsistent with an admission in an affirmative defense that there was a consideration for the contract sued on, and in such case plaintiff cannot be put upon proof of the matter denied: *Allen v.*

Olympia L. & P. Co., 13 Wash. 307; citing Seattle Nat. Bank v. Carter, 13 Wash. 281; Norris Safe and Lock Co. v. Clark, 28 Wash. 268. See Davis v. Seattle Nat. Bank, 19 Wash. 65.

Where an allegation of general denial in an answer is followed in an affirmative defense by a special averment of the truth of the matter which had been denied, the defenses are so inconsistent they cannot stand together, and the plaintiff will not be compelled to establish the truth of an allegation in his complaint to which such defenses are set up: Seattle Nat. Bank v. Carter, 13 Wash. 281; Allen v. Olympia etc. Co., 13 Wash. 310; cited in Corbett v. Harrington, 14 Wash. 197; Lamberton v. Shannon, 13 Wash. 404; Olympia v. Stevens, 15 Wash. 601.

In an action upon a promissory note, a general denial that defendants had as principals promised to pay the sum alleged in the complaint to plaintiff, "except as herein expressly admitted, explained, or qualified," will, in the absence of anything restricting the application of such qualifications to the general denial, apply to an affirmative defense; and, in such case, the averments in the affirmative defense that defendants indorsed as sureties only, will destroy the effect of the general denial, as being inconsistent therewith: Lamberton v. Shannon, 13 Wash. 404; Seattle Nat. Bank v. Carter, 13 Wash. 281; Allen v. Olympia L. & P. Co., 13 Wash. 307; Allen v. Chambers, 13 Wash. 327.

In an action to recover damages for death resulting from the alleged negligence of defendant, an answer denying negligence, and setting up further, that, if there was any, the plaintiff's intestate was guilty of contributory negligence, is not objectionable as setting up inconsistent defenses: Pugh v. O. I. Co., 14 Wash. 331; cited in Glass v. Coleman, 14 Wash. 639. See Seattle Nat. Bank v. Carter, 13 Wash. 281; Corbett v. Harrington, 14 Wash. 197; Davis v. Seattle Nat. Bank, 19 Wash. 365; Spencer v. Terrel, 17 Wash. 514; Lord v. Horr, 30 Wash. 477; Irwin v. Holbrook, 32 Wash. 319; Irwin v. Buffalo Pitts Co., 39 Wash. 346; Bluett v. Wilce, 43 Wash. 492. In an action of ejectment where a plaintiff fails to require an election by the defendant, when he has pleaded an affirmative defense inconsistent with his denials, the plaintiff cannot take advantage of the defects in the answer by way of request for instructions, to the effect that the burden of proof was upon the defendant to show want of title in the plaintiffs: Lynch v. Richter, 10 Wash. 486. A denial of the execution of a contract, and an affirmative defense setting up that any signature of the defendant secured by plaintiff to any contract was obtained by trickery and fraud, which was set forth.

are not inconsistent defenses: Loveland v. Jenkins-Boys Co., 49 Wash. 369.

AMENDMENTS.—The fact that the court allows defendants to amend their answer at the trial, after three answers had already been filed in the case, does not constitute an abuse of discretion on the part of the court: Barnes v. Packwood, 10 Wash. 50.

The action of the trial court in permitting the amendment of an answer to a complaint on a promissory note, on the day of trial, so as to change an admission of its execution to a denial thereof, without a showing of good grounds therefor, and its refusal to grant a new trial to plaintiff, who was misled by the original answer into the assumption that no proof of execution was necessary, is an abuse of discretion on the part of the court warranting a reversal: Gould v. Gleason, 10 Wash. 477.

Where the nature of the answer interposed to a complaint and the proof thereunder clearly indicate that it was the intention of defendant to plead a three years' statute of limitations as a bar, and by mistake the defendant in pleading such statute had specified two years instead of three, it is not an abuse of discretion for the court after the hearing of the cause, to allow an amendment correcting the mistake, although the equities of the case may be in favor of the plaintiff: Morgan v. Morgan, 10 Wash. 99.

WAIVER BY APPEARANCE, ETC.—Objection to jurisdiction of the person of the defendant is waived by appearance and pleading to the merits: Meigs v. Keach, 1 W. T. 305.

Objections to jurisdiction of the person taken before entry of default are waived by motion to open default and by the subsequent filing of an answer: Sayward v. Carlson, 1 Wash. 29.

An objection for misnomer of plaintiff is waived by filing an answer to the merits; but it is not prejudicial error for the court to order the filing of an amended complaint after issue joined, where no considerable expense or delay is suffered: Lee v. Lee, 3 Wash. 236.

The filing of a substituted answer does not operate as a waiver of exception to an order striking out an affirmative defense in the original pleading: Schulte v. Littlejohn, 2 Wash. 129.

JUDGMENT ON PLEADINGS: See 2 Remington's Digest, pp. 2289, 2290, §§ 145-150. If an answer is filed which fails to controvert the material allegations of the complaint, plaintiff is entitled to judgment for failure to answer, although plaintiff may have filed a reply to the defective answer: Port v. Parfit, 4 Wash. 369; King v. I. R. & N. Co., 1 Wash. 127.

In an action for purchase price of land, where there is no denial of the allegation that defendants were in possession at the

time of the commencement of the action, nor of any other material allegation thereof, plaintiff is entitled to judgment on the pleadings: *Hanna v. Savage*, 7 Wash. 414.

In an action upon a promissory note, plaintiff is entitled to judgment on the

pleadings, when the answer admits the execution of the note and negatives the allegation of nonpayment in the complaint merely by general denial: *National Bank v. Western Iron & Steel Co.*, 14 Wash. 162.

§ 265. (4913.) Counterclaim Defined.

The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:—

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. [Cf. L. '54, p. 140, § 45; L. '69, p. 21, § 81; L. '77, p. 19, § 83; Cd. '81, § 83; 2 H. C., § 195.]

See *infra*, § 823.

As to when a counterclaim may be interposed against an assigned debt, see *supra*, § 191.

Cited in 3 Wash. 368; 7 Wash. 560; 8 Wash. 646; 9 Wash. 463; 10 Wash. 194; 11 Wash. 574; 12 Wash. 598; 16 Wash. 373; 16 Wash. 566; 26 Wash. 182; 28 Wash. 236; 32 Wash. 653; 33 Wash. 469; 33 Wash. 621; 48 Wash. 446; 51 Wash. 665.

Sufficiency, in general and what may be subject of counterclaim; See 2 Remington's Digest, pp. 2569-2572, §§ 1-15; *Myers v. Landrum*, 4 Wash. 762; *Graham v. McCoy*, 17 Wash. 63; *Young v. Borzone*, 26 Wash. 4; *Maney v. Hart*, 11 Wash. 67; *Spaulding v. Burke*, 33 Wash. 679; *Gordon v. Decker*, 19 Wash. 188; *Peterson v. Johnson*, 20 Wash. 497; *Fishburne v. Merchants' Bank*, 42 Wash. 473; *Peters v. Lewis*, 33 Wash. 617; *Tacoma Mill Co. v. Perry*, 32 Wash. 650; *Corliss v. Dunning*, 8 Wash. 332; *First Nat. Bank v. Parker*, 28 Wash. 234; *Federal Iron etc. Co. v. Hock*, 42 Wash. 668.

A counterclaim is in the nature of a cross-complaint, and must state a cause of action against the plaintiff, who is really a defendant therein: *Caine v. Seattle & Northern Ry. Co.*, 12 Wash. 596, 598.

A cross-complaint is in the nature of an original action: *Northwestern & P. H. Bank v. Ridpath*, 29 Wash. 687.

Under subdivision 1 there is no distinction whatever between liquidated and unliquidated damages, provided the cause of action arises out of the same contract or transactions, hence an unliquidated claim for damages may be a subject of counterclaim: *Niver v. Nash*, 7 Wash. 558.

The defendant may counterclaim for any cause of action against plaintiff arising on contract, whether liquidated or not: *Shelton v. Conant*, 10 Wash. 193.

If a counterclaim be not barred by the statute of limitations at the commencement of the action in which it is pleaded.

it does not become so afterward during the pendency of the action: *Id.*

Affirmative relief cannot be granted to the defendant in the absence of a cross-bill or counterclaim: *Distler v. Debney*, 7 Wash. 431.

Where a party proposes to amend his answer by including other matters as set-offs, he must show the demands sought to be offset, so that the court may ascertain whether it is a proper subject of setoff: *Newberg v. Farmer*, 1 W. T. 182.

A counterclaim for damages arising out of the wrongful issuance of attachment cannot be pleaded in answer to the complaint in the original action: *Veysey v. Thompson*, 49 Wash. 571.

As to counterclaim, see *City of Whatcom v. B. B. Imp. Co.*, 16 Wash. 138; *Conner v. Scott*, 16 Wash. 371; *First Nat. Bank v. Parker*, 28 Wash. 234; *Sheafe v. Hastie*, 16 Wash. 563; *Boyer v. Robinson*, 26 Wash. 118.

Under subdivision 3 a defendant in an action at law may avail himself of both legal and equitable defenses: *Ryan v. Ferguson*, 3 Wash. 356, 368; see *Brown v. Hazard*, 2 W. T. 464; *Brown v. Bank*, 132 U. S. 216; and a defendant in action to recover lands is entitled to set up any valid defense either legal or equitable: *Edson v. Knox*, 8 Wash. 642, 646.

A claim in which a stranger to the suit is interested jointly with the party to the action is not a proper subject of setoff: *Williams v. Miller*, 1 W. T. 88, 90.

One defendant is not entitled to set up by cross-complaint that a codefendant converted the property to his own use to the cross-complainant's damage, as such claim relates to matter not embraced in the original complaint: *Hill v. Frink*, 11 Wash. 562.

A demurrer to a counterclaim, on the ground that it did not arise out of the same transaction as the cause set out in the complaint, is waived by the admission, without objection, of evidence in support of the counterclaim: *Reynolds v. Dickson*, 48 Wash. 407.

If a complaint against a corporation does not allege its corporate character, objection thereto is waived by defendant's pleading a counterclaim as though plaintiff were in fact a corporation: *Frost v. Ainslie L. Co.*, 3 Wash. 241.

In an action for partition of land, defendants may set off moneys paid out at request of plaintiff in defending the title to the land: *Blackwell v. McLean*, 9 Wash. 301.

Defendant in partition proceedings may set off the value of necessary improvements made by him upon the land, provided the claim for improvements is confined to their value as part of the land without regard to their cost: *Id.*

In an action for the rescission of a contract for the sale of land, and for the cancellation of notes and mortgage given to secure the purchase price, a counterclaim asking for the foreclosure of the mortgage on account of breach of conditions therein may properly be interposed: *Duggar v. Dempsey*, 13 Wash. 396.

Although a surety upon a building contract has, in an action for damages by the owner, set up by way of counterclaim a new contract with himself for the construction of the building after abandonment by the contractor, he may also set up a counterclaim upon the part of all the defendants under the original contract: *Brodek v. Farnum*, 11 Wash. 566.

In an action for damages upon a joint claim against several parties for breach of a building contract, any one of the defendants may, under §§ 264, 265, 406, plead the joint claim of all for any balance due under the contract by way of counterclaim, and would be entitled to judgment for any balance, over and above the damages sustained by plaintiffs: *Id.*

If inconsistent defenses have been pleaded, an election should be required of defendant as to which one he replies upon: *Lynch v. Richter*, 10 Wash. 486, 491.

Question as to whether or not such defenses are allowable under our statutes not decided: *Id.*

If, under a building contract, all differences between owner and contractor are to be submitted to a superintendent, there is no dispute as to contract price, and the superintendent has allowed certain items for extra work, the contractor may recover therefor, and the owner cannot set up any claim for damages in reduction of contract price or extra work when he has not presented such claim to the superintendent at a meeting of both

parties to the contract held for the purpose of settling the account between them: *Hughes v. Bravinder*, 9 Wash. 595.

In an action instituted by the landlord against the tenant for rent, under the forcible entry and detainer act (§ 787 et seq., *infra*), an answer setting up a counterclaim on account of repairs made by tenant which it was the duty of the landlord to make, is demurrable on the ground that it does not state a defense: *Phillips v. Port Townsend Lodge*, 8 Wash. 529. It seems that in such an action defendant cannot interpose an answer alleging that in drawing up the lease certain terms thereof were omitted by mutual mistake, and asking that the lease be reformed to express the contract of the parties: *Id.*

A valid counterclaim cannot be based upon the transfer of a contract to furnish supplies to the United States, as such a transfer is forbidden by law: *Turnbull v. Farnsworth*, 1 W. T. 444.

In an action for unlawful detainer, it is inadmissible to set up a counterclaim for damages on account of loss of business, depreciation in property purchased for use on the leased premises, and for repairs, alleged as resulting from the action of the landlord: *Ralph v. Lomar*, 3 Wash. 401. Counterclaims and offsets are not available in actions for unlawful detainer: *Phillips v. Port Townsend Lodge*, *supra*; see *infra*, § 823.

In the foreclosure of a mortgage for purchase money, given for land covenanted by grantor in fee simple, but to which he had neither a legal nor equitable title, the mortgagor may counterclaim his expenses and outlay in defending and settling a suit in ejectment, stating a good cause of action, since constructive eviction is thereby established: *Potwin v. Blasher*, 9 Wash. 460.

In an action to rescind a sale and cancel a chattel mortgage given by the plaintiffs, a counterclaim setting up the mortgage and seeking its foreclosure is so connected with the cause of action that it may be properly interposed: *Reynolds v. Dickson*, 48 Wash. 407.

In an action of replevin for goods sold under a conditional bill of sale, the vendee may counterclaim for damages by reason of the vendor's breach of a contemporaneous agreement respecting the mode of payment, since the two contracts arise out of the same transaction: *Gilbert Co. v. Husted*, 50 Wash. 61.

In an action to quiet title by the cancellation of a contract of sale, upon which a first payment had been made, the defendant is not entitled to set up a counterclaim for the money paid, and a personal money judgment therefor is error, although repayment might have been adjudged a condition precedent to the equitable relief sought: *Kane v. Borthwick*, 50 Wash. 8.

§ 266. Setoff, When Allowed.

The defendant in a civil action upon a contract expressed or implied, may set off any demand of a like nature against the plaintiff in interest, which existed and belonged to him at the time of the commencement of the suit. And in all such actions, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him. [Cd. '81, § 497; 2 H. C., § 806.]

See 2 Remington's Digest, pp. 2569-2572, §§ 1-15, and notes to § 265, supra. Hill's Code appear to be recognized by the courts as still in force: See Sheafe v. Hastie, 16 Wash. 563, 567.

§ 267. Demand Against Beneficiary Set Off in Action by Trustee.

If the plaintiff be a trustee to any other, or if the action be in a name of the plaintiff who has no real interest in the contract upon which the action is founded, so much of a demand existing against those whom the plaintiff represents or for whose benefit the action is brought, may be set off as will satisfy the plaintiff's debt, if the same might have been set off in an action brought by those beneficially interested. [Cd. '81, § 498; 2 H. C., § 807.]

§ 268. Demand Against Decedent in Action by Executor.

In actions brought by executors and administrators, demands against their testators and intestates, and belonging to defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased. [Cd. '81, § 499; 2 H. C., § 808.]

Under this section, in an action brought by an executor or administrator, a demand against the estate may be offset to the extent of plaintiff's recovery, without previous presentation of a claim therefor, as required by § 1470, infra: Mendenhall v. Davis, 52 Wash. 169.

§ 269. Effect of Judgment Against Executor.

When a setoff shall be established in an action brought by executors or administrators, and a balance found due to the defendant, the judgment rendered thereon against the plaintiff shall have the same effect as if the action had been originally commenced by the defendant. [Cd. '81, § 500; 2 H. C., § 809.]

§ 270. Setoff in Action Against Executor.

In actions against executors and administrators and against trustees and others, sued in their representative character, the defendants may set off demands belonging to their testators or intestates or those whom they represent, in the same manner as the person so represented would have been entitled to set off the same, in an action against them. [Cd. '81, § 501; 2 H. C., § 810.]

§ 271. Setoff must be Pleaded.

To entitle a defendant to a setoff he must set the same forth in his answer. [Cd. '81, § 502; 2 H. C., § 811.]

§ 271½. Judgment for Balance Only.

If the amount of the setoff, duly established, be equal to the plaintiff's debt or demand, judgment shall be rendered that the plaintiff take nothing by his action; if it be less than the plaintiff's debt or demand, the plaintiff shall have judgment for the residue only. [Cd. '81, § 503; 2 H. C., § 812.]

§ 272. No Judgment for Balance if Contract shall have been Assigned.

If there be found a balance due from the plaintiff in the action to the defendant, judgment shall be rendered in favor of the defendant for the amount thereof, but no such judgment shall be rendered against the plaintiff when the contract, which is the subject of the action, shall have been assigned before the commencement of such action nor for any balance due from any other person than the plaintiff in the action. [Cd. '81, § 504; 2 H. C., § 813.]

§ 273. (4913a.) What may be Set Forth in Answer.

The defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have heretofore been denominated legal or equitable, or both. They shall each be separately stated, and refer to the causes of action which they are intended to answer, in such a manner that they may be intelligibly distinguished. [L. '54, p. 140, § 45; Cd. '81, pt. of § 83; 2 H. C., pt. of § 195.]

See notes to § 264, *supra*.

Cited in 22 Wash. 10; 24 Wash. 329; 30 Wash. 482; 33 Wash. 621.

See 2 Remington's Digest, pp. 2262, 2263, §§ 41-44.

Legal or equitable defenses or both may be set up in the answer: *Hanna v. Reeves*, 22 Wash. 6.

Pleading inconsistent defenses: See 2 Remington's Digest, p. 2262, § 42; *Brown v. Porter*, 7 Wash. 327; *Seattle Nat. Bank v. Carter*, 13 Wash. 281; *Allen v. Olympia L. & P. Co.*, 13 Wash. 307; *Davis v. Seattle Nat. Bank*, 19 Wash. 65; *Spencer v. Terrel*, 17 Wash. 514; *Lord v. Horr*, 30 Wash. 477; *Irwin v. Holbrook*, 32 Wash. 349; *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346; *Bluett v. Wilce*, 43 Wash. 492.

Joinder of denial and affirmative matter: See 2 Remington's Digest, p. 2263, § 43; *Seattle Nat. Bank v. Carter*, 13 Wash.

281; *Lamberton v. Shannon*, 13 Wash. 404; *Olympia v. Stevens*, 15 Wash. 601; *Lynch v. Richter*, 10 Wash. 486; *Corbitt v. Harrington*, 14 Wash. 197; *Pugh v. Oregon Imp. Co.*, 14 Wash. 331; *Davis v. Ford*, 15 Wash. 1070.

Defendant cannot be required to elect between a plea of general denial and an immaterial affirmative defense: See *Norris Safe & Lock Co. v. Clark*, 28 Wash. 268.

Pleas in abatement and bar: See 2 Remington's Digest, p. 2254, §§ 46-48; *State ex rel. Holgate v. Superior Court*, 21 Wash. 33; *Staver & Walker v. Missimer*, 6 Wash. 173; *Commercial Bank v. Hart*, 10 Wash. 308; *State ex rel. Scandinavian Amer. Bank v. Tallman*, 29 Wash. 411.

§ 274. (4914.) Defendant may Demur to One or More Causes and Answer the Residue.

The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue. [L. '54, p. 140, § 46; Cd. '81, § 84; 2 H. C., § 196.]

See *supra*, § 260, grounds of demurrer.

See *supra*, § 261, when objection taken by answer.

See *infra*, § 286, making pleading more definite and certain.

§ 275. (4915.) Answer may be Stricken, When.

Sham, frivolous, and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in its discretion impose. [Cf. L. '54, p. 140, § 47; L. '69, p. 21, § 83; Cd. '81, § 85; 2 H. C., § 197.]

See *infra*, § 286, when irrelevant matter may be stricken.

Cited in 4 Wash. 59.

See 2 Remington's Digest, pp. 2291-2293, §§ 151-157.

Where the answer contains superfluous matter, this defect can only be reached by motion, and not by demurrer: *Isaacs v. Holland*, 4 Wash. 54.

In the particular case, held error to strike certain paragraphs from answer: *Distler v. Dabney*, 7 Wash. 431.

In an action for breach of contract to clear land, an answer which admits the contract, but denies a breach thereof, and shows affirmatively the defendants were proceeding with due performance thereof until requested by plaintiff to desist, cannot be said to be either sham, frivolous or immaterial: *Brown v. Porter*, 7 Wash. 327.

A general denial of the material allegations of a complaint cannot be stricken out on the ground that it is a sham or frivolous pleading: *Larson v. Winder*, 14 Wash. 647.

A sham pleading is one good in form but false in fact: *Brown v. Porter*, 7 Wash. 327.

A denial of payment on certain particular dates is sham: *Distler v. Dabney*, 7 Wash. 431.

Motion to strike a motion will not be allowed: *Mann v. Young*, 1 W. T. 454.

A refusal to strike out a pleading cannot be reviewed where a new pleading was filed and no exception taken: *Kratz v. Dawson*, 3 W. T. 100.

Where a party refuses to answer interrogatories, the only judgment authorized is one of dismissal of his action, where no default is taken for his failure to reply to an affirmative defense, and no proof is introduced in support of the matters alleged in such defense: *Waite v. Wingate*, 4 Wash. 324.

The failure of a defendant in a divorce case to comply with an order for the payment of alimony and suit money to the plaintiff will not warrant the court in striking the defendant's answer: *Bachelor v. Bachelor*, 30 Wash. 639.

It is not error to strike an answer in a proceeding in which none is required to be filed: *State ex rel. Ami Co. v. Superior Court*, 42 Wash. 675.

Insufficient allegations or denials are not grounds for striking an answer: See *Hatch v. Tacoma etc. R. Co.*, 6 Wash. 1, 7; *Silsby v. Tacoma etc. R. Co.*, 6 Wash. 295.

It is proper to strike an amended answer containing the same matters as the original answer held bad on demurrer: See *Noyes v. Loughhead*, 9 Wash. 325. See, also, *Rochford v. Doty*, 37 Wash. 232.

§ 276. (4916.) Plaintiff may Demur to Answer, When—Reply.

The plaintiff may demur to an answer containing new matter, when it appears upon the face thereof that such new matter does not constitute a defense or counterclaim, or he may for like cause demur to one or more of such defenses or counterclaims, and reply to the residue. [L. '54, p. 140, § 48; L. '69, p. 22, § 85; Cd. '81, § 87; 2 H. C., § 198.]

See notes to following section.

See *supra*, § 259, grounds of demurrer of defendant.

See 2 Remington's Digest, p. 2273, §§ 83, 84.

Since the enactment of this section in 1854 the grounds of demurrer extended to defendant by § 259, *supra*, have been enlarged, but the grounds open to plaintiff are confined to this section: See on this subject, *Pom. Rem.*, §§ 586, 595.

If an answer to a complaint raises material issues upon the matters alleged therein, it is not demurrable for want of facts: *Bennett v. T. L. & W. Co.*, 3 Wash. 337.

An objection that answer does not state facts sufficient to constitute a defense is more properly raised by demurrer than by an objection to the evidence: *Anderson v. Carothers*, 18 Wash. 520.

No reply is necessary where by stipulation the facts are admitted, or where the allegations in an answer amount to mere denials: *Fife v. Olson*, 5 Wash. 789; *Raymond v. Morrison*, 9 Wash. 156.

A plaintiff is not called upon to reply to an affirmative defense while his demurrer to a special defense remains undetermined: *Ewing v. Van Wagenen*, 6 Wash. 39.

An affirmative defense setting up a different version of a contract than that alleged in the complaint cannot be construed as adding more than a general denial already made, and hence is properly demurrable: *Peterson v. Seattle Traction Co.*, 23 Wash. 615.

§ 277. (4917.) When Plaintiff may Reply—Contents of.

When the answer contains new matter constituting a defense or counter-claim, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defense to such new matter in the answer. [Cf. L. '54, p. 140, § 48; L. '69, p. 22, § 84; L. '77, p. 19, § 86; Cd. '81, § 86; 2 H. C., § 199.]

See *infra*, § 297, material allegations not controverted deemed admitted.

Cited in 3 Wash. 204; 15 Wash. 115; 17 Wash. 674; 51 Wash. 445.

See 2 Remington's Digest, pp. 2269-2271, §§ 67-74.

A claim for relief as set forth in the complaint cannot be in any manner enlarged by plaintiff's reply: *Bell v. Waudby*, 4 Wash. 743.

The matters set up in the reply must be consistent with the case made in the complaint. A reply which states a cause of action for breach of a specific contract is inconsistent with a complaint counting on money had and received by defendant from plaintiff: *Distler v. Dabney*, 3 Wash. 200, 205.

A reply not inconsistent with the complaint is not a departure therefrom. We have no "new assignment" as at common law: *Puget Sound Iron Co. v. Worthington*, 2 W. T. 472.

A party cannot set up one cause of action in his complaint, and after answer made, abandon that and make an entire new cause of action in a reply: *Osten v. Winehill*, 10 Wash. 333.

Where the complaint in an action is founded on a quantum meruit for labor performed and materials furnished for defendant, and the answer sets up that the work was done under a written contract, the terms of which are set forth, a reply admitting the terms of the contract and that the work was to be done for a stipulated price, but alleging that plaintiff was prevented from fulfilling his contract by the failure of defendant to perform conditions thereof on his part, constitutes such a departure in pleading as to warrant a nonsuit: *Id.*

See *Distler v. Dabney*, *supra*.

If complaint and reply are inconsistent, and one negatives the other, yet if the issues have been fully tried and no harm or surprise resulted in consequence thereof, the error is harmless: *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67.

By proceeding to trial without raising the objection that the reply constitutes a departure from the cause of action set out in the complaint, the defendant waives his right to urge the objection on appeal: *Asplund v. Mattson*, 15 Wash. 328.

When one portion of a reply to an affirmative defense set up in the answer,

which alleges a contract between the parties authorizing the acts complained of, admits such contract, another portion of the reply denying the contract, on the ground that plaintiff had no power to make it, should be stricken out on motion of the defendant therefor: *Davis v. Ford*, 15 Wash. 107.

Error of the court in refusing to strike a reply upon defendant's motion is cured by the action of the court in trying the case upon the theory that such reply was entirely irrelevant and immaterial: *Davis v. Ford*, 15 Wash. 107.

The fact that a bill of particulars presents a case different from the complaint does not constitute a departure: *Dudley v. Duval*, 29 Wash. 528.

As to what constitutes a departure, see *Gile v. Baseel*, 38 Wash. 212.

Plaintiff need not reply to an affirmative defense until his demurrer to a special defense is determined: *Ewing v. Van Wagenen*, 6 Wash. 39.

Where issues are squarely presented in the complaint and answer, and the reply denies the facts set up in the answer, it is error to sustain a demurrer to the reply, and to dismiss the action: *Davis v. Oldacres*, 3 W. T. 593.

In an equity cause, the insufficiency of the reply is immaterial when the defendants fail to substantiate the allegations of their answer: *Hill v. Young*, 7 Wash. 33.

The failure of defendant to call attention of the trial court to the fact that his answer contains affirmative matter not replied to is a waiver of the right to take advantage of such omission: *Ritchie v. Carpenter*, 2 Wash. 512, 522.

A plaintiff who improperly sues for money had and received cannot recover, although his real cause of action is disclosed by the answer and reply: *Clark v. Sherman*, 5 Wash. 681; distinguished in *Dibble v. DeMattos*, 8 Wash. 543.

Where the answer sets up that certain wheat was delivered in payment of "wheat notes," the purchase price of certain lands, a reply setting up the contract for sale of the land, defendant's want of title, etc., is not inconsistent with nor a departure from the complaint: *Ankeny v. Clark*, 1 Wash. 549.

An omission to plead in the reply a rescission of the contract, which does not mislead, nor affect defendant's rights, may be cured by amendment at any stage of the proceedings: *Id.*

In an action by a light company to enjoin a city and its officers from interfering with the company's franchise, to which a defense has been interposed that the franchise was forfeited, a reply setting up matters showing a waiver of forfeiture on the part of the city does not constitute a departure in pleading: *Commercial Electric Light & P. Co. v. Tacoma*, 17 Wash. 661.

New matter, not inconsistent with the complaint, constituting a defense to new matter set forth in the answer, may be alleged in the reply, without being open to the objection of being a departure from the cause stated in the complaint: *McCorkle v. Mallory*, 30 Wash. 632; *Childs Lum. & Mfg. Co. v. Page*, 28 Wash. 128; *Dodds v. Gregson*, 35 Wash. 402.

In an action upon a contract, where the defendant alleged failure to perform within the time limit, it is not a departure to set up in the reply a modification of the original contract as to the time limit and delay occasioned by the defendant preventing a performance within such time, which was thereby waived: *Erickson v. McLellan & Co.*, 46 Wash. 661.

A denial in a reply that defendants hold under a certain lease is not inconsistent with a denial of the validity of the lease: *Ryan v. Lambert*, 49 Wash. 649.

It is not a material variance, that, in an action for a divorce, the plaintiff, in reply to an answer setting up the illegality of the marriage, proved the annulment of the marriage: *Buckley v. Buckley*, 50 Wash. 213.

In an action for unlawful detainer it is unnecessary to reply to affirmative mat-

ter contained in the answer: *Fife v. Olson*, 5 Wash. 789.

The failure to reply to defendant's allegations of title and color of title is immaterial, when the stipulated facts upon which the cause is tried admit title in the plaintiffs: *Id.*

In an action upon a policy of fire insurance to which a plea of release has been interposed by the defendant, the plaintiff may, under the code system, set up in his reply that the release was procured by fraud, and is not required to first obtain a decree in equity canceling the release before instituting an action upon the policy: *Sanford v. Royal Ins. Co.*, 11 Wash. 653.

In such an action it is not necessary to restore the consideration received for the release before attacking it on the ground of fraud, if such restoration be provided for in the judgment sought: *Id.*

Refusal to render judgment for defendant because of failure to reply to an affirmative answer, will not be ground of reversal when the record shows no rule of court prescribing time in which a reply must be filed: *Waite v. Wingate*, 4 Wash. 324.

Allowing reply to be filed after motion for judgment or after time fixed by rules of court cannot be urged as error where no abuse of discretion is shown: *Stinson v. Sachs*, 8 Wash. 391; *Mounts v. Goranson*, 29 Wash. 261. This section is not applicable to pleadings in a justice's court. The only provision for a reply in a justice's court is in subdivision 3 of § 1779, *infra*; that is, when the answer sets up a setoff by way of defense; all other new matter in the answer is to be deemed denied: *Bellingham Bay etc. Ry. Co. v. Strand*, 1 Wash. 133.

§ 278. (4918.) Judgment for Failure to Plead to New Matter.

If the answer contain a statement of new matter constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it, he may have a jury called to assess the damages. [Cf. L. '54, p. 140, § 49; L. '69, p. 22, § 86; Cd. '81, § 88; 2 H. C., § 200.]

See *infra*, § 411, judgments by default.

Cited in 4 Wash. 373; 5 Wash. 662.

See 2 Remington's Digest, p. 2269, §§ 65-68.

If the answer fails to controvert the material allegations of the complaint, plaintiff is entitled to judgment for failure to answer, although plaintiff may have filed a reply to such defective answer: *Port v. Parfit*, 4 Wash. 369; such judgment is not technically a judgment on the pleadings, but a judgment authorized by § 411, *infra*, on failure to answer: *Id.*; see *Dillon*

v. Spokane Co., 3 W. T. 498; *King v. Ilwaco R. & N. Co.*, 1 Wash. 127; *Lake v. Steinbach*, 5 Wash. 659.

It is only to new matter, inconsistent with the complaint, that reply is necessary: See *Lake v. Steinbach*, 5 Wash. 659; *Frank v. Jenkins*, 11 Wash. 611.

An affirmative answer to which there is no reply operates as a finding of the court: *Smith v. Ormsby*, 20 Wash. 396.

Judgment on pleadings is erroneous, when grounded on plaintiff's failure to

reply to an allegation of the answer which is merely a denial of a corresponding allegation of the complaint: *Raymond v. Morrison*, 10 Wash. 156.

Judgment on the pleadings is not authorized where a reply, though insufficient in law, has actually been filed to the affirmative matter in the answer: *Davis v. Ford*, 15 Wash. 107.

Where a plea of another action pending has been interposed, a reply that, subsequent to the filing of the plea, the suit whose pendency was alleged had been dismissed is good against demurrer: *Boyle v. Great Northern R. Co.*, 13 Wash. 383.

Judgment on insufficient reply: See 2 *Remington's Digest*, p. 2290, § 147; *Davis v. Ford*, 15 Wash. 107.

Judgment on pleadings in general: See 2 *Remington's Digest*, pp. 2289-2291, §§ 145-152.

Where the burden of an issue is on defendant, judgment in his favor on the pleadings is not warranted: *Hoshor v. Kautz*, 19 Wash. 258.

A defect in the complaint in failing to state a cause of action does not justify a final judgment for defendant on the merits after plaintiff's opening statement to the jury, and the sufficiency of the complaint will not be considered upon appeal from such a judgment: *Redding v. Puget Sound Iron etc. Works*, 36 Wash. 642.

Admissions by plaintiff of affirmative defenses pleaded by defendant warrants a judgment in his favor on the pleadings: *Rockford Shoe Co. v. Jacob*, 6 Wash. 421.

While the sufficiency of pleadings should not generally be tested by motion for judgment thereon, the practice is proper where it is apparent that no technical objection is made and that the pleadings are incapable of amendment, and the parties elect to stand thereon for that reason: *Hubenthal v. Spokane etc. R. Co.*, 43 Wash. 677.

Immaterial variance between the proof and pleadings does not warrant a judgment in favor of defendant where the pleadings can be amended without prejudice to him: See *Ernst v. Fox*, 26 Wash. 520.

On motion for judgment on the pleadings, the allegations of complaint and reply are admitted notwithstanding denials of the answer: *Fishburne v. Merchants' Bank*, 42 Wash. 473. A claim in the reply of a rescission of a lease set up in the answer is within the issues: *Snyder v. Harding*, 34 Wash. 286.

Objections to the sufficiency of denials in the answer will be deemed waived unless seasonably made: *Howard v. Hibbs*, 22 Wash. 513.

§ 279. (4919.) Demurrer or Motion to Reply.

The defendant may demur to any new matter contained in the reply, when it appears upon the face thereof that such new matter is not a sufficient reply to the facts stated in the answer. Sham, frivolous, and irrelevant replies may be stricken out in like manner and on the same terms as like answers and defenses. [Cf. L. '54, p. 140, § 50; L. '69, p. 22, § 87; Cd. '81, § 89; 2 H. C., § 201.]

See supra, § 259, grounds of defendant's demurrer.

See supra, § 275, when answer may be stricken.

When one portion of a reply to an affirmative defense set up in the answer, which alleges a contract between the parties authorizing the acts complained of, admits such contract, another portion of the reply denying the contract, on the ground that plaintiff had no power to

make it, should be stricken out on motion of the defendant therefor: *Davis v. Ford*, 15 Wash. 107.

It is proper to sustain a demurrer to a reply which does not traverse the affirmative matters of an answer: *Hughes v. N. Y. Life Ins. Co.*, 32 Wash. 1.

§ 280. (4920.) Court Rules Fixing Times for Pleading.

The court shall establish the rules prescribing the time in which pleadings subsequent to the complaint shall be filed. [L. '57, p. 10, § 10; Cd. '81, § 90; 2 H. C., § 202; see Const., Art. IV, § 24.]

Cited in 4 Wash. 325.

The appellate court will not take judicial notice of the rules of the superior

courts adopted in pursuance of this section: *Waite v. Wingate*, 4 Wash. 324.

As to time for filing pleadings, see 2 *Remington's Digest*, p. 2288, § 142.

CHAPTER VIII.

VERIFICATION OF PLEADINGS.

§ 281. (4925.) Subscription and Verification of Pleadings.

Every pleading shall be subscribed by the party or his attorney, and except a demurrer, shall also be verified by the party, his agent or attorney, to the effect that he believes it to be true. The verification must be made by the affidavit of the party, or if there be several parties united in interest and pleading together, by one at least of such parties, if such party be within the county and capable of making the affidavit; otherwise the affidavit may be made by the agent or attorney of the party. The affidavit may also be made by the agent or attorney if the action or defense be founded on a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the affidavit is made by the agent or attorney, it must set forth the reason of his making it. When a corporation is a party, the verification may be made by any officer thereof, upon whom service of a notice [summons] might be made; and when the state, or any officer thereof in its behalf, is a party, the verification may be made by any person to whom all the material allegations of the pleading are known. When the party is absent from or a nonresident of the county in which suit is brought, the verification may be made by the agent or attorney of said party. [Cf. L. '54, p. 141, §§ 53, 54; L. '67, p. 92, § 1; L. '69, p. 23, § 89; Cd. '81, § 91; L. '88, p. 29, § 1; 2 H. C., § 203.]

Cited in 11 Wash. 126; 40 Wash. 212.

As to verification of pleadings, see 2 Remington's Digest, p. 2286, §§ 129-131.

Under this section, covering the verification of pleadings, a complaint asking for a temporary injunction verified upon the belief of the applicant is sufficient: Cady v. Case, 11 Wash. 124.

The verification of complaint in divorce, to the effect that plaintiff believes the contents of the complaint to be true, is sufficient: Burdick v. Burdick, 7 Wash. 533.

On appeal a defective verification will be treated as amended, or disregarded: Smith v. Newell, 32 Wash. 369.

§ 282. (4926.) When Verification may be Omitted.

When, in the judgment of the court, an answer to an allegation in any pleading might subject the party answering to a criminal prosecution, the verification of the answer to such allegation may be omitted. No pleading shall be used in a criminal prosecution against the party as evidence of a fact alleged in such pleading. [Cf. L. '54, p. 141, § 54; L. '69, p. 23, § 90; Cd. '81, § 92; 2 H. C., § 204.]

Cited in 13 Wash. 8.

§ 283. (4927.) Pleadings are not Proof on Trial.

Pleadings sworn to by either party in any case shall not, on the trial, be deemed proof of the facts alleged therein, nor require other or greater proof on the part of the adverse party. [L. '54, p. 219, § 484; Cd. '81, § 741; 2 H. C., § 792.]

Cited in 3 Wash. 237.

The pleadings of a party may be introduced in evidence against him and its admissions therein are conclusive unless shown to have been made under a mis-

take: O. R. & N. Co. v. Dacres, 1 Wash. 195.

While an original complaint does not cease to be a part of the record by reason of the filing of an amended complaint,

nevertheless the plaintiff cannot avail himself of any allegations contained in the original complaint, although his adversary may: *Sengfelder v. Hill*, 16 Wash. 355.

It is not error to exclude evidence of facts which are admitted: *Charlton v. Markland*, 36 Wash. 40.

As to the admissibility of verified pleadings in evidence and their effect, see *Bellingham Bay etc. R. Co. v. Strand*, 1 Wash. 133; *Tingley v. Fairhaven Land Co.*, 9 Wash. 34; *Goldwater v. Burnside*, 22 Wash. 215; *Stanley v. Stanley*, 32 Wash. 489. As to admissibility of bill of particulars, see *American Copper etc.*

Works v. Galland-Burke B. & M. Co., 30 Wash. 178.

Where an allegation of an amended complaint is not denied by the answer, it is error to permit the introduction in evidence of the first complaint in the action, which contains an allegation contrary to the allegation of the amended complaint admitted as true by the answer: *Goldwater v. Burnside*, 22 Wash. 215.

The rule as to the amount of testimony necessary to overcome a sworn answer in chancery is abrogated by this section: *Lee v. Lee*, 3 Wash. 236.

CHAPTER IX.

GENERAL RULES OF PLEADING.

§ 284. (4930.) Pleading Written Instruments and Accounts—Bill of Particulars.

It shall not be necessary for a party to set forth in a pleading a copy of the instrument of writing, or the items of an account therein alleged; but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within ten days after a demand thereof in writing, deliver to the adverse party a copy of such instrument of writing, or the items of an account, verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or judge thereof, may order a further account, when the one delivered is defective; and the court may, in all cases, order a bill of particulars of the claim of either party to be furnished. [L. '54, p. 142, § 55; Cd. '81, § 93; 2 H. C., § 205.]

See supra, § 258, what complaint shall contain.

See infra, §§ 342, 343, subpoena duces tecum.

See infra, §§ 1254-1263, documentary evidence.

See note to § 408, infra.

Cited in 2 Wash. 342; 3 Wash. 769; 15 Wash. 217; 25 Wash. 665; 35 Wash. 195; 43 Wash. 221.

As to bill of particulars, see 2 Remington's Digest, pp. 2286-2288, §§ 133-139.

As to pleading written instruments, see 2 Remington's Digest, p. 2255, § 14; Id., p. 2286, § 132; *Seal v. Cameron*, 24 Wash. 62; *Hays v. Dennis*, 11 Wash. 360.

The filing by defendant of a motion for a bill of particulars is sufficient, ipso facto, to extend the time for answering: *Plummer v. Weil*, 15 Wash. 427.

The object of a bill of particulars or the items of an account is to apprise the defendant of the nature and extent of the cause of action in order that he may, with greater certainty, plead thereto: *Ferry v. King Co.*, 2 Wash. 337, 343.

Where an action is upon an instrument in writing, the setting forth of a copy thereof in the complaint, which was duly verified, is a substantial compliance with this section, requiring a verified copy to be filed, etc.: Id., 342.

If accounts sued on are public accounts, equally accessible to both parties, it is not error for the court to refuse to order plaintiff to furnish a bill of particulars to defendant, as the ordering of a bill of particulars is a matter largely of discretion with the trial court: *Ferry v. King Co.*, supra; see *Isham v. Parker*, 3 Wash. 755.

The defendant is not entitled to a bill of particulars when its only office would be to make plaintiff disclose the specific evidence upon which he relies for a recovery: *Blackburn v. Washington Gold Min. Co.*, 19 Wash. 361; *Ingram v. Wishkah Boom Co.*, 35 Wash. 191.

In an action by an attorney for services, it is error to require the plaintiff to file a bill of particulars placing a valuation on each item of the service, where the employment was all in one continuous matter and it appeared that the services were so blended together and related to each other that it was impossible to separate one service from another; since bills for the services of an attorney stand

upon a different footing from other claims: *Moore v. Scharnikow*, 48 Wash. 564.

The refusal of the court, in an action for damages for failure to transport plaintiff, to require plaintiff to furnish a bill of particulars showing the respective amounts claimed for loss of time, trouble, annoyance, disappointment and anxiety of mind, is not an abuse of discretion, especially where the damages claimed are general in their nature and are not required to be specifically alleged: *Turner v. Gt. Northern Ry. Co.*, 15 Wash. 213.

When plaintiff makes a bona fide attempt to comply with defendant's demand for a bill of particulars, and if defendant, on account of its insufficiency, moves for an additional itemized account, he cannot object to proof thereunder on the ground of its insufficiency after allowing his motion to lie dormant and entering upon the trial without objection: *Isham v. Parker*, supra.

If a bill of particulars furnished by plaintiff pursuant to an order of the court is insufficient, the court has authority to order him to file a further and amended bill of particulars: *Plummer v. Weil*, 15 Wash. 427.

In an action by an attorney to recover the value of professional services he may be required to particularize the services and the value of each item, and his failure to keep an account thereof cannot be set up as an excuse for not complying: *Id.*

The fact that a defendant, at the time of filing his affidavit of merits for removal of cause in objection to the jurisdiction of the court, does not demur or answer, but makes demand for a bill of particulars preparatory to answering, is a sub-

stantial compliance with § 208, supra: *State v. Superior Court*, 5 Wash. 518.

A plaintiff who furnishes a bill of items, on which his complaint is founded, though under no obligation to do so, is confined to the proof of the items set out therein, although a number of years may have elapsed between the filing of the complaint and the trial: *Seattle v. Packer*, 13 Wash. 450.

A bill of particulars is not a pleading, and is not a part of the complaint for the purpose of subsequent pleadings but only to the extent of restricting the plaintiff's proof to the matters therein specified: *Dudley v. Duval*, 29 Wash. 528.

A bill of particulars not filed before the trial, but furnished upon the oral request of the opposite party, is subject to the same rule: *Howells v. North American T. & T. Co.*, 24 Wash. 689; *American Copper etc. Works v. Galland-Burke etc. Co.*, 30 Wash. 178.

Where, in an action for slander, a bill of particulars was furnished showing when and before whom the words were spoken, the plaintiff is not entitled to show that the words were spoken at other times and places; and such proof, introduced for the purpose of showing malice, will not support a verdict where the complaint was not amended: *Bleitz v. Carton*, 49 Wash. 545.

Motion to make definite and certain is not equivalent to a demand for bill of particulars: *Goupille v. Chaput*, 43 Wash. 702.

The fact that a bill of particulars presents a case different from the complaint does not constitute a departure in pleading: *Dudley v. Duval*, 29 Wash. 528.

§ 285. (4931.) Pleadings Liberally Construed.

In the construction of a pleading, for the purpose of determining its effect, its allegation[s] shall be liberally construed, with a view to substantial justice between the parties. [L. '54, p. 142, § 56; Cd. '81, § 94; 2 H. C., § 206.]

See supra, § 258, what complaint shall contain.

See supra, § 144, laws to be liberally construed.

Cited in 4 Wash. 59; 11 Wash. 363; 27 Wash. 104; 35 Wash. 684.

As to construction of pleadings in general, see 2 Remington's Digest, pp. 2256, 2257, §§ 16-21.

Under this section, pleadings must be liberally construed, with the aim to arrive at substantial justice, and it is no longer the rule that a pleading must be most strongly construed against the pleader: *Isaacs v. Holland*, 4 Wash. 54.

A suitor is no longer to be turned out of court, if by making all reasonable intendments, enough can be seized hold of in his pleadings to show that he has rights which ought to be enforced: *Chambers v. Hoover*, 3 W. T. 107, 110.

The rule as to liberal construction of pleadings applies only to matters of form; and does not go to the fundamental requisites of a cause of action, and it is therefore still necessary that they should present a clear and unequivocal statement of the cause of action or defense: See *P. S. I. Co. v. Worthington*, 2 W. T. 472; *Renton v. St. Louis*, 1 W. T. 215, 223; *Newberg v. Farmer*, 1 W. T. 182; *Harris v. Halverson*, 23 Wash. 779; *Grout v. Tacoma Eastern R. Co.*, 33 Wash. 524; *Malloy v. Benway*, 34 Wash. 315.

General averments are always controlled by the specific allegations of fact in a pleading: *Malloy v. Benway*, 34 Wash. 315.

Express admissions in an answer control direct averments to the contrary: *Irwin v. Buffalo-Pitts Co.*, 39 Wash. 346.

Inappropriate words will be construed in support of complaint if there are sufficient allegations to show what was meant: *Boyle v. Great Northern R. Co.*, 13 Wash. 383.

Pleadings are to be liberally construed on a motion for judgment on the pleadings: *Townsend v. Price*, 19 Wash. 415.

A complaint for fraud and false representations, although exceedingly meager, will be liberally construed and upheld if possible, when attacked for the first time at the trial: *Walsh v. Meyer*, 40 Wash. 650.

After verdict, where no motion has been made to make the pleadings more definite and certain, they will be liberally construed to sustain the judgment: *Johnson v. Leonhard*, 1 Wash. 564; *Coats v. W. C. Fire Ins. Co.*, 4 Wash. 375; *Lyen v. Bond*, 3 W. T. 407; *King v. Ilwaco R. & N. Co.*, 1 Wash. 127; *Montesano v. Blair*, 12 Wash. 188; *Bishop v. Averill*, 17 Wash. 209;

Mosher v. Bruhn, 15 Wash. 332; *Hall v. Woolery*, 20 Wash. 440; *Carey v. Hays*, 41 Wash. 580.

If the pleadings are not full and accurate, the remedy is by motion to cure the defect: *P. S. I. Co. v. Worthington*, supra; or have his pleading dismissed: *Chambers v. Hoover*, supra.

Although a pleading fail to allege any value to collateral pledged as security, yet some value will be presumed from the allegation that they were accepted and retained upon agreement to extend the notes secured thereby: *Commercial Bank v. Hart*, 10 Wash. 303.

On objections first urged on appeal, pleadings will be liberally construed or considered as amended: *Island County v. Babcock*, 17 Wash. 438; *State ex rel. Sander v. Jones*, 20 Wash. 576; *Turner v. Turner*, 33 Wash. 118; *Livingston v. Lovegren*, 27 Wash. 102. Where the language of an affidavit is capable of two constructions, that which is plainly consonant with common sense and the actual facts must be adopted: *Goore v. Goore*, 24 Wash. 139.

§ 286. (4932.) Irrelevant, Redundant and Indefinite Matter, How Objected to.

If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby; and when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment, or may dismiss the same. [L. '54, p. 142, § 57; Cd. '81, § 95; 2 H. C., § 207.]

See supra, § 275, and notes, when answer may be stricken.

See notes to last section.

See infra, § 305, when informal pleadings may be stricken.

Cited in 10 Wash. 540; 43 Wash. 221.

As to motions to strike irrelevant or redundant matter, see 2 Remington's Digest, p. 2292, § 157.

As to motions to make more definite and certain, see *Id.*, p. 2293, §§ 158-161. Matter is irrelevant which has no bearing upon the question in controversy, but if the alleged irrelevancy carries with it a doubt as to its sufficiency in law the question should be raised by demurrer and not by motion: *Hatch v. T. O. & G. H. Ry. Co.*, 6 Wash. 1, 7.

Evidential matter in a pleading may be stricken on motion: *Bigelow v. Scott*, 2 W. T. 378, 380.

Superfluous matter in a pleading can only be reached by motion; it is not a defect for which a demurrer will lie: *Isaacs v. Holland*, 4 Wash. 54.

Recitals of evidence, and arguments in pleading, although not denied, are of no avail: *Meeker v. Gilbert*, 3 W. T. 369, 377.

A defendant who has pleaded irrelevant affirmative matter in his answer cannot complain of a refusal to strike like irrelevant matter from the reply in re-

sponse thereto: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

A general denial of the material allegations of a complaint cannot be stricken out on the ground that it is sham or frivolous pleading: *Larson v. Winder*, 14 Wash. 647.

It is not prejudicial error for the court to refuse to strike a portion of defendant's answer in divorce which, though not constituting a defense to the action, sets forth the physical condition of defendant and present and prospective financial condition of the party: *Lee v. Lee*, 3 Wash. 236.

In an action for damages to abutting property for the construction and operation of a railroad in a street, an answer which is, in effect, a plea of license from the city cannot be stricken out as irrelevant and immaterial; its sufficiency can only be tested by demurrer: *Hatch v. T. O. & G. H. Ry. Co.*, supra.

This section is applicable to petitions necessary in probate practice: *Renton v. Campbell*, 10 Wash. 533.

The allegations must be specific and certain: *Roedes v. Brown*, 1 W. T. 112;

Wilkeson Coal & Coke Co. v. Driver, 9 Wash. 177; Hastings v. Anacortes Packing Co., 29 Wash. 224; Woodcock v. Guy, 33 Wash. 234.

Error in striking part of a pleading is not prejudicial if sufficient remains to enable the party to put in his whole case: *Penter v. Staight*, 1 Wash. 365.

The failure of the court to strike parts of a complaint relating to the damages is not prejudicial when no evidence is introduced thereunder and the court correctly instructs the jury as to the proper rule of damages: *Waldron v. Canadian Pac. R. Co.*, 22 Wash. 253; *Tyler v. North American T. & T. Co.*, 24 Wash. 253.

Defendant may properly plead by way of inducement certain facts showing the illegality of plaintiff's title, and it is error to strike such matter: *Hays v. Parker*, 2 W. T. 198.

Irrelevant and redundant matter may be struck out: See 2 Remington's Digest, p. 2293, § 157; *Allen v. Olympia L. & P. Co.*, 13 Wash. 307; *State v. Lorenz*, 22 Wash. 289; *Williams v. Minemire*, 23 Wash. 393; *Jordan v. Coulter*, 30 Wash. 116; *Rand, McNally & Co. v. Royal*, 36 Wash. 420; *Tait v. Pigott*, 38 Wash. 59.

Making more definite and certain: See 2 Remington's Digest, p. 2293, §§ 158-161.

If interrogatories have not been sufficiently answered the remedy is by motion to make more specific: *Knapp v. Order of Pendo*, 36 Wash. 601.

In an action for libel it is proper to require the complaint to set out the libelous article in full: *McClure v. Review Pub. Co.*, 38 Wash. 160.

Where an answer to a complaint admits part of a paragraph and denies the remainder, and there exists in the mind of the plaintiff any doubt as to the meaning of such denial, it is his duty to move to make the answer more definite and certain: *O'Brien v. Seattle Ice Co.*, 43 Wash. 217.

The objection that allegations are too indefinite and uncertain can only be reached by motion: *Columbia & Puget Sound R. Co. v. Hawthorne*, 3 W. T. 353; *Wilkeson Coal & Coke Co. v. Driver*, 9 Wash. 177; *Fares v. Gleason*, 14 Wash. 657; *Waldo v. Milroy*, 19 Wash. 156; *Croft v. Northwestern Steamship Co.*, 20 Wash. 175; *Hall v. Law Guarantee & T. Soc.*, 22 Wash. 305; but see *Kizer v. Caufield*, 17 Wash. 417.

In an action to obtain a deed of tide lands, by reason of the alleged ownership of abutting upland, the plaintiff may be required to set forth a description of the uplands which were the basis of his right to purchase the tide lands, and the same would not be requiring him to plead his evidence; and it is not an abuse of discretion to dismiss the action upon plaintiff's refusal so to do: *Washington etc. Imp. Co. v. Cannel Coal Co.*, 45 Wash. 462.

The objection that some of the allegations in a complaint are conclusions of law must be reached by motion to make more certain: *Harris v. Halverson*, 23 Wash. 779; *Isaacs v. Holland*, 4 Wash. 54.

A complaint alleging negligence in the manufacture and bottling of a dangerous explosive called champagne cider by failing to observe the proper temperature, amount of gas, and strength of the bottles, and failing to attach labels or give notice of the danger, is not demurrable as being so indefinite as to be meaningless, but the remedy is by motion to make more definite and certain: *Weiser v. Holzman*, 33 Wash. 87.

The denial of a motion to make a complaint for personal injuries more definite and certain as to an allegation that plaintiff was "otherwise greatly bruised and injured" is not prejudicial error where no evidence was given of injuries other than those particularly described in the complaint and in a trial amendment thereof: *Helbig v. Grays Harbor Elec. Co.*, 37 Wash. 130.

Where by a complaint it appeared that the defendant agreed to keep as trustee any money earned by the plaintiff in America, it is proper to overrule a motion to make the same more definite and certain by stating what employment the plaintiff agreed to engage in, since she did not obligate herself to engage in any business: *Goupille v. Chaput*, 43 Wash. 702.

In an action to recover damages to property occasioned by flooding, a motion to make a complaint more definite and certain should be granted, where damage to lands, tenements, furniture, hay, livestock, lumber and other personal property is lumped at \$2000, without any particular description of the personal property damaged: *Berg v. Humptulips Boom etc. Co.*, 38 Wash. 342.

Where there is sufficient in the pleading to advise the adverse party or the matter is, or should be, within the knowledge of both parties, the motion should be denied: *Ekstrand v. Barth*, 41 Wash. 321; *Port Townsend v. Trumbull*, 40 Wash. 386; *Boyer v. Robison*, 43 Wash. 97.

A motion to make more definite made two months before trial is waived by failing to bring it up for hearing, until after the commencement of the trial: *Isham v. Parker*, 3 Wash. 755. But see *Griffith v. Wright*, 21 Wash. 494.

The overruling of a motion to make more definite and certain becomes unimportant in view of testimony subsequently introduced covering the points in questions: *Johnston v. Gerry*, 34 Wash. 524.

The fact that the allegations of a complaint are not so full and particular as they should be respecting any issue cannot be taken advantage of by motion to withdraw from the jury the evidence upon

such issue, where the allegations are sufficient to advise defendant of the nature and amount of the demand against him: *Johnson v. San Juan Fish & P. Co.*, 31 Wash. 238.

A motion to strike will be considered as a demurrer if so treated by the parties and court below: *Seal v. Cameron*, 24 Wash. 62. Appeal does not lie from an order striking a complaint from the files: *Vaktaren Pub. Co. v. Pacific etc. Pub. Co.*,

41 Wash. 355; but see *Hays v. Peavey*, 43 Wash. 163.

Defects or uncertainties in a pleading may be cured by the pleadings and admissions of the adverse party: *Sengfelder v. Mutual Life Ins. Co.*, 5 Wash. 121; *Cerf, Schloss & Co. v. Wallace*, 14 Wash. 249; *Megrath v. Gilmore*, 15 Wash. 558; *Bates v. Drake*, 28 Wash. 447; *Rattelmiller v. Stone*, 28 Wash. 104.

§ 287. (4933.) Judgments of Inferior Courts, How Pleaded.

In pleading a judgment or other determination of a court or office[r] of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction. [L. '54, p. 142, § 58; Cd. '81, § 96; 2 H. C., § 208.]

See supra, § 258, what complaint shall contain.

See infra, §§ 1255, 1256, foreign judgments and evidence to sustain them, etc.

Cited in 18 Wash. 99; 45 Wash. 422.

§ 288. (4934.) Conditions Precedent, How Pleaded.

In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance. [L. '54, p. 142, § 59; Cd. '81, § 97; 2 H. C., § 209.]

See supra, § 258, what complaint shall contain.

Cited in 42 Wash. 307; 50 Wash. 662, 663.

This section has reference only to conditions precedent or necessary to the crea-

tion of the contract or to the perfecting of the right of action, and not to conditions subsequent: *Port Blakely Mill Co. v. Hartford Fire Ins. Co.*, 50 Wash. 657.

§ 289. (4935.) Private Statutes, How Pleaded.

In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its passage, and the court shall thereupon take judicial notice thereof. [L. '54, p. 142, § 60; Cd. '81, § 98; 2 H. C., § 210.]

See supra, § 258, what complaint shall contain.

Cited in 21 Wash. 350.

§ 290. (4936.) Existence of City or Town, How Pleaded.

In pleading the existence of any city or town in this state, it shall be sufficient to state in such pleading that the same is an existing city or town, incorporated or organized under the laws of the state of Washington. [Cd. '81, § 2063; 1 H. C., § 767.]

§ 291. (4937.) Ordinances, How Pleaded.

In pleading any ordinance of a city or town in this state, it shall be sufficient to state the title of such ordinance and the date of its passage, whereupon the court shall take judicial knowledge of the existence of such ordinance, and the tenor and effect thereof. [Cd. '81, § 2064; 1 H. C., § 768.]

See supra, § 289, and notes, pleading private statute.

See supra, § 258, what complaint shall contain.

Cited in 9 Wash. 241.

It is not necessary to plead an ordinance by title, number and date of passage in a complaint filed in a court of the municipality, as it is the duty of such court to take judicial notice of the ordinance: *Seattle v. Pearson*, 15 Wash. 575. See, also, *Seattle v. Turner*, 29 Wash. 515.

A conviction in a city police court of the violation of a city ordinance, which

was read to the jury by the court from a bound volume of ordinances printed by authority of the city, cannot be objected to on appeal on the ground that the ordinance was not introduced in evidence, where no objection was taken below, since the existence of the ordinance was sufficiently established or would be judicially noticed: *Spokane v. Griffith*, 49 Wash. 293.

§ 292. (4938.) Libel or Slander, How Pleaded.

In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish on trial that it was so published or spoken. [L. '54, p. 142, § 61; Cd. '81, § 99; 2 H. C., § 211.]

See supra, § 258, what complaint shall contain.

See infra, § 2777, criminal libel.

See 2 Remington's Digest, p. 1714, §§ 20, 21.

Oral defamation does not constitute criminal libel: *State v. McArthur*, 5 Wash. 558.

In civil actions, the question whether a publication constitutes libel is one of law to be determined by the court where the language is unambiguous: *Urban v. Helmick*, 15 Wash. 155.

In determining whether the language is libelous, it must be given its ordinary meaning, and the meaning cannot be extended by innuendo beyond what the words justify in connection with the extrinsic facts: *Id.*

It is not libelous per se to accuse some one of being deficient in some quality which the law does not require him as a good citizen to possess: *Id.*

A publication charging a hotel proprietor with being a "hog" for the reason that he would not trade at home and build up the home trade and town as much as possible, but sent to another city for supplies, because he wanted to make it all, is not libelous per se: *Id.*

A plaintiff will be required to set out in full an alleged libelous article if the full

meaning of the objectionable part can only be ascertained by construing it in connection with the whole article: *McClure v. Review Pub. Co.*, 38 Wash. 160.

A complaint for libel setting out the publication of the fact that plaintiff secured a marriage license, attempted to suppress the fact, and could not find the bride, is demurrable for want of sufficient facts, where it contains no inducement or innuendo and it is not alleged that any of the statements published are false, the statements not being libelous per se: *Whitehouse v. Cowles*, 48 Wash. 546.

In an action for defamation of character, the failure to charge in the complaint that the words were maliciously spoken is not objectionable, if other words expressive of malicious intent are used: *Stewart v. Major*, 17 Wash. 238.

It is actionable slander per se to say of a man that he "has another wife back east," as the words in effect charge bigamy: *Bleitz v. Carton*, 49 Wash. 545.

It is not actionable per se to utter orally that a man is not fit to associate with other people, and has been in jail two or three years back east: *Bleitz v. Carton*, 49 Wash. 545.

§ 293. (4939.) Answers in Justification and Mitigation.

In an action mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not; he may give in evidence the mitigating circumstances. [L. '54, p. 143, § 62; Cd. '81, § 100; 2 H. C., § 212.]

See supra, § 264, what answer shall contain.

See infra, § 2157, truth of matters as defense in criminal libel.

Laws 1899, p. 101, for the retraction of newspaper libels, was repealed by Laws 1905, p. 13, § 1.

Cited in 11 Wash. 509; 40 Wash. 312, 313.

See 2 Remington's Digest, p. 1714, §§ 17-19.

The publication by a newspaper as an item of news of certain actions and conduct of an individual, at the time of the supposed discovery of a crime, from which damaging inferences might be drawn as to his having committed the crime, is not libelous, there being no direct charge of crime, if what is stated concerning his actions and conduct is true: *Haynes v. Spokane Chronicle Pub. Co.*, 11 Wash. 503.

Under this section the truth of the statement of acts and facts may be shown to defeat recovery in an action for libel, although it is pleaded merely in mitigation of damages and not by way of justification: *Id.*

A publication which appears libelous upon its face may not be so in fact, by reason of something which is not apparent from the words themselves, and which may be shown by pleading and proving extrinsic facts in mitigation or in justification: *Id.*

The finding of a jury upon a question whether a publication is within the definition of libel correctly given them by the court, will not be disturbed: *Id.* See, also, *Chambers v. Leiser*, 43 Wash. 285; *Leghorn v. Review Pub. Co.*, 31 Wash. 627.

As to facts constituting justification, see *Hall v. Elgin Dairy Co.*, 15 Wash. 542.

A conditional statement charging a man with bigamy "if what Mr. D. tells me is true," made by a member of a fraternal order, of and respecting an applicant for membership, and made to a member of the order while the applicant's reputation was under investigation for the purpose of showing his unfitness, is a privileged communication for which damages cannot be recovered, where D. had told the defendant that plaintiff (who had a wife and children here) "had another wife and children in Illinois," and had communicated to the defendant circumstances known to D. back east, from which it appears that the plaintiff was not a bigamist, but had secured a divorce from his first wife, that he had been charged with perjury in so doing, had settled the matter by giving notes to her, and had paid only one of the notes: *Bleitz v. Carton*, 49 Wash. 545.

Where the complaint in an action for slander alleged the uttering of a positive charge of bigamy, a justification in the answer admitting that the words were uttered conditionally, i. e., "If what Mr. D. has told me is true," is not inconsistent with a general denial, and does not admit the allegation of the complaint: *Bleitz v. Carton*, 49 Wash. 545.

§ 294. (4940.) **Falsely Charging Certain Crime, Actionable.**

Every charge of incest, fornication, adultery, or whoredom falsely made by any person against a female, also words falsely spoken of any person charging such person with incest or the infamous crime against nature, either with mankind or the brute creation, shall be [actionable] in the same manner as in the case of slanderous words charging a crime the commission of which would subject the offender to death or other degrading penalties. [L. '54, p. 219, § 487; Cd. '81, § 747; 2 H. C., § 798.]

Cited in 17 Wash. 239.

§ 295. (4941.) **Answers in Actions to Recover Property Distrained.**

In an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good without setting forth the title to such real property. [L. '54, p. 143, § 63; Cd. '81, § 101; 2 H. C., § 213.]

See *supra*, § 264, what answer must contain.

See *infra*, § 3187, statute relating to distraint of animals doing damage.

§ 296. (4942.*) **Joinder of Causes of Action.**

The plaintiff may unite several causes of action in the same complaint, when they all arise out of,—

1. Contract, express or implied; or
2. Injuries, with or without force, to the person; or
3. Injuries, with or without force, to property; or
4. Injuries, to character; or

5. Claims to recover real property, with or without damages for the withholding thereof; or

6. Claims to recover personal property, with or without damages for the withholding thereof; or

7. Claims against a trustee, by virtue of a contract or by operation of law.

8. The same transaction.

But the causes of action so united must affect all the parties to the action, and not require different places of trial, and must be separately stated. [L. '07, p. 172, § 1. Cf. L. '54, p. 143, § 64; L. '61, p. 51, § 5; L. '69, p. 25, § 100; Cd. '81, § 102; 2 H. C., § 214.]

See supra, § 153, form of action.

See supra, § 180, when executor, trustee, etc., may sue alone.

See supra, § 255, forms of pleadings.

See supra, § 258, what complaint shall contain.

See notes to § 796, infra.

Cited in 14 Wash. 479; 29 Wash. 533; 30 Wash. 634; 31 Wash. 662; 34 Wash. 76; 42 Wash. 88; 42 Wash. 254; 46 Wash. 401; 47 Wash. 41; 49 Wash. 343; 51 Wash. 258.

See 1 Remington's Digest, pp. 32-34, §§ 19-24.

It is not an improper joinder to seek, in an action for divorce and alimony, to set aside certain fraudulent conveyances, on which the award of alimony is dependent: *Prouty v. Prouty*, 4 Wash. 174.

Legal and equitable causes of action may be joined in the same complaint, without affecting the allegation in either necessary to constitute a cause of action: *Thompson v. Caton*, 3 W. T. 31.

Where plaintiff endeavors to state equitable and legal causes as separate causes of action, and in fact but one cause is stated, it is error to require an election and to dismiss the case for failure to elect between the two causes: *Brown v. Calloway*, 34 Wash. 175.

Under Bal. Code, § 4942, it is proper to join a cause of action upon a guaranty to pay plaintiff's salary to a certain date with a cause upon an express contract to pay the salary after such date: *Dudley v. Duval*, 29 Wash. 528.

It is not a misjoinder of causes of action to unite in one complaint an action for the recovery of damages for the breach of a contract, and an action alleging wrongful conversion of certain buildings and camp equipment erected by virtue of the same contract: *McCorkle v. Mallory*, 30 Wash. 632.

In an action to recover both actual and statutory damages, the plaintiff should be required to elect whether he will seek to recover actual or the statutory damages; but failure to do so is not prejudicial where only statutory damages were awarded: *Galbraith v. Carmode*, 43 Wash. 456.

In an action to establish water rights, based upon the plaintiffs' claims under (1) riparian ownership, (2) appropriation, and (3) contract, a motion to separately state the several causes of action and to elect

upon which they will rely is properly overruled; since there was but one indivisible cause of action, and the independent sources of plaintiff's title do not constitute separate causes: *Hutchinson v. Mt. Vernon Water etc. Co.*, 49 Wash. 469.

As to pleading separate causes of actions, see 2 Remington's Digest, p. 2259, §§ 28-30; *Nor. Pac. R. Co. v. Hess*, 2 Wash. 383; *Seattle Trust Co. v. Kerry*, 19 Wash. 389; *Page v. Page*, 43 Wash. 293; *Sly v. Palo Alto Gold Min. Co.*, 28 Wash. 485. See, also, *Saunders v. U. S. Marble Co.*, 25 Wash. 475.

Under this section several causes of action must be separately stated, even in equity, or the complaint will be struck out: *Hockersmith v. Ferguson*, 51 Wash. 256.

Under Bal. Code, § 4942, causes of action upon two distinct contracts may be joined in one action: *Moylan v. Moylan*, 50 Wash. 341.

An action on contract and an action on tort cannot be joined: See 1 Remington's Digest, p. 33, § 22; *Clark v. Great Northern R. R. Co.*, 31 Wash. 658; *Willey v. Nichols*, 18 Wash. 528; *Sanders v. Stimson Mill Co.*, 34 Wash. 357; *Lambert v. La Conner Trad. etc. Co.*, 37 Wash. 113; *Voss v. Bender*, 32 Wash. 566.

In an action for wrongful eviction, it is proper to join causes of actions for property destroyed and for other property converted to the use of the defendant, where the same arise out of the same wrongful act: *McClure v. Campbell*, 42 Wash. 252.

Where a complaint sets forth facts tending to show a liability both in tort and on contract, such recital is not open to objection on the ground of stating more than one cause of action, when such facts all relate to a single transaction and are relied upon as the basis of a single cause of action: *Barto v. Nix*, 15 Wash. 563.

If the complaint sets forth two causes of action without separately stating them, it is not error to refuse to strike out certain portions thereof when the causes could be properly joined; the proper remedy is by

motion to require them to be separately stated: *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648; *Moore v. Brownfield*, 10 Wash. 439.

A complaint attempting to allege causes of action against the state to annul a judgment of conviction in a criminal case, against the state dental board with reference to the issuance of a license to practice dentistry, and against the members of the board and certain dental societies for damages, is demurrable on the ground of misjoinder of causes of action: *Brown v. State*, 46 Wash. 399.

There is no improper joinder of causes of action in a complaint to reform plaintiffs' absolute deed, which was intended as a mortgage, and to restore the plaintiffs'

rights in the premises by placing them in possession, and for the cancellation of a fraudulent judgment of ouster obtained by the grantors in the deed: *Gustin v. Crockett*, 14 Wash. 536.

Parties and interests affected by joinder: See 1 *Remington's Digest*, p. 33, § 24; *Huggins v. Sutherland*, 39 Wash. 352; *Johnson v. S. E. Co.*, 39 Wash. 211; *Gilmore v. Skookum Box Factory*, 20 Wash. 703; *Utterback v. Meeker*, 16 Wash. 185; *Brodek v. Farnum*, 11 Wash. 565.

Splitting or consolidating causes of action: See 1 *Remington's Digest*, p. 34, §§ 25-27; *Achey v. Creech*, 21 Wash. 319; *Peterson v. Dillon*, 27 Wash. 78; *Kane v. Kane*, 35 Wash. 517; *Wheeler, Osgood & Co. v. Ralph*, 4 Wash. 617.

§ 297. (4943.) Material Allegations not Controverted Admitted, Except in Reply.

Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purpose of action, be taken as true; but the allegation of new matter in a reply is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require. [L. '69, p. 26, § 101; L. '77, p. 22, § 103; Cd. '81, § 103; 2 H. C., § 215.]

See next section.

See supra, § 258, and notes, what complaint shall contain.

See supra, § 264, what answer must contain.

See supra, § 277, what reply must contain.

Cited in 2 Wash. 482; 5 Wash. 662; 11 Wash. 617; 42 Wash. 307.

Admissions by failure to traverse: See 2 *Remington's Digest*, p. 2267, § 57; *Sengfelder v. Mutual Life Ins. Co.*, 5 Wash. 121; *Roberts v. Center*, 26 Wash. 435; *Sherman v. Sweeny*, 29 Wash. 321.

Every material allegation of the complaint not controverted by the answer shall be taken as true: *Lake v. Steinbach*, 5 Wash. 659, 662.

An answer which merely controverts the conclusions drawn by the pleader from the facts stated does not traverse any material fact, and presents no issue: *Id.*, 659.

An insufficient denial is in effect no denial and admits the facts well pleaded: *Frost v. Ainslie L. Co.*, 3 Wash. 241, 243.

If no reply is filed to affirmative matter in the answer, it is error to treat the affirmative matter as denied and take evidence thereunder—since it is to be pleaded as true: *Johnson v. Maxwell*, 2 Wash. 482.

The failure of defendant to call the attention of the trial court to the fact that his answer contains affirmative matter not replied to is a waiver of the right to take advantage of such omission: *Ritchie v. Carpenter*, 2 Wash. 512, 522.

In a suit for wages, when the allegations of the complaint regarding employment are admitted, proof of that fact is unnecessary, and errors committed in introduction of testimony regarding employment are im-

material: *Fitzgerald v. School Dist.*, 5 Wash. 112.

An allegation of "no consideration" is not new matter requiring a reply: *Frank v. Jenkins*, 11 Wash. 617.

The allegations of an answer will not be construed as admissions unless so intended or the answer requires it: *Turner v. Turner*, 3 Wash. 118; *American Copper etc. Works v. Galland-Burke etc. Co.*, 30 Wash. 178; *Browder v. Phinney*, 37 Wash. 70; *Collier v. Great Northern R. Co.*, 40 Wash. 639. Express admissions in an answer control direct averments to the contrary, since the pleading must be construed most strongly against the pleader, and in the absence of an amendment evidence contrary to the admission is properly excluded: *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346.

A plea of general denial does not admit the corporate existence of plaintiff where that is a necessary allegation of the complaint: *Denver v. Spokane Falls*, 7 Wash. 220.

A general allegation of fraud in a complaint is not admitted by a demurrer thereto: *Olympia Water Works v. Gelbach*, 16 Wash. 482.

A motion to quash a writ of mandamus admits the facts stated, but not the conclusions drawn therefrom: *Hester v. Thompson*, 35 Wash. 119.

Where a building contract permits the owner to fix the damages for delay and requires arbitration if the contractor dissents, and the reply admits that the dam-

ages were fixed, the plaintiff cannot avoid the effect of such admission by showing that the delay was not its fault, where those defenses had not been submitted to arbitration or any attempt made to arbi-

trate; and judgment is properly given on the pleadings for the amount claimed, less the damages fixed: *Childs Lum. & Mfg. Co. v. Page*, 32 Wash. 250.

§ 298. (4944.) Material Allegations Defined.

A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient. [L. '54, p. 143, § 65; Cd. '81, § 104; 2 H. C., § 216.]

CHAPTER X.

MISTAKES AND AMENDMENTS.

§ 299. (4949.) Variance, When Material.

No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just. [L. '54, p. 143, § 66; Cd. '81, § 105; 2 H. C., § 217.]

Variance generally: See notes to § 301, failure of proof.

See next section.

As to what plaintiff may prove under general denial, see § 264, *supra*, and notes.

Cited in 1 Wash. 545; 2 Wash. 520; 3 Wash. 487; 3 Wash. 534; 5 Wash. 57; 16 Wash. 48; 21 Wash. 640; 22 Wash. 142; 24 Wash. 155; 26 Wash. 527; 26 Wash. 553; 29 Wash. 534; 30 Wash. 169; 38 Wash. 543; 39 Wash. 54; 43 Wash. 222; 50 Wash. 688.

As to variances, see 2 Remington's Digest, pp. 2301-2304, §§ 180-190.

As to evidence admissible under pleading, see 2 Remington's Digest, pp. 2297-2301, §§ 69-79.

The definition of variance given in this section is anything but definite, and its application has ever been a fruitful source of trouble and disagreements among jurists, some claiming, with much force, that its principal mission is to provide for a quarrel between court and counsel: *Marsh v. Wade*, 1 Wash. 538, 545.

When the testimony fails to meet the allegations of the complaint, but is received without objection or motion to strike or suggestion of surprise, a nonsuit is properly refused: *Guley v. N. W. Coal & T. Co.*, 7 Wash. 491, 493; and the complaint should be considered amended to correspond with the facts proven: *Murray v. Meade*, 5 Wash. 693; *Olson v. Snake River etc. R. Co.*, 22 Wash. 139; *Taylor v. Ballard*, 24 Wash. 191; *Richardson v. Moore*, 30 Wash. 406; *Gay v. Havermale*, 30 Wash. 622; *Helphrey v. Strobach*, 13 Wash. 128; *Al-lend v. Spokane Falls & N. R. Co.*, 21 Wash. 324; *State v. Lorenz*, 22 Wash. 289;

Kinthead v. Holmes & Bull Fur. Co., 24 Wash. 216; *Green v. Tidball*, 26 Wash. 338.

The omission to plead in a reply a rescission of a contract, which does not mislead the defendant, nor affect his substantial right, may be cured by amendment at any stage of the proceedings: *Ankeny v. Clark*, 1 Wash. 549. See next section.

In an equity case the decision will be based upon the evidence introduced without objection, regardless of the pleadings, yet it is the duty of the court to exclude testimony wholly irrelevant when objected to: *Davis v. Hincheliffe*, 7 Wash. 199.

A plaintiff cannot allege one cause of action in his complaint and then, by means of a reply, recover upon an entirely different cause of action: *Dibble v. DeMattos*, 8 Wash. 542, 543; *Comegys v. Am. L. Co.*, 8 Wash. 661, 667; *Clark v. Sherman*, 5 Wash. 681; *Dietz v. Winehill*, 6 Wash. 109, 110; *Osten v. Winehill*, 10 Wash. 333; *Distler v. Dabney*, 3 Wash. 200; see *Ankeny v. Clark*, *supra*.

A defendant cannot urge a variance between the contract pleaded by plaintiff and the one offered in evidence, when the judgment is based on the contract pleaded by defendant in his answer: *Megrath v. Gilmore*, 15 Wash. 558; *Rattelmiller v. Stone*, 28 Wash. 104. A defendant cannot complain that evidence and instructions were not applicable to the issues presented by the complaint, when such issues were brought in by his affirmative answer: *Ryan*

v. Lambert, 49 Wash. 649. Where the complaint in an action to recover for personal injuries contains a general allegation of negligence, any fact tending to contribute approximately to the injury is admissible in evidence thereunder: *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261; *Clukey v. Seattle Elec. Co.*, 27 Wash. 70; *Crooker v. Pac. Lounge & Mattress Co.*, 34 Wash. 191; *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253.

In an action for personal injuries, in which the complaint alleges certain items of special damages, and prays for a sum in excess thereof, it is proper to allow a trial amendment alleging general damages in a sum equal to the difference between the special damages and the sum prayed for, where proof of the general damages was admitted without objection, and the defendant did not move for a continuance on making its claim of surprise: *Lobb v. Seattle etc. R. Co.*, 48 Wash. 238.

IN PARTICULAR CASES.—An action for money had and received is not supported by proof that plaintiff had paid defendant certain sums of money on a written contract for conveyance of land, which had been rescinded by plaintiff: *Distler v. Dabney*, *supra*.

Where complainant seeks a recovery for goods sold defendants as partners, it is error to admit evidence to show, and to instruct the jury on the theory, that defendants were a corporation: *Kelly v. Johnson*, 5 Wash. 785.

Where the complaint in an action on a note alleges that plaintiff had loaned the defendant money, there is no variance when the evidence shows that the money had been loaned by plaintiff's wife, but was in fact his money: *Piling v. Morse*, 5 Wash. 797.

In an action to recover land, and set aside defendant's deed, plaintiff declared specially on a defective deed, averring title thereunder, but upon the trial introduced over defendant's objection a prior deed to remedy such defective deed. Held, no error, since, the case being an equitable one, the particularity of pleading made use of by plaintiff was not necessary; the liberality of the rule in regard to amendments permitted plaintiff to put in the evidence and amend his pleadings to conform thereto on proper terms, and it appeared that defendant was denied no indulgence that he asked by reason of being misled by the pleadings: *Carson v. Railsback*, 3 W. T. 168.

Where a complaint described a judgment as rendered for costs in the sum of \$19.30, and the judgment offered was rendered for \$18.30, the defendant is not misled and the variance is immaterial: *Ritchie v. Carpenter*, 2 Wash. 512.

The variance is immaterial when the complaint describes a city warrant for street improvement as Stevens street warrant "A, 896," and the proof shows that its number should be "A, 893," when the

amounts, date of issue, rate of interest and payee correspond with the allegations: *Roe v. Cutter*, 4 Wash. 611.

Proof that services were performed and a bill rendered therefor, which was stated to be satisfactory, sustains a recovery either on contract or on a quantum meruit for the services: *Wright v. Lake*, 48 Wash. 469.

EVIDENCE HELD ADMISSIBLE OR NOT ADMISSIBLE UNDER ALLEGATIONS IN INSTRUMENTS: See 2 Remington's Digest, p. 2298, § 170; *Washington Bridge Co. v. Improvement Co.*, 12 Wash. 272; *Skagit R. & L. Co. v. Cole*, 2 Wash. 57; *Stephens v. Spokane*, 11 Wash. 41; *Everett Land Co. v. Maney*, 16 Wash. 552; *Interstate Sav. & Loan Assn. v. Knapp*, 20 Wash. 225; *Carroll v. Caine*, 27 Wash. 402. An indefinite memorandum of a settlement between parties, making no reference to a wheat transaction in controversy, is inadmissible to show a settlement when none was pleaded: *Wees v. Page*, 47 Wash. 213. Under allegations regarding fraud: See *Rathbone, Sard & Co. v. Frost*, 9 Wash. 162; *Cade v. Head Camp, W. O. W.*, 27 Wash. 218; *McMullen v. Rousseau*, 40 Wash. 497.

Under allegations regarding title and ownership, see *Rogers v. Miller*, 13 Wash. 82; *Miller v. Lake In. Co.*, 27 Wash. 447; *Kemp v. Folsom*, 14 Wash. 16.

EVIDENCE HELD ADMISSIBLE OR NOT ADMISSIBLE UNDER AVERMENTS OF ANSWERS: See 2 Remington's Digest, p. 2299, § 173; *Corliss v. Dunning*, 8 Wash. 332; *Brown v. Seattle City R. Co.*, 16 Wash. 465; *Kennedy v. School Dist. No. 1*, 20 Wash. 399; *Wasmund v. Harm*, 36 Wash. 170; *United States, Use etc. v. Aetna Indemnity Co.*, 40 Wash. 87; *Wheeler v. Aberdeen*, 45 Wash. 63.

EVIDENCE HELD ADMISSIBLE UNDER GENERAL ISSUE OR GENERAL DENIALS: See 2 Remington's Digest, p. 2299, § 174. Any evidence which tends to disprove the allegations of the complaint: *Penter v. Staight*, 1 Wash. 365; *Fairhaven v. Cowgill*, 8 Wash. 686; *Nichols v. Opperman*, 6 Wash. 618; *Trumbull v. Jackman*, 9 Wash. 524; *Kellogg v. Scheuerman*, 18 Wash. 293; *Peterson v. Seattle Traction Co.*, 23 Wash. 615; *Bay View Brew. Co. v. Grubb*, 24 Wash. 163; *Lund v. St. Paul M. & M. R. Co.*, 31 Wash. 286; *Armstrong v. Musser Lumber & Mfg. Lum. Co.*, 43 Wash. 584; *Parker v. Dacres*, 1 Wash. 190; *Carkeek v. Boston Nat. Bank*, 16 Wash. 399; *Chrast v. O'Connor*, 41 Wash. 360.

EVIDENCE HELD INADMISSIBLE UNDER GENERAL DENIAL: *Griffith v. Wright*, 21 Wash. 494; *Nunn v. Jordan*, 31 Wash. 506; *Murray v. Okanogan Livestock etc. Co.*, 12 Wash. 259; *Buddress v. Schafer*, 12 Wash. 310; *McKay v. Elwood*, 12 Wash. 579; *Bruce v. Foley*, 18 Wash. 96.

One who waives a defense set out in her answer, and is permitted to offer proof of another defense which she fails to establish, and thereupon seeks relief under the

defense that had been waived, cannot object that the court went out of the issues in the cause in deciding equities to which the parties appeared to be entitled under the evidence: *Budlong v. Budlong*, 48 Wash. 645.

Defenses to be specially pleaded: See 2 *Remington's Digest*, p. 2301, § 178; *Maitland v. Zanga*, 14 Wash. 92; *Taylor v. Modern Woodmen of America*, 42 Wash. 304.

Under a general denial and plea of contributory negligence evidence as to plaintiff's intoxication is admissible: *Carter v. Seattle*, 19 Wash. 597.

A bill of particulars limits the proof to the items charged therein: *Seattle v. Parker*, 13 Wash. 450; *Dudley v. Duval*, 29 Wash. 528; *Howells v. North Amer. Trans. & Trad. Co.*, 24 Wash. 689; *American Copper etc. Works v. Galland-Burke etc. Co.*, 30 Wash. 178; but see *Spokane & Idaho Lum. Co. v. Loy*, 21 Wash. 501.

In an action on a conditional fire insurance policy, declared upon as unconditional, there is no reversible error, where the evidence shows the fire not to have been of the excepted classes, and the statute as to variances was not complied with: *Pencil v. Home Ins. Co.*, 3 Wash. 485.

Plaintiff should be nonsuited in an action upon a fire insurance policy in which the complaint declares upon a contract for insurance upon a certain building to cover \$500, when the evidence shows that the contract was for a policy in the sum of \$600 upon two buildings upon the same lot: *Waldron v. H. M. Ins. Co.*, 9 Wash. 534.

An allegation that a water-closet is out of repair, without any attempt to allege defect in the original construction, does not furnish the foundation for proof of defective construction: *Bernhard v. Reeves*, 6 Wash. 424; *Imhoof v. Northwestern Lum. Co.*, 43 Wash. 387.

On the question of undue influence, where there is no allegation nor testimony that defendants had solicited an attorney who drew the deed and contract to use his influence with plaintiff to make the deed, defendants' offer to prove that they had not solicited said attorney is immaterial: *Kennedy v. Currie*, 3 Wash. 442.

In an action to recover commissions on sale of real estate, defendants may, under the general issue, show that plaintiff was in the employ of the purchasers, and receiving compensation from them, in order to discredit his testimony as to the making of a contract pleaded: *Dillon v. Folsom*, 5 Wash. 439.

Under an allegation in a complaint for damages that the defendant so negligently conducted itself in the management of its car that, through its negligence and its servants in driving the car, plaintiff was injured, it is admissible to prove defects in the brake-rod of the car: *Cogswell v. West St. & N. End etc. Ry. Co.*, 5 Wash. 46.

In an action by a servant for injuries received by the negligence of his master where the complaint alleges that he left his work to go to the water-closet and was injured while on the way there, and the proof shows that he was on his way to his work in the morning, but had not yet begun work when injured, there is no material variance: *Sayward v. Carlson*, 1 Wash. 29.

The fact that the plaintiff was unable to prove the particular cause of a collision of street-cars, as set forth in her complaint, does not deprive her of the benefit of the presumption that negligence is presumed from the happening of a collision, since that was alone the substance of the issue, and the particular cause alleged need not be proved: *Lobb v. Seattle, Renton & Southern R. Co.*, 48 Wash. 238.

Proof cannot be limited to allegations which are mere conclusions of the pleader, where there are other sufficient allegations in the complaint: *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324; *Mercier v. Travelers' Ins. Co.*, 24 Wash. 147.

Proof of special damages is inadmissible when no allegation as to such damages is made in the pleadings: *Meeker v. Gardella*, 1 Wash. 139; *Kaufman v. Tacoma etc. R. Co.*, 11 Wash. 632; *Stowe v. La Conner Trad. & Transp. Co.*, 39 Wash. 28.

Where the evidence of defects in an engine, and also evidence of the character of the work and wages received by plaintiff prior to a collision in which he was injured, were admitted under allegations respectively of gross negligence on the defendant's part and of permanent disability from injury suffered, it was held that the evidence was admissible that such allegations were broad enough to cover the testimony, and if not, no ground of exception would lie under this section: *N. P. R. Co. v. O'Brien*, 1 Wash. 599.

In a suit to foreclose a mechanic's lien against the "Installment Building & Loan Company" for materials furnished the corporation itself, it is an immaterial variance that the notice of lien offered in evidence describes the corporation as the "Installment Building & Loan Association": *I. B. & L. Co. v. Wentworth*, 1 Wash. 467.

But a notice is insufficient which states that a lien is claimed "upon that certain wooden frame building situated upon the S. E. corner of Tenth and J street, upon lot 12 in block 4016," when the proof shows the materials were furnished in the construction of a dwelling-house on lots 1 and 2 in block 3919: *Mt. Tacoma Mfg. Co. v. Cultum*, 5 Wash. 294.

After verdict, when no motion has been made to make the pleadings more definite and certain, they will be liberally construed to sustain the judgment: *Johnson v. Leonhard*, 1 Wash. 564; *Livesley v. O'Brien*, 3 Wash. 546.

In an action based upon promissory notes which had been signed upon their face by the defendant as maker, it is not a variance

to put such notes in evidence, although containing an indorsement over the signature of individuals who had not been made parties to the effect that "we hereby severally join in the execution of the within notes as original makers thereof and waive presentation and protest notice": *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349. See, also, *Anderson v. New York Life Ins. Co.*, 34 Wash. 616.

Variance between allegation and proof: See 2 *Remington's Digest*, pp. 2301-2305, §§ 181-191.

A variance regarding a fact not properly in issue is immaterial: *State ex rel. Olson v. Allen*, 14 Wash. 684.

An immaterial variance between the pleadings and proof will not be considered or the pleading will be treated as amended: *Mercier v. Travelers' Ins. Co.*, 24 Wash. 147; *Irbv v. Phillips*, 40 Wash. 618.

The pleadings may be amended at the trial if there is no material change in the issues and the adverse party has not been surprised or prejudiced: *Wolf v. Hemrich Bros. Brew. Co.*, 28 Wash. 187; *McClammy v. Spokane*, 36 Wash. 339; *Leghorn v. Review Pub. Co.*, 31 Wash. 627; *State v. Lorenz*, 22 Wash. 289; *Westland Pub. Co. v. Royal*, 36 Wash. 399; *McDonough v. Great Northern R. Co.*, 15 Wash. 244; *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324; *Smith v. Michigan Lum. Co.*, 43 Wash. 402; *Gritman v. U. S. Fidelity etc. Co.*, 41 Wash. 77; *Helbig v. Grays Harbor Elec. Co.*, 37 Wash. 130; *Morrissey v. Faucett*, 28 Wash. 52; *Stern v. Sill*, 39 Wash. 557; *Whitney v. Priest*, 26 Wash. 48; *Van Behren v. Rettkowski*, 37 Wash. 247; *State ex rel. Matson v. Superior Court*, 42 Wash. 491; *Cummings v. Weir*, 37 Wash. 42. Or a new trial may be granted: See *Ernst v. Fox*, 26 Wash. 526. Where the defendant's demurrer to the complaint is overruled and he stands thereon, the judgment must be limited to the demand in the complaint, and amendments to conform to the proof cannot be made: *State v. Pittenger*, 37 Wash. 384.

Variance between pleadings and proofs as to performance of contracts will be held immaterial if the adverse party has not been misled to his prejudice: *Bigelow v. Scott*, 2 W. T. 378; *Olson v. Snake River Val. R. Co.*, 22 Wash. 139; *Childs Lum. & Mfg. Co. v. Page*, 28 Wash. 128; *Dudley v.*

Duval, 29 Wash. 528; *Meals v. De Soto Placer Min. Co.*, 33 Wash. 302; *Griffith v. Ridpath*, 38 Wash. 540; *Bringgold v. Spokane*, 27 Wash. 202.

Where the proof offered would not support the theory of the complaint, the variance is material: *Koyukuk Min. Co. v. Van de Vanter*, 30 Wash. 385; *Butler v. Carvin*, 33 Wash. 621; *Albin v. Seattle Elec. Co.*, 40 Wash. 51; *Jacobs v. First Nat. Bank*, 15 Wash. 358; *Price Baking Powder Co. v. Rinear*, 17 Wash. 95; *Scholey v. De Mattos*, 18 Wash. 504; *Dickey v. Northern Pac. R. Co.*, 19 Wash. 350.

Partial failure of proof as to full performance of contracts or damages claimed in pleading may be treated as immaterial variance: *Washburn v. Case*, 1 W. T. 253; *Olson v. Snake River Valley R. Co.*, 22 Wash. 139; *Sterrett v. Northport Min. & Smelt. Co.*, 30 Wash. 164.

Variance to be material must have misled the adverse party to his prejudice: *Denny v. Saywood*, 10 Wash. 422; *Mercier v. Travelers' Ins. Co.*, 24 Wash. 147; *Dudley v. Duval*, 29 Wash. 528; *Olson v. Snake River Valley R. Co.*, 22 Wash. 139; *Grissom v. Hofius*, 39 Wash. 51.

Failing to prove an unnecessary allegation is not a variance: *Freeman v. Gloyd*, 43 Wash. 607.

Variance between pleadings and proofs as to parties or persons is immaterial if adverse party has not been misled or prejudiced: *Post-Intelligencer Pub. Co. v. Harris*, 11 Wash. 500; *Bignold v. Carr*, 24 Wash. 413; *Dennis v. First Nat. Bank*, 33 Wash. 161; *Vulcan Iron Works v. Burrell Constr. Co.*, 39 Wash. 319.

In an action for slander in uttering of a man that he has "another wife and child back east," in effect charging him with the crime of bigamy, it is a fatal variance to prove that "he has a wife and child back east and is living with another woman here," which would only constitute the crime of adultery; since the old rule that in slander a variance is fatal has not been relaxed to such an extent as to allow allegation as to one crime and proof of another: *Bleitz v. Carton*, 49 Wash. 545.

Proof of a conditional statement of slanderous words does not support an allegation of a positive or direct statement: *Bleitz v. Carton*, 49 Wash. 545.

§ 300. (4950.) Immaterial Variance, Effect of.

When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. [L. '54, p. 144, § 67; Cd. '81, § 106; 2 H. C., § 218.]

See notes to last section.

Cited in 22 Wash. 142; 26 Wash. 528; 38 Wash. 544; 40 Wash. 621.

§ 301. (4951.) Failure of Proof.

When, however, the allegation of the cause of action or defense to which the proof is directed is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof. [L. '54, p. 144, § 68; Cd. '81, § 107; 2 H. C., § 219.]

See notes to § 299, *supra*.

Cited in 1 Wash. 543; 1 Wash. 545; 22 Wash. 143; 26 Wash. 553; 28 Wash. 190; 29 Wash. 543; 38 Wash. 661. See 2 Remington's Digest, p. 2305, § 191.

The rule that the allegata and probata should correspond prevails under the code as well as under the common law: *Marsh v. Wade*, 1 Wash. 538, 541; *Carson v. Railsback*, 3 W. T. 168.

An action for money had and received is not supported by proof that plaintiff had paid defendant certain sums of money upon a written contract which had been rescinded by plaintiff: *Distler v. Dabney*, 3 Wash. 200; or upon a contract for payment of money in consideration of the surrender of an interest in real estate: *Clark v. Sherman*, 5 Wash. 681; following *Distler v. Dabney*, *supra*; and plaintiff cannot recover in an action improperly brought as one for money had and received, although the real cause of action may be disclosed by the answer and reply: *Clark v. Sherman*, *supra*.

On a complaint alleging an express contract between plaintiff and defendant, no recovery can be had on proof of a contract between defendant and a third party for plaintiff's benefit: *Haynes v. T. O. & G. H. R. Co.*, 7 Wash. 211, 213.

In an action on notes given for purchase price of land, although evidence to show a tender of a deed would have been vain and useless, yet where plaintiff has not pleaded an excuse for tender, he cannot urge the uselessness of complying with the obligation on his part: *Underwood v. Tew*, 7 Wash. 297.

In an action against partners for goods sold and delivered, it is error to admit evidence to show, and to instruct the jury on the theory, that defendants were a corporation: *Kelly, Dunn & Co. v. Johnson*, 5 Wash. 785.

In a suit against a carrier to recover damages for wrongful ejection of a passenger from a vessel, in which he pleads the contract of carriage, breach and circumstances of aggravation causing additional injury, a failure to prove the contract is not a variance, but a total failure of proof: *Magee v. O. R. & N. Co.*, 46 Fed. (Wash.) 734.

Proof of an illegal consideration for a note cannot be given under the allega-

tion of no consideration, but the facts showing the illegality must be pleaded: *Lyts v. Keevey*, 5 Wash. 606.

In an action of replevin by a mortgagee to recover the mortgaged property which had been attached while in his possession by creditors of the mortgagor, it was error, after excluding the mortgage by reason of invalidity, to treat the transaction brought about by the mortgage as a pledge, and admit oral testimony to establish the relation of pledgor and pledgee: *Marsh v. Wade*, 1 Wash. 538.

In an action of replevin, where personal property had been mortgaged to plaintiffs by third parties afterward, but prior to the maturity of the debt, delivered by the mortgagors to the defendant, it is a failure of proof, and not a mere variance, curable by amendment, to prove the existence of the mortgage in support of the allegations of plaintiff's ownership: *Silsby v. Aldridge*, 1 Wash. 117.

In an action for the possession of personal property, where plaintiff claims as owner under a bill of sale from a third party, and the proof shows that he is merely a mortgagee, he cannot recover: *Kerron v. M. P. L. & M. Co.*, 1 Wash. 241.

There is a marked distinction between an immaterial variance and an absolute failure of proof, since the former may be cured by amendment while the latter is fatal to the action or defense: *Dudley v. Duval*, 29 Wash. 528; *Malloy v. Benway*, 34 Wash. 315; *Weber v. Snohomish Shingle Co.*, 37 Wash. 576.

Where the complaint alleges a contract between the plaintiff as one party, and the defendants jointly as the other parties, and the proof showed a contract between the defendant agent as one party, and his two employers jointly, as the other party, there is a fatal variance amounting to a failure of proof under this section: *Hartman v. Belden*, 38 Wash. 655.

In an action for slander in charging a man with being a bigamist, proof that he did not actually call him a bigamist, but said he had a wife back east and was living with another woman here, is not only a total failure of proof, but amounts to a positive denial of the allegation: *Bleitz v. Carton*, 49 Wash. 545.

§ 302. (4952.) Variance in Action to Recover Personal Property.

Where the plaintiff in an action to recover the possession of personal property, on a claim of being the owner thereof, shall fail to establish on trial such ownership, but shall prove that he is entitled to the possession thereof by virtue of a special property therein, he shall not thereby be defeated of his action, but shall be permitted to amend, on reasonable terms, his complaint, and be entitled to judgment according to the proof in the case. [L. '57, p. 10, § 11; L. '69, p. 27, § 106; Cd. '81, § 108; 2 H. C., § 220.]

See notes to last section.

Cited in 1 Wash. 119; 16 Wash. 48.
In an action of replevin the defendant may, under a general denial of plaintiff's title and right of possession, show title to the property in himself: *Harvey v. Ivory*, 35 Wash. 397.

§ 303. (4953.) Amendments, Allowance of.

The court may, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this code, and may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. [L. '54, p. 144, § 69; L. '75, p. 11, § 20; Cd. '81, § 109; L. '91, p. 106, § 3; 2 H. C., § 221.]

Superseded so far as concerns the vacation of a divorce decree by § 235, supra: *Metler v. Metler*, 32 Wash. 494.

See supra, § 250, amendments to notices.

See infra, § 307, and notes, what defects may be disregarded.

See infra, § 472, vacation of judgments.

See supra, § 245, opening default in certain cases.

See infra, § 464, causes for vacation and modification of judgments.

See infra, § 677, amendments in attachment proceedings.

For provision relating to amendments on appeal from justices' courts, see infra, § 1788.

Cited in 3 Wash. 709; 4 Wash. 505; 4 Wash. 763; 8 Wash. 594; 10 Wash. 310; 11 Wash. 73; 12 Wash. 664; 17 Wash. 357; 17 Wash. 566; 17 Wash. 601; 18 Wash. 211; 18 Wash. 390; 18 Wash. 842; 21 Wash. 640; 23 Wash. 251; 25 Wash. 656; 25 Wash. 669; 28 Wash. 165; 31 Wash. 185; 31 Wash. 254; 32 Wash. 174; 32 Wash. 376; 32 Wash. 497; 35 Wash. 358; 35 Wash. 361; 35 Wash. 687; 37 Wash. 226; 48 Wash. 430; 50 Wash. 374; 51 Wash. 465, 677.

As to the amendment of pleadings in general, see 2 Remington's Digest, pp. 2276-2286, §§ 99-128.

The act of February 26, 1891, entitled "An act relating to pleadings in civil actions, and amending §§ 76, 77 and 109 of the code of Washington of 1881," does not conflict with Art. 2, § 19, of the constitution, although § 109 of the Code of 1881 concerns the time within which courts may vacate judgments: *Marston v.*

Humes, 3 Wash. 267, 269; overruling *Harland v. Territory*, 3 W. T. 131.

The limitation of time contained in the prior law is entirely omitted in the amendment: *Id.*

AMENDMENTS are allowed, in the discretion of the court, upon such terms as shall seem just: *Williams v. Miller*, 1 W. T. 88; *Silsby v. Frost*, 3 W. T. 388.

The power of the court to allow amendments to pleadings is largely discretionary, and its exercise will not be reviewed on appeal, unless the discretion has been abused, and especially not where ample opportunity has been offered to meet and defend against the amended pleading: *Silsby v. Frost*, supra; *Hulbert v. Brackett*, 8 Wash. 438; *Morgan v. Morgan*, 10 Wash. 99; *Belles v. Miller*, 10 Wash. 259; *Seward v. Derickson*, 12 Wash. 225; *McDonough v. Great Northern R. Co.*, 15 Wash. 244; *Ogle v. Jones*, 16 Wash. 319; *West Seattle Land & Imp. Co. v.*

Herren, 16 Wash. 665; *Seattle v. Baxter*, 20 Wash. 714; *Hart Lum. Co. v. Rucker*, 20 Wash. 383; *Long v. Eisenbeis*, 23 Wash. 556; *Daly v. Everett Pulp & P. Co.*, 31 Wash. 252; *Thomas v. Price*, 33 Wash. 459; *Cummings v. Weir*, 37 Wash. 42; *Helbig v. Grays Harbor Elec. Co.*, 37 Wash. 130; *Davis v. Seattle*, 37 Wash. 223; *Van Behren v. Rettkowski*, 37 Wash. 247; and for a proper exercise of such discretion in allowing or refusing such amendments, see, also, *Balch v. Smith*, 4 Wash. 497; *Maney v. Hart*, 11 Wash. 67; *Price v. Scott*, 13 Wash. 574; *Price Baking Powder Co. v. Rinear*, 17 Wash. 95.

If an amended complaint is filed, any error of the court in ruling upon the original complaint is thereby waived: *Bell v. Waudby*, 4 Wash. 743; but where a demurrer to a pleading is improperly sustained and an exception taken thereto the objection is not waived by the filing of an amended complaint: *Wood v. Mastick*, 2 W. T. 64; and opportunity should be given to amend if the pleading is amendable: *Renton v. St. Louis*, 1 W. T. 215.

When the court directs the amendment of a pleading a copy thereof need not be served, unless expressly ordered by the court: *Williams v. Miller*, *supra*.

The refusal of the trial court to allow an amendment substituting entirely new parties plaintiff is not an abuse of discretion: *Liebmann v. McGraw*, 3 Wash. 520. But see *Zeimantz v. Blake*, 39 Wash. 6; *Davis v. Seattle*, 37 Wash. 223.

The nature and character of a proper amendment of pleadings must be made to clearly appear to the appellate court before it will review the action of the lower court in refusing to allow the same: *Newberg v. Farmer*, 1 W. T. 182.

Under the statute permitting amendments to pleadings, it is within the discretion of the court to permit the filing of an amended answer on the merits after a finding against defendant, setting up the pendency of another suit: *State v. Superior Court*, 9 Wash. 366; or allowing the setting up of the statutes of limitation in an amended reply before trial: *Thomas v. Price*, 33 Wash. 459; or allowing amendments after reversal and remand for further proceedings: *Interstate Sav. & L. Assn. v. Knapp*, 20 Wash. 225; *Richardson v. Carbon Hill Coal Co.*, 18 Wash. 368.

An omission to plead in a reply a rescission of a contract, which does not mislead the defendant, nor affect his substantial rights, may be cured by amendment at any stage of the proceedings: *Ankeny v. Clark*, 1 Wash. 549; see *Distler v. Dabney*, 3 Wash. 200; *Osten v. Weinhill*, 10 Wash. 333.

The refusal of the court to permit a defendant to amend its answer so as to set up another defense, after plaintiff

had rested, which if granted would have necessitated a continuance to procure testimony to meet the new defense, is not an abuse of discretion: *Skagit R. & L. Co. v. Cole*, 2 Wash. 57.

A suitor may be required on motion to conform his statement of fact to the rules of good pleading, and if he refuse, may be turned out of court: *Chambers v. Hoover*, 3 W. T. 107.

The liberality of the rule regarding amendments permits the evidence to be put in and an amendment of pleadings to conform thereto, on proper terms: *Carson v. Railsback*, 3 W. T. 168; see *Carson v. Dahms*, 3 W. T. 176, 178; *Carson v. Chandler*, 3 W. T. 177; *Leaman v. Thompson*, 43 Wash. 579.

In an action between former partners, upon an alleged promise to pay whatever amount was overdrawn on dissolution of the partnership, it is an abuse of discretion to refuse leave to amend the complaint so as to ask an accounting, where it appears at the trial that no such promise was made as alleged, but that the parties had been equal partners and that defendant had overdrawn a sum that could be determined only upon an accounting; since a party is not to be turned out of court if entitled to any relief: *Maitland v. Purdy*, 49 Wash. 575.

An order setting aside a homestead for the use of a widow and children is a final order which can be set aside only by motion for a new trial or petition on statutory grounds, under this section and § 464, and cannot be vacated on petition of the widow on the mere allegation that the property was community property and that she was entitled to the exclusive possession of the same: *In re McKeever's Estate*, 48 Wash. 429.

Where, without objection, evidence is taken on the trial upon matters which ought to be affirmatively pleaded in defense, and the cause submitted for decision upon such evidence, the court should disregard the defect in the pleadings, or order an amendment to conform to the evidence: *Galliher v. Cadwell*, 3 W. T. 501.

The ordering of an amendment of the complaint on the trial, because of a misnomer of plaintiff, is harmless error, where there is no inconsiderable delay or expense: *Lee v. Lee*, 3 Wash. 236.

It is not an abuse of discretion for the court to allow an answer to be amended at the trial, although three answers had already been filed in the case: *Barnes v. Packwood*, 10 Wash. 50.

The amendment of a complaint during the progress of a trial rests in the discretion of the court and when it appears that no different answer is required, that defendant is not taken by surprise and does not ask time to answer the new pleading, its allowance is not an abuse of

discretion: *Hulbert v. Brackett*, 8 Wash. 438; for abuse of discretion, see *Gould v. Gleason*, 10 Wash. 477; *Norris Safe & Lock Co. v. Clark*, 28 Wash. 268; *McCleary v. Willis*, 35 Wash. 676; *Carstens & Earles v. Hine*, 39 Wash. 498.

If the nature of the answer and proof thereunder clearly indicate that it was the intention to plead a three years' statute of limitations as a bar, and by mistake the pleading had specified a two years' limitation, it is not an abuse of discretion, after the hearing of the cause, to allow an amendment correcting the mistake although the equities be in favor of plaintiff: *Morgan v. Morgan*, 10 Wash. 99.

An affidavit and notice of application to amend an affirmative defense are not necessary where it appears that a mistake was made in drawing the first answer: *Cooke v. Cain*, 35 Wash. 353; *Daly v. Everett Pulp & Paper Co.*, 31 Wash. 252.

In an action upon a note payable on demand in case the maker transfers his real estate before maturity, an amended complaint alleging the transfer of his real estate is not inconsistent with the original complaint alleging a transfer of "certain" of his real estate, and is allowable: *Love-day v. Parker*, 50 Wash. 260.

Terms and conditions as to amendments are within discretion of court: *Williams v. Miller*, 1 W. T. 88; *Silsby v. Frost*, 3 W. T. 388; *Morrissey v. Faucett*, 28 Wash. 52.

Where plaintiff relies upon on express admission in the answer and insists upon claiming a surprise, a refusal to allow an amendment except upon condition of a continuance, is within the discretion of the court: *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346. It is error to refuse a continuance on allowing a trial amendment changing the issues or alleging additional matter to surprise of defendant: *Gould v. Gleason*, 10 Wash. 476; *Wright v. Northern R. Co.*, 38 Wash. 64; *Eldridge v. Young America etc. Min. Co.*, 27 Wash. 297.

The sufficiency of defendant's excuse for delay in filing answer to a complaint after the setting aside of the original judgment therein is a matter resting largely in the discretion of the trial court for determination: *Woodham v. Anderson*, 32 Wash. 500.

An affidavit in supplemental proceedings may, with permission, be amended, to conform to the original proceeding: *Murne v. Schwabacher*, 2 W. T. 130.

If a complaint has been amended twice, the refusal to grant a third amendment is not an abuse of discretion, especially when the application is not accompanied with the proposed amended pleading: *Balch v. Smith*, 4 Wash. 497; *Ross v. Howard*, 25 Wash. 1; *Harris v. Cowles*, 38 Wash. 331.

Amendments should be liberally allowed in appeals from justices of the peace, so long as the issue in the justice's court be not made different thereby. Amendments should, however, be allowed, in the discretion of the court, to promote the ends of justice, and the refusal of such an amendment is error: *Newberg v. Farmer*, *supra*.

In a case appealed from a justice of the peace to the superior court, it is discretionary with the court to allow amendments to the pleadings used before the justice, and prohibition will not lie to prevent such action: *State v. Superior Court*, 3 Wash. 705.

A claim in a complaint of a homestead in the premises may be amended by alleging subsequent performance of acts required to perfect the same: *Ross v. Howard*, 25 Wash. 1.

An amendment introducing new elements of damages in addition to those originally claimed is properly denied: *Anderson v. Harper*, 30 Wash. 378.

An amendment to the complaint is proper where it does not affect the material issues involved, although contradictory of the complaint: *Hadevis v. Nutting*, 43 Wash. 40.

Upon sustaining a demurrer to a petition and granting leave to amend, the court is not thereby precluded from overruling a demurrer to an amended petition stating substantially the same facts with some additional averments: *Murphy v. Murphy*, 43 Wash. 142.

VACATING JUDGMENTS.—A motion to vacate a judgment is directed to the discretion of the trial court, and its action in passing thereon will not be reversed, unless showing made therefor leaves no room for the exercise of discretion by it: *Livesley v. O'Brien*, 6 Wash. 553.

A court will not open a judgment regularly entered, although it may be through mistake, unless it appears that the judgment was wrongful or oppressive: *N. P. etc. Ry. Co. v. Black*, 3 Wash. 327.

Where judgment has been taken against defendant by default for failure to answer, it should be vacated when it appears that he has a meritorious defense and was misled by a statement of plaintiff's attorney, that the cause would be tried several months later than the time at which default was taken: *Bast v. Hyson*, 6 Wash. 170.

It is not an abuse of discretion for a trial court to deny a motion to vacate a judgment by default, when the only ground claimed for relief is that defendant's counsel was prevented from answering, on account of absence from the city: *Sanborn v. Furniture Mfg. Co.*, 5 Wash. 150; nor to deny a motion to vacate a judgment, when the affidavits in support of the motion show only a want of atten-

tion to the case by counsel and client: *Myers v. Lundrum*, 4 Wash. 762.

Mistake of an attorney in noting the day in which answer must be filed, when a summons is handed him by a client, owing to which mistake judgment by default is taken against his client for want of answer, will warrant the court in setting aside the default: *Reitmeir v. Seigmund*, 13 Wash. 624.

This section authorizes a trial court to vacate its own order denying a new trial, taken against a party through mistake, inadvertence, surprise or excusable neglect: *Little Bill v. Dyslin*, 51 Wash. 675.

An order vacating a judgment will not be reversed on the technical ground that it was granted after denial of a former motion for such order, when on the same grounds, when the first motion should have been granted: *Clein v. Wandschneider*, 14 Wash. 257.

Under § 109 of the Code of 1881, of which this section is an amendment, it was held that an order vacating a judgment, whether at the same term or within five months thereafter, is not appealable: *Lilienthal v. Wright*, 1 Wash. 1; *Gower v. Gower*, 1 Wash. 16; see contra, *N. P. etc. Ry Co. v. Black*, 3 Wash. 327.

In *Freeman v. Ambrose*, 12 Wash. 1, it is held that an order setting aside a default is not appealable.

An order of the court granting a motion to vacate a default judgment for \$500 upon condition that the defendant would give bond in the sum of \$2,000, to secure the payment of any judgment that might be rendered against it, is not an abuse of the discretion vested in the court in such cases by this section, when it appears that the object of the defendant was to postpone action for the purpose of defeating the judgment on execution, and there is no showing of inability on the part of defendant to furnish the bond: *Halter v. Spokane Soap Works Co.*, 12 Wash. 662.

As to vacation of judgments, when taken through mistake, surprise, or inadvertence, see 2 *Remington's Digest*, p. 1602, §§ 110-112.

See further as to vacation of judgments: *Chehalis County v. Ellingson*, 21 Wash. 638; *Spokane & Idaho Lumber Co. v. Stanley*, 25 Wash. 653; *Griffith v. Maxwell*, 25 Wash. 658; *Spokane Co. v. Colfelt*, 30 Wash. 628; *Dane v. Daniel*, 28 Wash. 156; *Denton v. Merchants Nat. Bank*, 18 Wash. 387; *Hull v. Vining*, 17 Wash. 352; *Hart Lumber Co. v. Rucker*, 17 Wash. 600.

AMENDMENT OF PLEADINGS AT TRIAL: See 2 *Remington's Digest*, p. 2278, § 104, and cases cited. The amendment of a complaint to correspond to the proof is a matter within the discretion of the court, and will only be disturbed when it appears that injustice was there-

by done to defendant: *Seward v. Derrickson*, 12 Wash. 225.

It is within the discretion of the court to permit the amendment of a complaint after the close of plaintiff's testimony, and it is not an abuse of such discretion when the amendment is not of such a character as to materially change the cause of action, nor such as to occasion surprise or place opposing counsel at a disadvantage: *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244; following *Hulbert v. Brackett*, 8 Wash. 438.

Refusal to allow defendant to amend his answer upon application therefor made after the plaintiff's testimony has been introduced, is not an abuse of the court's discretion: *Price v. Scott*, 13 Wash. 574.

Denial of defendant's application to file an amended answer, at the trial, setting up a counterclaim, is not an abuse of discretion when the defendant had once waived the filing of it: *Maney v. Hart*, 11 Wash. 67.

In an action to recover for labor performed and material furnished to defendant in the driving of a certain number of piles, it is not error to permit plaintiff, at the time of going to trial, to amend his complaint, over the objection of defendant, by striking therefrom the claim for materials furnished, as modification of the complaint imposes no additional burden on defendant in conducting his defense, nor does it materially change the issues so as to require further preparation for trial: *Id.*

Where, after trial commenced, leave is granted to file a supplemental answer setting up a counterclaim, it is not error to require the trial to proceed, after the court had announced that a demurrer would be sustained, it being understood that it was so traversed by oral demurrer: *Veysey v. Thompson*, 49 Wash. 571.

An objection to the amendment of a complaint on the trial, so as to show recovery of a judgment in the supreme court of another state instead of in the circuit court, is waived by an admission that there is a judgment-roll against the party objecting and that it is a proper exemplification of the judgment rendered in the supreme court of the state, when such admission is made in connection with a demand for opening and closing the case before the jury on other issues: *Edmunds v. Black*, 13 Wash. 490.

A trial amendment to show venue in replevin is within the discretion of the court: *Standard Furniture Co. v. Anderson*, 38 Wash. 582.

Where the court withdraws the case from the jury for the purpose of an accounting the pleadings may be considered amended: *Goupille v. Chaput*, 43 Wash. 702.

It is not necessary to amend where the issue was raised by denials: *Vulcan Iron Works v. Burrell Const. Co.*, 39 Wash. 319.

It is an abuse of discretion to refuse leave to set up a defense omitted by mistake: *Van Lehn v. Morse*, 16 Wash. 672.

Where a demurrer to a defense has been sustained, and no amendment is offered until the trial, it is not an abuse of discretion to refuse to allow a trial amendment, when the adverse party makes a claim of surprise: *United States, Use etc. v. Aetna Indem. Co.*, 40 Wash. 87.

No abuse of discretion appears where application to amend was made several days before the trial, and no request for a continuance was made: *Shine v. Culver*, 42 Wash. 484.

The denial of a nonsuit is not such surprise as warrants an amendment to the answer: *Vulcan Iron Works v. Burrell Const. Co.*, 39 Wash. 319.

It is not error to refuse to allow an amendment immaterial to the issue: *Tebbetts v. Northern Commercial Co.*, 36 Wash. 599.

An application by defendants to amend their answer so as to question the individual liability of one of them, made at the commencement of a second trial after the cause had been once tried and appealed on the same pleadings, is a matter

peculiarly within the discretion of the superior court, and its action will not be disturbed in the absence of a showing of abuse of such discretion: *Bishop v. Averill*, 19 Wash. 490.

An amended answer, containing explanatory matters, may be allowed where plaintiff is not taken by surprise: *Brown v. Baruch*, 24 Wash. 572.

On motion for judgment against a garnishee, his answer will be treated as amended to meet the issue raised by the reply: *McAvoy v. Jennings*, 39 Wash. 109.

It is not prejudicial error to refuse to allow an intervener to file a cross-complaint setting up fraud when the cause has already been tried on that issue: *Biddle Pur. Co. v. Pt. Townsend Steel etc. Co.*, 16 Wash. 681.

A verbal amendment to the reply may be made at the trial where defendant is not prejudiced thereby: *Bergman v. London etc. Fire Ins. Co.*, 34 Wash. 398.

On an issue of adverse possession an amended reply stating new facts is permissible where the issue is not changed by such amendment: *Kline v. Stein*, 38 Wash. 124.

The filing of an amendatory demurrer is within the discretion of the trial court: *Roche v. Spokane County*, 22 Wash. 121; *McClaine v. Fairchild*, 23 Wash. 758.

§ 304. (4954.) Amendments, How Made.

When any pleading or proceeding is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended complaint, or otherwise, as the case may be. Such amended pleading shall be complete in itself, without reference to the original, or any preceding amended one. [L. '69, p. 27, § 108; Cd. '81, § 110; 2 H. C., § 222.]

Cited in 15 Wash. 612; 16 Wash. 357.

Mode of making amendment: See 2 Remington's Digest, p. 2280, § 106.

Under this section an amendment is effected by filing a new pleading: *Luce v. Luce*, 15 Wash. 608, 612.

When the court directs the amendment of a pleading under this section a copy need not be served unless the court so orders: *Williams v. Miller*, 1 W. T. 88.

An offer to amend must show what the

proposed amendment is: *Newberg v. Farmer*, 1 W. T. 182.

Amendment by interlineation allowed: See *Newman v. Buzard*, 24 Wash. 225.

A complaint to foreclose a logger's lien may be amended without permission by adding new parties plaintiff and defendant, and also asking damages for the eloignment of the logs, and a ruling of the lower court refusing to strike such an amended complaint will not be reversed: *Cross v. Dore*, 20 Wash. 121.

§ 305. (4955.) Informal Pleadings, Stricken Out—Amendment of.

Any pleading not duly verified and subscribed may, on motion of the adverse party, be stricken out of the case. When any pleading contains more than one cause of action or defense, if the same be not pleaded separately, such pleading may, on motion of the adverse party, be stricken out of the case. When a motion to strike out is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading; or if the motion be disallowed, and it appear to have been made in good faith, the court may, upon like terms, allow the party to plead over. [L. '69, p. 27, § 109; Cd. '81, § 111; 2 H. C., § 223.]

See supra, § 258, what complaint must contain.

See supra, § 259, subd. 5, grounds of defendant's demurrer.

See supra, § 264, what answer must contain.

See supra, § 286, striking irrelevant, redundant and indefinite matter.

See supra, § 275, striking sham, frivolous and irrelevant answers.

See supra, § 282, when verification may be omitted.

Cited in 40 Wash. 212.

The action of the trial court in striking out an answer, and giving judgment on the pleadings, because the answer had been once ruled as demurrable and had been again filed, after the sustaining of a demurrer to an amended answer, will not be disturbed, although such procedure may not be strictly regular: *Noyes v.*

Longhead, 9 Wash. 325; see *Hays v. Peavey*, 43 Wash. 163.

When the record shows that, subsequent to the denial of a motion to strike out the reply, a new complaint was filed, and a new chain of pleadings made, and no objection saved, the appellant cannot insist that the refusal to strike the reply was error: *Kratz v. Dawson*, 3 W. T. 100.

§ 306. (4956.) Defendant Designated by Fictitious Name, When.

When the plaintiff shall be ignorant of the name of the defendant, it shall be so stated in his pleading, and such defendant may be designated in any pleading or proceeding by any name, and when his true name shall be discovered, the pleading or proceeding may be amended accordingly. [L. '54, p. 144, § 70; L. '69, p. 28, § 110; Cd. '81, § 112; 2 H. C., § 224.]

See supra, § 229, process against unknown parties.

§ 307. (4957.) Harmless Errors Disregarded.

The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect. [L. '54, p. 144, § 71; Cd. '81, § 113; 2 H. C., § 225.]

See supra, § 250, effect of imperfect notice, amendment.

See supra, § 303, amendments generally.

See infra, § 412, vacating judgments by default.

Cited in 24 Wash. 221; 26 Wash. 342; 50 Wash. 363.

Objections and waiver: See 2 Remington's Digest, pp. 2305-2311, §§ 192-214.

While the venue in an action to recover specific personal property is jurisdictional, yet the omission to allege that it was within the county in which the action is brought is harmless and should be disregarded, when the sheriff's return on file in the cause shows the property to be within the jurisdiction: *Stiles v. James*, 2 W. T. 194; see *Eakin v. McCraith*, 2 W. T. 112.

Testing a complaint by motion instead of demurrer is harmless where the motion was in substance a demurrer and so treated: *Bethel v. Robinson*, 4 Wash. 446; *Seal v. Cameron*, 24 Wash. 62.

The overruling of a demurrer to an answer is not error when the demurrer is practically a denial of all the averments of the complaint: *Schell v. Walla Walla*, 44 Wash. 43.

Erroneous rulings on demurrers will be considered waived or treated as harmless error if cured by subsequent proceedings in case: *Moore v. Walla Walla*, 2 W. T. 184; *Penter v. Staight*, 1 Wash. 365; *Lowman v. West*, 7 Wash. 407; *Washington*

Nat. Bldg. etc. Assn. v. Saunders, 24 Wash. 321; *Marvin v. Yates*, 26 Wash. 50; *Washington Nat. Bldg. etc. Assn. v. Saunders*, 24 Wash. 321; *Crane Co. v. Aetna Indemnity Co.*, 43 Wash. 516; *Asplund v. Mattson*, 15 Wash. 328; *Moran Bros. Co. v. Northern Pac. R. Co.*, 19 Wash. 266. See, also, *Kinhead v. Holmes etc. Co.*, 24 Wash. 216; *Green v. Tidball*, 26 Wash. 339; or by filing amended pleadings: *Bell v. Waudby*, 4 Wash. 743; *Prescott v. Puget Sound etc. Dredg. Co.*, 31 Wash. 177; *Reed v. Parker*, 33 Wash. 107; *Hays v. Peavey*, 43 Wash. 163; *Maris v. Clevenger*, 29 Wash. 395; see 2 Remington's Digest, p. 2309, § 204; or by pleading over: *Tolmie v. Dean*, 1 W. T. 46; *Ward v. Moorey*, 1 W. T. 104; *Renton v. St. Louis*, 1 W. T. 215; but not after exception taken and going to trial: *Wood v. Mastick*, 2 W. T. 64; *Jones v. St. Paul etc. R. Co.*, 16 Wash. 25; *Scott v. Hallock*, 16 Wash. 439. See 2 Remington's Digest, p. 2309, § 205.

Error in ruling on objections to complaint is waived by pleading over and trial on merits: See 2 Remington's Digest, p. 2306, § 196. See, also, *Bell v. Waudby*, 4 Wash. 743; *Davis v. Ford*, 15 Wash. 107; *Blumauer v. Clock*, 24 Wash. 596; *Nye v. Kelly*, 19 Wash. 73; *Bates v. Drake*, 28

Wash. 447; *Port Townsend v. Lewis*, 34 Wash. 413.

Error in rulings on motions is harmless if cured by the pleadings or further action in case: See 2 Remington's Digest, p. 309, § 208; *Kratz v. Dawson*, 3 W. T. 100; *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739; *Du Clos v. Batcheller*, 17 Wash. 389; *Boardman v. Hager*, 24 Wash. 487; *Rattelmiller v. Stone*, 28 Wash. 104; *Anderson v. Harper*, 30 Wash. 378; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355; *In re Pike St.*, 42 Wash. 551; *Federal Iron & B. B. Co. v. Hock*, 42 Wash. 668; *Johnson v. Seattle Elec. Co.*, 39 Wash. 211; but see *Pettygrose v. Rothschild*, 2 Wash. 6.

A party is bound by the legal effect of his evidence upon an issue whether it was made or not made by the pleadings: *Sherman v. Sweeny*, 29 Wash. 321; or where the evidence has not been objected to: *Bruce v. Foley*, 18 Wash. 96.

Defects in pleadings or proceedings, if not prejudicial, may be treated as eliminated by verdict or judgment: See 2 Remington's Digest, pp. 2310, 2311, §§ 212, 213; *Johnson v. Leonhard*, 1 Wash. 564; *Moran Bros. Co. v. Northern Pac. R. Co.*, 19 Wash. 266; *Moynahan v. Interstate Min. etc. Co.*, 31 Wash. 417; *Price Baking Powder Co. v. Rinear*, 17 Wash. 95; *Pain v. Isaacs*, 10 Wash. 173; *Edmunds v. Black*, 13 Wash. 490; *Green v. Tidball*, 26 Wash. 338; *Jacobson v. Aberdeen Pack. Co.*, 26 Wash. 175; *Brown v. Gillett*, 33 Wash. 264; *Gallamore v. Olympia*, 34 Wash. 379; *Prescott v. Puget Sound Bridge etc. Co.*, 31 Wash. 177; *Ellsworth v. Layton*, 37 Wash. 340; *Clark v. Northern Pac. R. Co.*, 29 Wash. 139; *King v. Ilwaco R. & Nav. Co.*, 1 Wash. 127; *Titlow v. Cascade Oatmeal Co.*, 15 Wash. 652; *Bonne v. Security Sav. Soc.*, 35 Wash. 696; *Carstens v. Milo*, 40 Wash. 335.

§ 308. (4958.) Supplemental Pleadings, When Allowed.

The court may, on motion, allow supplemental pleadings showing facts which occurred after the former pleadings were filed. [L. '54, p. 144, § 72; Cd. '81, § 114; 2 H. C., § 226.]

Cited in 1 Wash. 375; 3 Wash. 657; 27 Wash. 335.

See 2 Remington's Digest, pp. 2284-2286, §§ 123-128.

The refusal of the court to allow the filing of a supplemental complaint, after the plaintiff has allowed the time to expire to further plead on the sustaining of a demurrer to the original complaint, is not an abuse of discretion: *Davis v. Erickson*, 3 Wash. 654.

Where an action, of equitable cognizance, has been treated by all parties as one at law, it is not error to permit the filing of a supplemental complaint asking for judgment generally, after defendant's action has prevented plaintiff from securing equitable relief: *Kleeb v. Bard*, 7 Wash. 41; see *Bard v. Kleeb*, 1 Wash. 375.

When the maker of a note pays an assignee thereof who holds the same as security after institution of suit thereon by the payee, a supplemental complaint claiming attorney's fees, and alleging collusion between maker and assignee to prevent judgment for attorney's fees, pleading held insufficient: *Davis v. Erickson*, supra.

In an action by a wife to vacate a judgment and sale against her husband involving community real estate, leave to file a supplemental complaint, alleging proceedings and decree for divorce between herself and husband, during its pendency, and her purchase of her husband's interest in lands at sheriff's sale, was properly denied, as amounting to a substitution of a different cause of action: *Andrews v. Andrews*, 3 W. T. 286.

Where a temporary injunction had been granted an attaching creditor, before judgment in a law action, against the foreclosure by a wife of a fraudulent chattel mortgage of the attached property, a supplemental pleading should have been allowed, showing the rendition of judgment in the law action, instead of dismissing the original bill, for failing to show a judgment to be protected: *Meacham Arms Co. v. Swarts*, 2 W. T. 413.

Allowing or not allowing the filing of supplemental pleadings is largely discretionary: *Long v. Eisenbeis*, 23 Wash. 556; *McDaniels v. Gowey*, 30 Wash. 412; *Burnett v. Ewing*, 39 Wash. 45.

A purchaser pendente lite of the claim of a party to an action will not be permitted to come in and take part in the proceedings in the cause without the filing of supplemental pleadings, unless by consent of the other parties to the suit: *Powell v. Nolan*, 27 Wash. 318.

Supplemental answer showing payment should be allowed where the facts warrant it: *Burnett v. Ewing*, 39 Wash. 45.

It is proper to allow a supplemental answer to show a settlement made after the verification and service of the original answer: *McRea v. Warehime*, 49 Wash. 194.

A conditional tender of money by defendant is waived by bringing the same into court without condition, and its acceptance by plaintiffs does not waive any rights, and cannot be pleaded in a supplemental answer as an abandonment of the right of action: *Tilden v. Gordon & Co.*, 34 Wash. 92.

An order refusing leave to file a supplemental complaint is reviewable on appeal without any formal exceptions, where it is embodied in a written order and journal entry in the cause: *Burnett v. Ewing*, 39 Wash. 45.

New grounds for complaint and new demands arising since institution of suit may be set forth in a supplemental complaint: *Scoland v. Scoland*, 4 Wash. 118;

Knapp v. Order of Pendo, 36 Wash. 601; *Pacific Bridge Co. v. U. S. Fidelity etc. Co.*, 33 Wash. 47; *Hodges v. Price*, 38 Wash. 1; *Belles v. Miller*, 10 Wash. 259.

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CHAPTER I.

ISSUES IN CIVIL ACTIONS.

§ 309. (4962.) **Issues Defined, Kinds of.**

Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds—First, of law; and second, of fact. [Cf. L. '54, p. 163, § 179; Cd. '81, § 200; 2 H. C., § 333; L. '93, p. 415, § 28.]

Cited in 24 Wash. 96.

§ 310. (4963.) **Issue of Law Arises, When.**

An issue of law arises upon a demurrer to the complaint, answer or reply. [Cf. L. '54, p. 163, § 180; Cd. '81, § 201; 2 H. C., § 334; L. '93, p. 415, § 29.]

See supra, §§ 258, 259, 264, and notes.

Cited in 17 Wash. 602.

§ 311. (4964.) **Issue of Fact, How Raised.**

An issue of fact arises,—

First: Upon a material allegation in the complaint controverted by the answer; or

Second: Upon new matter in the answer, controverted by the reply; or

Third: Upon new matter in the reply, except when an issue of law is joined thereon.

Issues both of law and of fact may arise upon different and distinct parts of the pleadings in the same action. [Cf. L. '54, p. 163, § 181; Cd. '81, § 202; 2 H. C., § 335; L. '93, p. 415, § 30.]

§ 312. (4965.) **Trial Defined.**

A trial is the judicial examination of the issues between the parties, whether they are issues of law or fact. [L. '93, p. 416, § 31.]

Cited in 17 Wash. 602.

§ 313. (4966.) **Issue of Law, How Tried.**

An issue of law shall be tried by the court, unless it is referred as provided by the statutes relating to referees. [Cf. L. '54, p. 164, § 183; Cd. '81, § 204; 2 H. C., § 337; L. '93, p. 416, § 32.]

Cited in 16 Wash. 384.

§ 314. (4967.) **Issue of Fact, How Tried.**

An issue of fact, in an action for the recovery of money only, or of specific real or personal property shall be tried by a jury, unless a jury is

waived, as provided by law, or a reference ordered, as provided by statute relating to referees. [Cf. L. '54, p. 164, § 183; L. '69, p. 50, § 208; L. '73, p. 52, § 206; Cd. '81, § 204; 2 H. C., § 337; L. '93, p. 416, § 33.]

See *infra*, § 316, for notes as to waiver of jury.

See *infra*, § 1848, waiver of jury in justices' courts.

Cited in 28 Wash. 71; 30 Wash. 6.

As to right of trial by jury, under this section, see 2 Remington's Digest, p. 1646, §§ 2, 3.

A proceeding to recover specific real or personal property must be tried by jury: *In re Alfstad's Estate*, 27 Wash. 175;

Winston v. Crowe, 28 Wash. 65; *Filley v. Murphy*, 30 Wash. 1.

Where the pleadings in a case filed in probate raise the issue as to the right of possession of real and personal property, a jury trial is demandable, under this section: *Filley v. Murphy*, 30 Wash. 1.

§ 315. (4968.) Trial of Other Issues.

Every other issue of fact shall be tried by the court, subject, however, to the right of the parties to consent, or of the court to order, that the whole issue, or any specific question of fact involved therein, be tried by a jury, or referred. [L. '93, p. 416, § 34.]

Cited in 16 Wash. 384.

§ 316. Jury Fee—Advance Deposit—Waiver of Jury.

In all civil actions triable by a jury in the superior court any party to the action may, at or prior to the time the case is called to be set for trial, serve upon the opposite party or his attorney, and file with the clerk of the court a statement of himself, or attorney, that he elects to have such case tried by jury. At the time of filing such statement such party shall also deposit with the clerk of the court \$12.00, which deposit, in the event that the case is settled out of court prior to the time that such case is called to be heard upon trial, shall be returned to such party by such clerk. Unless such statement is filed and such deposit made, the parties shall be deemed to have waived trial by jury, and consented to a trial by the court: Provided, that, in the superior courts of counties of the first class such parties shall serve and file such statement, in manner herein provided, at any time not later than two days before the time the case is called to be set for trial. [L. '03, p. 50, § 1; L. '09, p. 715, § 1.]

See *supra*, § 314, waiver of jury in certain cases.

See *infra*, § 2144, waiver of jury in criminal cases.

See *infra*, § 2116, jury cannot be waived in capital cases.

See *infra*, § 997, no jury in divorce cases.

Bal. Code, § 5028, providing for waiver of jury trials, was repealed by § 3 of the act of 1903.

Cited in 33 Wash. 536; 33 Wash. 537; 33 Wash. 539; 36 Wash. 603; 38 Wash. 687; 39 Wash. 106; 40 Wash. 355.

Legal actions may be tried by the court, but equitable actions must be so tried: *Enos v. Wilcox*, 3 Wash. 44, 47.

The trial of a cause by the court, when an issue of fact is made, there being no waiver of a jury as provided by § 314, *supra*, is an assumption of power not authorized by law: *Johnson v. Goodtime*, 1 W. T. 484.

When mere silence does not constitute a waiver under Bal. Code, § 5028, see *King Co. v. Hill*, 1 Wash. 404, 407.

Under § 314, *supra*, and Bal. Code, § 5028, it was held, where defendant de-

manded a jury on the original complaint, but, after the latter had been amended, went to trial without demanding a jury, but requested the appointment of a reporter to take the evidence, that this did not operate as a waiver to a right to a jury and that § 314 was mandatory: *Meeker v. Gilbert*, 3 W. T. 369.

Where a case proceeds to trial before the court on the merits, without objection or demand for a jury trial, the objection cannot be raised on appeal: *Stetson & Post M. Co. v. McDonald*, 5 Wash. 496, 498.

If the jury has been waived in an action, and trial had before a referee, the waiver holds good for a retrial after re-

versal on appeal: *Park v. Mighell*, 7 Wash. 304.

A jury trial cannot be demanded in trying the issue raised by a motion to discharge an attachment: *Windt v. Banniza*, 2 Wash. 147.

Any right that a defendant may have to a trial by jury is waived by his allowing the issues to be made up as though the action were one properly triable in equity: *Frye v. Hill*, 14 Wash. 83.

As to waiver of right to trial by jury, see 1 *Remington's Digest*, p. 1648, §§ 17-22.

This section is not unconstitutional as imposing any unreasonable conditions upon the right of trial by jury: *State ex rel. Clark v. Neterer*, 33 Wash. 535.

Defendant waives a jury by his default and failure to demand the same, under this section: *Oregon R. & Nav. Co. v. McCormick*, 46 Wash. 45.

This section applies to condemnation proceedings: See *Chelan County v. Navarre*, 38 Wash. 684.

Under this section it is within the discretion of the court to allow a trial by jury, though a jury was not demanded at the time the case was set for trial: *Knapp v. Order of Pendo*, 36 Wash. 601; *Fleming v. Wilson*, 39 Wash. 106, 1104; *Hart v. Cascade Timber Co.*, 39 Wash. 279.

A demand for a jury trial is waived where the trial is transferred to another judge, on the theory that the cause is of an equitable nature, with the suggestion that the party may save his right to a jury trial by a motion to remand, and no objection or motion to remand is made, and the trial is had without calling the trial judge's attention to the demand: *Zilke v. Woodley*, 36 Wash. 84.

Where plaintiff's action is founded upon a written contract, the withdrawal of the case from the jury at the close of plaintiff's case and directing a verdict for defendant, is in no sense a deprivation of the constitutional right of trial by jury: *Creagh v. Equitable Life Assur. Soc.*, 19 Wash. 108.

Where no demand for a jury trial was made below, the question will not be considered on appeal: *Grimm v. Pacific Creosoting Co.*, 50 Wash. 415.

IN EQUITABLE ACTIONS AND DEFENSES.—It is error to compel the trial of a cause as an action at law, when both complaint and answer invoke the equity powers of the court: *Distler v. Dabney*,

7 Wash. 431; *Hamar v. Peterson*, 9 Wash. 152.

The refusal to direct a jury trial of issues of fact in an equity cause is not ground of reversal, since the verdict of a jury therein would be only advisory: *Dearborn F. Co. v. Augustine*, 5 Wash. 67; but the court has authority in an equitable action to direct a trial of the issues of fact therein: *Id.*; following *State v. Lichtenberg*, 4 Wash. 553. See, also, *Wheeler v. Ralph*, 4 Wash. 617.

It is discretionary with the court to submit questions of fact to the jury, or to try all the issues itself, in equitable causes: *Wintermute v. Carner*, 8 Wash. 585.

The foreclosure of a mechanic's lien is of equitable cognizance, and a demand for a jury trial therein need not be recognized: *Bldg. & L. Co. v. Wentworth*, 1 Wash. 467; and defendant, in such suit, by setting up a claim for damages for breach of contract, cannot demand a jury trial: *Inst. Bldg. & L. Co. v. Wentworth*, *supra*.

Where defendant interposes an equitable defense in an action to recover possession of land, and does not demand a jury trial, or allege omission of jury trial as ground for a new trial, the omission to try the case by a jury is not assignable error by defendant: *Keane v. Brigger*, 3 Wash. 338, 351; *Morgan v. Bell*, 3 Wash. 554, 563.

Section 997, *infra*, dispensing with jury trials in divorce cases, also cuts off the right to have an issue therein of conspiracy to defraud plaintiff tried by a jury: *Prouty v. Prouty*, 4 Wash. 174.

Where an equity case is tried before a jury, and its verdict is a determination of the entire issue, judgment should be rendered in accordance therewith, when no findings of fact have been made by the court and when the verdict has not been set aside as contrary to the evidence: *Roberts v. Sabin*, 14 Wash. 35.

If all parties voluntarily submit their controversy to the equity side of the court, the fact that plaintiff had an adequate remedy at law cannot be raised by motion to dismiss upon trial: *Wilkeson C. & C. Co. v. Driver*, 9 Wash. 177.

The refusal of a court to direct a jury trial of issues of fact in an equity cause, not ground for reversal: *Dearborn Foundry Co. v. Augustin*, 5 Wash. 67.

§ 317. Fee Deposited to be Part of Costs.

The amount deposited by the party demanding a trial by jury shall be a part of the taxable costs in such action. The amounts received by the clerk on account of jury fees shall be accounted for as such other fees received. [L. '03, p. 50, § 2.]

§ 318. (4969.) Agreement to Refer.

The [waiver of a jury or] agreement to refer, shall be by stipulation of the parties filed, or the oral consent of parties given in open court and entered in the records: Provided, that nothing herein contained shall be so construed as to restrict the chancery powers of the judges, or to authorize the trial of any issue by a jury, when the complaint alleges an equitable claim, and seeks relief solely upon the ground of the equities of the demand made by the pleadings in the action. [Cf. L. '54, p. 164, § 183; L. '69, p. 50, § 208; L. '73, p. 52, § 206; Cd. '81, § 204; 2 H. C., § 337.]

Superseded as to waiver of jury by § 316, *supra*.

See *infra*, § 1848, waiver of jury in justices' courts.

See *supra*, § 92, definition of petit jury.

The first paragraph of this section as contained in Hill's Code is omitted as being covered by §§ 313-315, *supra*.

Cited in 3 Wash. 591; 33 Wash. 469, 539.

As to right to trial by jury being confined to legal issues, and as to what are legal or equitable issues, see 2 Remington's Digest, pp. 1646, 1647, §§ 4-11; Dearborn Foundry Co. v. Augustine, 5 Wash. 67; Hamar v. Peterson, 9 Wash. 152; Murray v. Okanogan Live Stock etc. Co., 12 Wash. 259; In re Alfstad's Estate, 27 Wash. 175; Winston v. Crowe, 28 Wash. 65; Filley v. Murphy, 30 Wash. 1; Wheeler, Osgood & Co. v. Ralph, 4 Wash. 617; Installment Bldg. & Loan Co. v. Wentworth, 1 Wash. 467; Eisenbach v. Wakeman, 3 Wash. 534; Prouty v. Prouty, 4 Wash. 174; Wintermute v. Canter, 8 Wash. 585; Mc-

Coy v. Spithill, 13 Wash. 158; Wilson v. Aberdeen, 25 Wash. 614; Murne v. Schwabacher, 2 W. T. 130; Windt v. Banniza, 2 Wash. 147; In re Clayson's Estate, 26 Wash. 253; Spokane Co-operative Min. Co. v. Pearson, 28 Wash. 118; Bluett v. Wilce, 43 Wash. 492; Powell v. Nolan, 27 Wash. 318; Rohrer v. Snyder, 29 Wash. 199; Maggs v. Morgan, 30 Wash. 604; Smith v. Mitchell, 21 Wash. 536; Peterson v. Philadelphia Mortgage etc. Co., 33 Wash. 464; Gaffney v. Megrath, 23 Wash. 476.

This section is not an infringement of the right to trial by jury: State ex rel. Clark v. Neterer, 33 Wash. 335.

§ 319. (4970.) Notice of Trial.

At any time after the issues of fact are completed in any case by the service of complaint and answer or reply when necessary, as provided in title three, either party may cause the issues of fact to be brought on for trial, by serving upon the opposite party a notice of trial at least three days before any day provided by rules of court for setting causes for trial, which notice shall give the title of the cause as in the pleadings, and notify the opposite party that the issues in such action will be brought on for trial at the time set by the court; and the party giving such notice of trial shall, at least three days before the day of setting such causes for trial file with the clerk of the court a note of issue containing the title of the action, the names of the attorneys and the date when the last pleading was served; and the clerk shall thereupon enter the cause upon the trial docket according to the date of the issue. In case an issue of law raised upon the pleadings is desired to be brought on for argument, either party shall, at least three days before the day set apart by the court under its rules for hearing issues of law, serve upon the opposite party a like notice of trial and furnish the clerk of the court with a note of issue as above provided, which note of issue shall specify that the issue to be tried is an issue of law; and the clerk of the court shall thereupon enter such action upon the motion docket of the court. When a cause has once been placed upon either docket of the court, if not tried or argued at the time for which notice was given, it need not be noticed for a subsequent session or day, but shall remain upon the docket from session to session or from law day to

law day until final disposition or stricken off by the court. The party upon whom notice of trial is served may file the note of issue and cause the action to be placed upon the calendar without further notice on his part. [L. '93, p. 416, § 35.]

Cited in 17 Wash. 408; 18 Wash. 209; 30 Wash. 629.

As to time of setting causes for trial, and notice of trial, see 2 Remington's Digest, pp. 2737, 2738, §§ 5, 6; Chelan County v. Navarre, 38 Wash. 684; Brown v. Blaine, 41 Wash. 287; Spokane & Idaho

Lum. Co. v. Stanley, 25 Wash. 653; Juch v. Hanna, 11 Wash. 676; State v. Brown, 37 Wash. 106; State v. Sexton, 37 Wash. 110; Western Security Co. v. Lafleur, 17 Wash. 406; Norris v. Campbell, 27 Wash. 654; Spokane etc. Copper Co. v. Colfelt, 30 Wash. 628.

§ 320. (4971.) After Notice Either Party may Bring Issue to Trial.

Either party, after the notice of trial, whether given by himself or the adverse party, may bring the issue to trial, and, in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require. [L. '93, p. 417, § 36.]

§ 321. (4972.) Pleadings, When to be Filed.

All pleadings in any civil action shall be filed with the clerk of the court, on or before the day when the case is called for trial, or the day when any application is made to the court for an order therein, and in case the moving party shall fail, or neglect to cause the pleadings to be filed with the clerk of the court as above required, the adverse party may apply to the court, without notice, for an order on such moving party to file such pleadings forthwith, and for a failure to comply with such order the court may order the cause dismissed unless good cause is shown for granting an extension of time within which to file such pleadings. [L. '93, p. 417, § 37.]

Cited in 15 Wash. 641; 22 Wash. 442; 38 Wash. 171.

Failure to file complaint does not make the judgment void for want of jurisdic-

tion: Snohomish Land Co. v. Blood, 40 Wash. 626; but see Ashcraft v. Powers, 22 Wash. 441.

CHAPTER II.

TRIAL OF CIVIL ACTIONS.

§ 322. (4977.) Motion for Continuance, When Allowed.

A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and residence of the witness or witnesses. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be continued. The court, upon its allowance of the motion, may impose terms or conditions upon the moving party. [Cf. L. '54, p. 164, § 184; L. '69, p. 50, § 209; Cd. '81, § 205; 2 H. C., § 338.]

See *infra*, § 484, costs on postponement.

See *infra*, §§ 1847, 1850, continuance in justices' courts.

See *infra*, § 2135, continuance in criminal cases.

Cited in 8 Wash. 726; 14 Wash. 581; 29 Wash. 380; 34 Wash. 204; 49 Wash. 13.

As to right to continuance in general, see 2 Remington's Digest, pp. 553-557, §§ 1-21.

As to surprise at trial, as a ground for continuance, see 1 Remington's Digest, p. 556, § 19; *Straw-Ellsworth Mfg. Co. v. Cain*, 20 Wash. 351; *Vulcan Iron Works v. Burrell Constr. Co.*, 29 Wash. 319; *O'Neill v. Lindsey*, 41 Wash. 649; *Lampe v. Jacobsen*, 46 Wash. 533; *Dunlop v. Seattle, Renton & Southern R. Co.*, 47 Wash. 576; *Merrill v. O'Bryan*, 48 Wash. 415; *Hendelman v. Kahn*, 50 Wash. 247. Amendment of pleadings, when sufficient grounds for continuance: See 1 Remington's Digest, p. 556, § 20; *Silsby v. Frost*, 3 W. T. 388; *Lee v. Lee*, 3 Wash. 236; *Hart Lumber Co. v. Rucker*, 20 Wash. 383; *Eldridge v. Young America & Cliff Cons. Min. Co.*, 27 Wash. 297; *Wright v. Northern Pac. R. Co.*, 38 Wash. 64.

An application for continuance is addressed to the sound discretion of the court: *Thompson v. Territory*, 1 W. T. 547; *State v. Murphy*, 9 Wash. 204; *Juch v. Hanna*, 11 Wash. 676; *State v. Boyce*, 24 Wash. 514; *State v. Burns*, 19 Wash. 52; *State v. Champoux*, 33 Wash. 339; *Knapp v. Order of Pendo*, 36 Wash. 601; *Leghorn v. Nydell*, 39 Wash. 17; *Bank of Montreal v. Howard*, 44 Wash. 10; *Spokane v. Costello*, 42 Wash. 182.

Due diligence must be shown in attempting to procure the testimony of witnesses to entitle a party to a continuance: *Roeder v. Brown*, 1 W. T. 112.

If there is a failure to show due diligence in securing attendance or depositions of absent witnesses, a denial of an application for continuance will not be disturbed: *O. R. & N. Co. v. Dacres*, 1 Wash. 195; *Juch v. Hanna*, *supra*; *Maggs v. Morgan*, 30 Wash. 604.

The denial of an application for a continuance in order to obtain the attendance of a witness residing in another county is not error where there is no showing of diligence in procuring his attendance, or that his testimony would not be cumulative, or that the same matter could be proved by some other witness in attendance: *State v. Brooks*, 4 Wash. 328; *State v. Murphy*, 9 Wash. 204; *State v. Wilson*, 9 Wash. 218; *State v. Hutchinson*, 14 Wash. 580; *State v. Boyce*, 24 Wash. 514; *Maggs v. Morgan*, 30 Wash. 604; *Benson v. Hamilton*, 34 Wash. 201; *Creech v. Aberdeen*, 44 Wash. 72.

A party cannot be forced to trial the instant the cause is at issue, but is entitled to a continuance, upon a proper showing that the principal witness is absent from the state: *Robertson v. Woolery*, 6 Wash. 156; *State v. Williams*, 18 Wash. 47.

Time to prepare for trial is a matter of right as much as time to plead, and cannot be taken away under any principle of jus-

tice: *Id.*, 157; *Wright v. Northern Pac. R. Co.*, 38 Wash. 64.

Where a party seeks the benefit of the testimony of a witness too intoxicated to testify, he should move for an adjournment until the witness should become competent: *Fox v. Territory*, 2 W. T. 297.

A defendant in a criminal case is entitled to a continuance upon a showing that a necessary witness is under conviction for the crime of perjury, from which an appeal is pending, and that defendant asks for a continuance until the appellate court shall have heard and determined the appeal: *State v. Harras*, 22 Wash. 57.

As to showing that a witness is sick and cannot attend, see *McClellan v. Gaston*, 18 Wash. 472.

Necessity and materiality of the evidence desired must be shown in the affidavit: *State v. Newton*, 29 Wash. 373; *Jackson v. Mercantile Mutual Fire Ins. Co.*, 45 Wash. 244; *Maloney v. Stetson & Post Mill Co.*, 46 Wash. 645; *Portland and Seattle R. Co. v. Ladd*, 47 Wash. 88; *Gauthier v. Wood & Iverson*, 49 Wash. 8.

Refusal to grant a continuance on account of absence of principal counsel is not an abuse of discretion, where applicant is represented by other attorneys, and the trial had been begun before the application is made: *Skagit R. & L. Co. v. Cole*, 2 Wash. 57; *Zelinsky v. Price*, 8 Wash. 256; *State v. Vance*, 29 Wash. 435. Nor where counsel has voluntarily withdrawn before trial: *McInnes v. Sutton*, 35 Wash. 384; *State v. Underwood*, 35 Wash. 558; see 1 Remington's Digest, p. 554, §§ 11, 12.

The refusal of the court to grant a continuance on the ground that the defendant could not have the services of a certain attorney on the day that the cause was set for trial, such day having been fixed at the instance of defendant after the setting aside of a default against him, is not an abuse of discretion: *Catlin v. Harris*, 7 Wash. 542.

If the affidavit for continuance shows clearly that the witness' testimony would have been irrelevant, frivolous, and inadmissible, it is not error to overrule the motion: *Ward v. Moorey*, 1 W. T. 104, 105.

Granting a continuance, in a criminal case, without the personal presence of the accused, is not in violation of the constitution giving the accused the right to appear and defend in person, etc.: *State v. Duncan*, 7 Wash. 336.

One charged with a crime is entitled to a continuance only in case he makes a showing therefor required in other cases: *Thompson v. Territory*, 1 W. T. 547.

Where the state, in order to avoid a continuance because of absence of a material witness, has admitted that the testimony set forth in the affidavit for continuance would be given if witness were present, it cannot impeach such testimony by showing that the absent witness had made dif-

ferent statements on a prior occasion: *State v. Carter*, 8 Wash. 272.

In postponing a trial, under § 484, the court cannot require the applicant to pay more than ten dollars to the adverse party in addition to witness fees: *Tacoma Nat. Bank v. Peet*, 9 Wash. 222, 528.

Where the imposition of terms as a condition of postponement does not require immediate payment, the party upon whom the condition is imposed may appear and defend at the trial, notwithstanding his failure to make payment: *Id.*

The presumption that the proceedings of courts are regular does not obtain where the court has imposed an excessive condition for the postponement of a trial, when the adverse party has failed to comply with a request of a party applying for postponement to show the costs incurred: *Id.*

Upon granting a continuance upon the application of the plaintiff, the court may impose the payment of costs within thirty days, and dismiss the action, without prejudice, at the cost of plaintiff, upon non-payment of the costs of the continuance within the time fixed: *Soder v. Adams Hardware Co.*, 38 Wash. 607.

This section is not unconstitutional as to witnesses without the state whose attendance the court cannot compel, for as to such witnesses the appellant would only have the right to take their depositions, and the admission would be of as much

benefit as a deposition: *State v. Hutchinson*, 14 Wash. 580.

Where several causes have been assigned for hearing upon the same day, the disposition of the causes is a matter in the discretion of the trial court, and the plaintiff in one of the causes would not be entitled to a continuance on the ground that some of the causes preceding his in the order of assignment had not been heard and disposed of prior to the calling of his cause for trial: *Juch v. Hanna*, *supra*.

A defendant is not entitled to a continuance in order to make up the issues as to a defendant subsequently appearing: *National Bank of Commerce v. Galland*, 14 Wash. 502.

Absence or illness of defendant are not alone sufficient grounds for continuance: See *Puget Sound etc. Depot v. Brown Alaska Co.*, 42 Wash. 681.

It cannot be said that the trial court abused its discretion in refusing a continuance on the ground of the absence of one of the defendants, who for some time had been ill in another state, where the action had been pending a long time, the trial had been continued two or three times, and the plaintiff admitted that the absent defendant would testify as claimed in the affidavit for a continuance: *Traynor v. White*, 44 Wash. 560; *Hill v. Hill*, 42 Wash. 250.

§ 323. (4978.) Impaneling Jury.

When the action is called for trial, the clerk shall prepare separate ballots containing the names of the jurors summoned who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become exhausted before the jury is complete, or if from any cause a juror or jurors be excused or discharged, the sheriff, under the direction of the court, shall summon from the bystanders, citizens of the county, as many qualified persons as may be necessary to complete the jury. Whenever it shall be requisite for the sheriff to summon more than one person at a time from the bystanders or body of the county, the names of the talesmen shall be returned to the clerk, who shall thereupon write the names upon separate ballots and deposit the same in the trial-jury box, and draw such ballots separately therefrom, as in the case of the regular panel. The jury shall consist of twelve persons, unless the parties consent to a less number. The parties may consent to any number not less than three, and such consent shall be entered by the clerk on the minutes of the trial. [Cf. L. '54, p. 164, § 185; L. '69, p. 51, § 210; Cd. '81, § 206; 2 H. C., § 339.]

See *supra*, §§ 109, 110, provisions for open venire.

Cited in 6 Wash. 187; 12 Wash. 180; 17 Wash. 550; 19 Wash. 59; 22 Wash. 133; 40 Wash. 584.

If objection is not taken to a juror at the time of impaneling the jury, the same is waived: *Clarke v. Territory*, 1 W. T. 68.

An error arising in impaneling a jury is not prejudicial to defendant, if, under the evidence, the court is warranted in directing a verdict for plaintiff: *Clancy v. Reis*, 5 Wash. 371.

The fact that the sheriff does not make his return on a special venire of jurors until after the commencement of the trial, is not ground for challenge: *State v. Payne*, 6 Wash. 563.

An order to fill the panel from bystanders is good, if those summoned have the necessary qualifications: *Yelm Jim v. Territory*, 1 W. T. 63; *Clarke v. Territory*, supra.

The ordering of a venire for additional jurors before the regular panel is exhausted, when none of the additional jurors are shown to have been called until the original panel was exhausted, is a mere irregularity: *Blanton v. State*, 1 Wash. 265.

Where the court orders the United States marshal to summon a talesman from the bystanders to fill an exhausted panel, the sheriff being present, and, so far as the record shows, not disqualified, and defendant objects, but fails to challenge the juror, and the juror is not shown to be unfit to try the cause, it is error without prejudice: *Meeker v. Gardella*, 1 Wash. 139.

If the panel of petit jurors has been discharged, the court is authorized, under Laws of 1863, page 401, § 8, to summon a jury to try the case: *Thompson v. Territory*, 1 W. T. 547.

Under this section, when the jury list has become exhausted before the completion of a jury, jurors may be summoned from the bystanders, even if some of those drawn may have failed to appear, as the presumption is that they had been properly excused by the court: *State v. Holmes*, 12 Wash. 169.

Mere informalities in drawing, selecting and certifying a jury list by the county commissioners are not ground of challenge to the panel, if it appears that the commissioners selected the list and caused it to be transmitted to the clerk of the court: *State v. Bokien*, 14 Wash. 403.

Although error may be committed in calling a jury, it is not prejudicial when the verdict rendered by them is directed by the court: *State v. Trimbell*, 12 Wash. 440.

§ 324. (4979.) Challenges—Kind and Number.

Either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it can be made. The challenge shall be to individual jurors, and be peremptory or for cause. Each party shall be entitled to three peremptory challenges. [L. '54, p. 165, § 186; Cd. '81, § 207; 2 H. C., § 340.]

See notes to § 333, *infra*.

Cited in 50 Wash. 93; 52 Wash. 231.

As to order and exhaustion of peremptory challenges, see 2 Remington's Digest, p. 1659, § 60; *State v. Eddon*, 8 Wash. 292; *Poncin v. Furth*, 15 Wash. 201; *State v. Vance*, 29 Wash. 435.

Error of the court in allowing a fourth peremptory challenge is harmless where it does not appear that the jury was rendered partial by the mistake, and the last juror was passed for cause: *Creech v. Aberdeen*, 44 Wash. 72.

Under this section a challenge by defendants separately appearing is properly denied where one of the defendants refuses to join therein: *Colfax Nat. Bank v. Davis*, 50 Wash. 92.

An abutting owner having a separate trial in condemnation cases is not entitled to exercise separate challenges, under this section: *Manhattan Building Co. v. Seattle*, 52 Wash. 226.

§ 325. (4980.) Peremptory Challenge, Defined.

A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him. [L. '69, p. 51, § 212; Cd. '81, § 208; 2 H. C., § 341.]

§ 326. (4981.) Challenge for Cause, Defined.

A challenge for cause is an objection to a juror, and may be either,—
1. General; that the juror is disqualified from serving in any action; or
2. Particular; that he is disqualified from serving in the action on trial.
[L. '69, p. 51, § 213; Cd. '81, § 209; 2 H. C., § 342.]

See supra, § 94, competency of jurors.

See supra, § 97, exemption from jury service.

See supra, § 100, who may be excused.

See supra, § 111, challenge for previous service within one year.

See *infra*, § 330, and notes, challenge for implied bias.
 See *infra*, § 331, and notes, challenge for actual bias.
 See *infra*, § 332, exemption a personal privilege.
 See *infra*, § 2141, and note, challenge for cause in criminal actions.
 Cited in 14 Wash. 411.

§ 327. (4982.) General Causes of Challenge.

General causes of challenge are:—

1. A conviction for a felony;
2. A want of any of the qualifications prescribed by law for a juror;
3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror. [L. '69, p. 52, § 214; Cd. '81, § 210; 2 H. C., § 343.]

See notes to last section.

As to qualifications of jurors, in general, see 2 Remington's Digest, p. 1650, §§ 27-30.

Women, not being electors, are not qualified to sit as jurors: *Harland v. Territory*, 3 W. T. 131; *White v. Territory*, 3 W. T. 397; *Rumsey v. Territory*, 3 W. T. 332a; *Walker v. Territory*, 2 W. T. 286; *Rosencrantz v. Territory*, 2 W. T. 267, holding that married women are compe-

tent to sit as grand jurors; overruled in *Harland v. Territory*, *supra*.

The objection that a venireman is not a resident, on account of a two years' absence from the territory, with a fixed intention of returning, is not sufficient. The circumstance of such person voting in another state would not establish a residence there against his sworn statement of residence here and unchanged intention: *Clarke v. Territory*, 1 W. T. 68.

§ 328. (4748.) Previous Service Within One Year.

It shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned upon an open venire and attended said court as a juror at any session of said court held within one year prior to the time of such challenge; or that he has been summoned from the bystanders or body of the county, and has served as a juror in any cause upon such summons, within one year prior to the time of such challenge. [L. '91, p. 88, § 11; 2 H. C., § 66.]

For first part of this section see *supra*, § 111.

Service upon a jury within the previous year does not render one incompetent to serve as a juror, in the absence of a challenge: *State v. Hall*, 24 Wash. 255.

§ 329. (4983.) Particular Causes of Challenge.

Particular causes of challenge are of two kinds:—

1. For such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias;
2. For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the trier, in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias. [L. '69, p. 52, § 215; Cd. '81, § 211; 2 H. C., § 344.]

See next two sections.

Cited in 3 Wash. 104; 30 Wash. 141; 46 Wash. 411.

§ 330. (4984.) Implied Bias, Defined.

A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:—

1. Consanguinity or affinity within the fourth degree to either party;
2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of the adverse party; or being surety or bail in the action called for trial, or otherwise, for the adverse party;
3. Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party upon substantially the same facts or transaction;
4. Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always the interest of the juror as a member or citizen of the county or municipal corporation. [Cf. L. '54, p. 165, 187; L. '69, p. 52, § 216; Cd. '81, § 212; 2 H. C., § 345.]

Cited in 3 Wash. 103; 24 Wash. 524; 30 Wash. 637.

Bias in general: See 2 Remington's Digest, pp. 1653-1657, §§ 40-53.

It is not sufficient for a party to declare in general terms that he objects to a juror, or that he challenges a juror. The grounds of the challenge must be specifically stated: *State v. Biles*, 6 Wash. 186.

Error in refusing to allow a challenge for cause to a jurymen, and thereby forcing defendant to peremptorily challenge him, is not prejudicial unless defendant exhausts thereby his peremptory challenges: *State v. Moody*, 7 Wash. 395.

The former employer of a decedent is disqualified as a juror in a trial for his murder: *State v. Coella*, 3 Wash. 99.

The interest of jurors as taxpayers of a county, in an action against the county, will not disqualify them from serving on the case: *Rathbun v. Thurston Co.*, 8 Wash. 238; *State v. King*, 12 Wash. 288.

As to implied bias from business connection or transactions with party or attorney, see 2 Remington's Digest, p. 1652, § 42; *State v. Boyce*, 24 Wash. 515; *McCorkle v. Mallory*, 30 Wash. 632; *State v. Lewis*, 31 Wash. 75; *Swope v. Seattle*, 36 Wash. 113. As to incompetency on the grounds of bias of one summoned as a witness, to serve as juror, see *State v. Stentz*, 30 Wash. 134.

Service in similar cause: See *State v. Van Waters*, 36 Wash. 358.

A jurymen in an action for personal injuries is not subject to challenge for cause because he states that he has a prejudice against that class of cases, which it might take evidence to remove, where his answers show that he is frank and fair, knew nothing of the case, and would try the case upon the evidence, disregarding any feelings or prejudice he might have against that class of cases: *Denham v. Washington Water P. Co.*, 38 Wash. 354.

§ 331. (4985.) Challenge for Actual Bias.

A challenge for actual bias may be taken for the cause mentioned in the second subdivision of section three hundred and twenty-nine. But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially. [L. '69, p. 53, § 217; Cd. '81, § 213; 2 H. C., § 346.]

See notes to previous section.

See *infra*, § 2142, disqualifying opinions in criminal actions.

Cited in 3 Wash. 104; 8 Wash. 15; 14 Wash. 411.

It is not every opinion formed or expressed that will disqualify a juror, but only such as prevent the giving of a fair trial and impartial verdict: *State v. Gile*, 8 Wash. 12.

Where a juror states that he has an impression as to the merits of the cause on

trial, he should not be permitted to answer whether or not it is favorable to the defendant: *White v. Territory*, 1 Wash. 279.

If the venireman states that he has formed and expressed an opinion which would require evidence to remove, but that he would try the case on the law and

the evidence, he is disqualified: *State v. Coella*, 3 Wash. 99.

It is ground of challenge to a juror when he states that he knows one of the parties and would believe his statement of a fact when contradicted only by the statements of a witness he did not know: *Stinson v. Sachs*, 8 Wash. 391.

A hypothetical opinion expressed by a juror prior to a trial, that if what he had read about the case was true the accused ought to be convicted on general principles, is not cause for a new trial: *State v. Gile*, 8 Wash. 12.

A venireman who states that he has read accounts of the affair in the current newspapers; that he has talked with others regarding it, and heard them express opinions; that he has formed but not expressed an opinion, and that his former impressions would not influence him as a juror, is competent: *Rose v. State*, 2 Wash. 310; *State v. Gile*, 8 Wash. 12; but if he states that he has formed an opinion as to the guilt or innocence of the accused which would take strong evidence to re-

move, but that he could lay aside his previous impression and be governed by the evidence given at the trial and the law as charged by the court, he is incompetent: *State v. Murphy*, 9 Wash. 204; *State v. Wilcox*, 11 Wash. 215.

It is no disqualification that the juror heard what purported to be the facts from several persons relative to the killing, soon after the occurrence, when he testifies that he could disregard any impression received therefrom, and try the case fairly upon the evidence: *State v. Coella*, 8 Wash. 512.

As to formation and expression of opinion as to cause, see, further, 2 Remington's Digest, pp. 1654-1656, §§ 46-48; *State v. Farris*, 26 Wash. 205; *State v. Straub*, 16 Wash. 112; *State v. Moodey*, 18 Wash. 165; *State v. Lattin*, 19 Wash. 57; *State v. Harras*, 22 Wash. 57; *State v. Royse*, 24 Wash. 440; *State v. Boyce*, 24 Wash. 515; *State v. Krug*, 12 Wash. 288; *Heasley v. Nichols*, 38 Wash. 485; *State v. Carey*, 15 Wash. 549; *State v. Croncy*, 31 Wash. 122.

§ 332. (4986.) Exemption not Cause of Challenge.

An exemption from service on a jury shall not be cause of challenge, but the privilege of the person exempted. [L. '69, p. 53, § 218; Cd. '81, § 214; 2 H. C., § 347.]

See supra, § 97, who are exempt from jury service.

See supra, §§ 111, 328, previous service within one year.

§ 333. (4987.) Peremptory Challenges, How Taken.

The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to wit:—

The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted. The panel being filled and passed for cause, after said challenge shall have been made by either party, a refusal to challenge by either party in the said order of alternation shall not defeat the adverse party of his full number of challenges, but such refusal on the part of the plaintiff to exercise his challenge in proper turn shall conclude him as to the jurors once accepted by him, and if his right be not exhausted, his further challenges shall be confined, in his proper turn, to talesmen only. [L. '69, p. 53, § 219; Cd. '81, § 215; 2 H. C., § 348.]

See infra, §§ 2137, 2139, criminal practice.

Cited in 8 Wash. 305; 8 Wash. 307; 15 Wash. 203; 29 Wash. 462.

Challenges, when to be taken: See notes to § 324, supra.

Under the provisions of this section, governing peremptory challenges, the defendant cannot proffer a peremptory challenge to a juror on the panel, when the jury has been passed for cause and the defendant has failed to peremptorily chal-

lenge such juror until after several talesmen have been called and examined in place of jurors excused at the peremptory challenge of the plaintiff, as the right of challenge must be exercised alternately by the adverse parties: *Poncin v. Furth*, 15 Wash. 201.

Waiver of challenge only applies to jurors then in the box: See *State v. Vance*, 29 Wash. 435.

§ 334. (4988.) Order of Taking Challenges.

The challenges of either party shall be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:—

1. For general disqualification;
2. For implied bias;
3. For actual bias;
4. Peremptory. [L. '69, p. 53, § 220; Cd. '81, § 216; 2 H. C., § 349.]

Cited in 30 Wash. 141.

§ 335. (4989.) Trial and Exceptions to Challenges.

The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall try the issue, and determine the law and the facts. [L. '69, p. 53, § 221; Cd. '81, § 217; 2 H. C., § 350.]

See *supra*, § 330, and notes.

As to objections and exceptions to challenges, see 2 Remington's Digest, p. 1659, § 62; *State v. Moody*, 7 Wash. 395; *State v. McCann*, 16 Wash. 249; *State v. Rutten*, 13 Wash. 203; *State v. Stentz*, 30 Wash. 134; *State v. Carey*, 15 Wash. 549; *State v. Champoux*, 33 Wash. 339.

As to examination of jurors and trial of challenges, see 2 Remington's Digest, pp. 1658, 1659, §§ 58, 59; *White v. Territory*, 3 W. T. 397; *Id.*, 1 Wash. 279; *State v. Coella*, 3 Wash. 99; *Piper v. Spokane*, 22 Wash. 147; *State v. Holedger*, 15 Wash. 443; *State v. Royse*, 24 Wash. 440; *State v. Boyce*, 24 Wash. 514; *Abby v. Wood*, 43 Wash. 379.

On the examination of a juror on his *voir dire* it is not proper to ask the juror the question: "After hearing all the evidence and the testimony and the instructions of this court in the cause, if there yet remains in your mind a reasonable doubt regarding the guilt of the defendant, would you return a verdict of not

guilty in his favor?": *State v. Bokien*, 14 Wash. 403.

In impaneling a jury it is proper in the trial of a challenge for actual bias to interrogate the jurors as to their relation to the attorneys of the parties, and particularly whether they sustain the relation of clients: *N. P. Ry. Co. v. Holmes*, 3 W. T. 202.

It is improper to ask a juror whether he would give as much credit to witnesses professing a certain religious belief as he would to members of any other faith: *Horst v. Silverman*, 20 Wash. 233.

Upon a prosecution for a homicide, committed by rigging a spring gun in a trunk, the defendant is entitled to ask *veniremen*, upon their *voir dire*, whether the fact of a death from such acts would create any prejudice or bias against the defendant, and it is prejudicial error to sustain objections thereto: *State v. Marfaudille*, 48 Wash. 117.

§ 336. (4990.) Trial of Challenge—Rules Governing.

Upon the trial of a challenge, the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge be determined to be sufficient, or found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; but if determined or found otherwise, it shall be disallowed. [L. '69, p. 54, § 222; Cd. '81, § 218; 2 H. C., § 351.]

See notes to last section.

§ 337. (4991.) Challenge, Exception and Denial may be Oral.

The challenge, the exception, and the denial may be made orally. The judge of the court shall note the same upon his minutes, and the substance of the testimony on either side. [L. '69, p. 54, § 233; Cd. '81, § 219; 2 H. C., § 352.]

See notes to § 335, *supra*.

§ 338. (4992.) Oath of Jurors.

As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict give, according to the law and evidence as given them on the trial. [L. '69, p. 54, § 224; Cd. '81, § 220; 2 H. C., § 353.]

See *infra*, § 2143, oath to jury in criminal cases.

See 2 Remington's Digest, p. 1660, § 63; Hartigan v. Territory, 1 W. T. 447; State v. Gin Pon, 16 Wash. 425; State v. Johnny Tommy, 19 Wash. 270.

As to the form of oath administered to the jury, it is sufficient if in substance that prescribed, yet it is better to follow

the statutory formula: Leonard v. Territory, 2 W. T. 381.

If the record recites that a jury were duly sworn, this shows that a proper oath was administered: Leschi v. Territory, 1 W. T. 13.

§ 339. (4993.*) Manner of Conducting Trials—Charging Jury.

When a jury has been sworn, the trial shall proceed in the following manner:

(1) The plaintiff shall briefly state the cause of action and the evidence by which he expects to sustain it. The defendant may in like manner state the defense, and the evidence he expects to offer in support thereof, but nothing in the nature of comments or argument shall be allowed in opening a case. It shall be optional with the defendant whether he states his case before or after the close of the plaintiff's evidence.

(2) The plaintiff, or the party upon whom rests the burden of proof in the whole action, must first produce his evidence; the adverse party will then produce his evidence.

(3) The parties then will be confined to rebutting evidence, unless the court shall consider that justice requires that evidence in the original case may then be offered.

(4) The court must reduce the charge to be given the jury to writing, and at the conclusion of the evidence he shall read his written charge to the jury. Either party may request such instructions as he deems material to the case, and the court may hear them upon the propriety of the requested instructions before finally settling the charge that he will give. If a stenographer shall be in attendance upon the trial of the cause, the court shall have the right to dictate the charge he desires to give to such stenographer, and to have the stenographer reduce the same to writing for him and a copy for each of the parties plaintiff and defendant. And the cost thereof shall be taxed as other costs in the action. When the charge shall have been given by the court, the plaintiff, or party having the burden of proof, may, by himself, or one counsel, address the court and jury upon the law and facts in the case, after which the adverse party may address the court and jury in like manner, by himself and one counsel or by two counsel, and be followed by the party or counsel of the party first addressing the court. No more than two speeches on behalf of the plaintiff or defendant shall be allowed. After the argument shall have been concluded, the jury shall retire to consider their verdict, and shall take with them to the jury room, among other matters proper to be taken to their jury room for further consideration by them, the written charge given them by the court. Either party, at any time before the hearing of a motion for a new trial may except to the instructions given by the court, or any

part thereof. [L. '09, p. 184, § 1. Cf. L. '69, p. 54, § 225; Cd. '81, § 221; 2 H. C., § 354; L. '03, p. 119, § 1.]

See *infra*, § 341, requests for special findings.

See *infra*, § 351, what papers jury may take while deliberating.

See *infra*, § 2158, trial procedure in criminal cases.

See *infra*, § 384, manner of taking exceptions to instructions.

See *infra*, § 1210, competency of witnesses.

See *supra*, § 303, and notes.

Cited in 1 Wash. 148; 2 Wash. 366; 3 Wash. 114; 4 Wash. 214; 9 Wash. 544; 15 Wash. 535; 28 Wash. 176; 30 Wash. 253; 31 Wash. 19; 32 Wash. 571; 37 Wash. 115; 50 Wash. 313; 51 Wash. 125.

GENERAL REFERENCES.—As to remarks and conduct of the judge during trial of the cause, see 2 Remington's Digest, p. 2739, § 14; and 1 Remington's Digest, p. 236, § 444. As to comments on the evidence by the court in giving instructions to the jury, see 2 Remington's Digest, pp. 2755-2757, §§ 66-73. As to instructions to the jury in general, see 2 Remington's Digest, pp. 2755-2769, §§ 66-117. As to harmless error in general, see 1 Remington's Digest, pp. 229-248, §§ 422-476.

CONSTITUTIONAL RESTRAINT ON COURT.—"Judges shall not charge juries with respect to matters of fact, nor comment thereon" (Const., Art. IV, § 16), hence it is error to tell the jury that there is no dispute in the testimony on a certain point, or that any fact is conclusively proven: *Bardwell v. Ziegler*, 3 Wash. 34; *Ledyard v. West. St. Elec. Ry. Co.*, 5 Wash. 64.

The provision of the constitution is intended to prevent the judge from conveying to the jury his opinion upon the facts, in order that these matters may be left to the exclusive province of the jury: *State v. Coella*, 3 Wash. 99, 121, and all remarks and observations by the court as to the facts before the jury are positively prohibited: *State v. Walters*, 7 Wash. 246; see *Freidrich v. Territory*, 2 Wash. 358, 366; *State v. Hyde*, 20 Wash. 234; *Blue v. McCabe*, 5 Wash. 125.

Comment on the facts by the judge during the progress of the trial, when not prejudicial to the party complaining, is harmless error: *Earles v. Bigelow*, 7 Wash. 581. Unless such comment is excepted to at the time, and called to the attention of the court, the error is waived: *Id.*, 588. Or comment on a matter not in issue: See *Nunn v. Jordan*, 31 Wash. 506. Or that verdict should not exceed amount demanded: See *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467.

In moving against the sufficiency of evidence, counsel challenging the court to pass upon its sufficiency and are not prejudiced by the remarks of the judge thereon, within the constitutional inhibition, if they fail to secure the absence of the jury in the interval: *Blue v. McCabe*, 5 Wash.

125; *Palchen v. P. & L. M. Co.*, 6 Wash. 486; see *Schmieg v. Wald*, 1 W. T. 473.

It is unlawful comment for the trial judge, in overruling an objection to evidence, to remark that he did not consider it very material or entitled to much weight; and the same is prejudicial error where the same related to the intoxication of the plaintiff and affected the credibility of his evidence at the time in question, as to which there was a sharp conflict in the evidence: *Schneider v. Great Northern R. Co.*, 47 Wash. 45.

It is unlawful comment for the judge to state what anyone with common sense must say upon an issue: *Spencer v. Arlington*, 49 Wash. 121.

An instruction that the jury may consider the relations of the parties and witnesses, their interest, temper, bias, demeanor, intelligence and credibility in testifying, does not infringe the constitutional prohibition: *Klepsch v. Donald*, 4 Wash. 436; see *Lyts v. Keevey*, 5 Wash. 606.

Questions as to the weight of the evidence, or as to the credibility of witnesses, are for the jury: See *Jose v. Stetson*, 20 Wash. 648; *Cowie v. Seattle*, 22 Wash. 659; *State v. McPhail*, 39 Wash. 199; *Gilmore v. Seattle & Renton Ry. Co.*, 29 Wash. 150; *Nelson v. McLellan*, 31 Wash. 208; *Herbert v. Hillman*, 50 Wash. 83; *Garretson v. Tacoma R. & Power Co.*, 50 Wash. 24.

Although isolated sentences in an instruction may be objectionable, and may intimate to the jury the opinion of the trial judge as to the value of some portions of the evidence, yet, if the instructions clearly give the jury to understand that the facts are exclusively for them to consider, and taken as a whole fairly state the law, they are sufficient: *White v. Territory*, 1 Wash. 279.

Where the facts are undisputed showing gross negligence, an instruction that they constitute gross negligence is not error: *N. P. Ry. Co. v. O'Brien*, 1 Wash. 599.

An instruction that the law does not "require the eyes and ears of plaintiff to be infallible" held, in connection with the instructions as a whole, not to be a comment upon the facts: *Steele v. Northern Pac. Ry. Co.*, 21 Wash. 287.

It is not error to omit or to briefly state the issues made by the pleadings: See *Lambert v. La Conner Trad. & Transp.*

Co., 37 Wash. 113; *Wiest v. Coal Creek R. Co.*, 42 Wash. 176.

An instruction charging that certain facts are evidence of negligence, or that other facts would be evidence of contributory negligence, held, in the particular case properly refused as being for the jury to determine: *Mitchell v. T. R. & M. Co.*, 9 Wash. 120.

The fact that the court in charging the jury rehearses the plaintiff's or defendant's theory of the case is not a comment on the facts in violation of the constitutional inhibition: *Binnian v. Jennings*, 14 Wash. 677.

A statement by the judge that "Here we come to some of the most important allegations on the part of the plaintiff, and to some of the most important issues of the case," was not reversible error in the absence of a showing of special injury to the party complaining: *Von Fobel v. Stetson & Post Mill Co.*, 32 Wash. 683.

An instruction to the jury that a judgment became a lien and encumbrance upon certain property, being upon a question of law, is not open to the objection of being a judicial comment on the facts in violation of the constitutional prohibition: *Frank v. Jenkins*, 11 Wash. 611.

The remarks of the court, preliminary to instructing the jury, that "you will be left to determine between the demands of public justice and the defense of the prisoner at the bar," is not prejudicial to defendant: *State v. Brooks*, 4 Wash. 328.

For misconduct of court in presence of jury, see *State v. White*, 10 Wash. 611, 615.

A comment upon the facts in violation of Const., Art. IV, § 16, necessitates a reversal: *State v. Surry*, 23 Wash. 655.

References to evidence not amounting to criticisms or explanations are not unlawful comment on the facts: See *State v. Surry*, 23 Wash. 655; *Drumheller v. Amer. Sur. Co.*, 30 Wash. 530; *French v. Seattle Traction Co.*, 26 Wash. 264. In an action for money loaned, an instruction that the defendants admitted in their answer that the plaintiff loaned them the two sums of money claimed is not an unlawful comment on the evidence when it was not an issue in the pleadings; and in any event the same would not confuse the jury where the defendants had the benefit before the jury of their contention that only part of it was received as a loan, and where under the evidence and the whole case the jury must have understood the instruction as meaning that defendants only admitted receiving the money: *Hendelman v. Kahan*, 50 Wash. 247. An instruction to the jury based upon the contingency that they find damages to timber "by the noxious vapors arising from its smelter" is not unlawful comment on the evidence, it having been shown that the vapors or gases were destructive, since they were therefore nox-

ious, and it is immaterial that they were so termed: *Johnson v. Northport etc. Co.*, 50 Wash. 567.

The repetition by the court of a statement by a witness, for the purpose of further explanation from counsel, is not unlawful comment on the evidence: *State v. Clem*, 49 Wash. 273.

The statement in an instruction to a jury that this is an action to recover money lost at gambling is not an unlawful comment on the evidence: *Crowley v. Taylor*, 49 Wash. 511.

Telling the jury that the written agreement is the best evidence, not comment: See *Carstens v. Earles*, 26 Wash. 676. It is not unlawful comment on the evidence for the court, in directing the defendant to state his defense, to say that the nature of the case is such that the jury ought to know how defendant intended to meet the state's case: *State v. King*, 50 Wash. 312. An instruction in an action for slander upon the subject of justification "if the jury should find that the defendant was provoked to speak the slanderous words," to which the court added that it was based "on the assumption that you find the words were uttered," is not objectionable as assuming that the words were uttered, or as an unlawful comment on the facts: *Childs v. Childs*, 49 Wash. 27.

An instruction that the plaintiffs had, upon one of their causes of action, waived all claims except for nominal damages because of the difficulty of determining the exact amount, is not an unlawful comment on the facts by reason of stating the reasons for the waiver: *Lownsdale v. Grays Harbor Boom Co.*, 36 Wash. 198.

Instructions as to damages, if the jury find "any at all" in a case in which nominal damages were conceded, did not mislead the jury where they found substantial damages: *Collins v. Huffman*, 48 Wash. 184.

As to assumptions by the court as to facts, see 2 Remington's Digest, p. 2756, § 69; *Drumheller v. American Surety Co.*, 30 Wash. 530; *Harris v. Carstens Packing Co.*, 43 Wash. 647; *Eggleston v. Seattle*, 33 Wash. 671; *Bardwell v. Ziegler*, 3 Wash. 34; *Woo Dan v. Seattle*, 5 Wash. 466; *State v. Walters*, 7 Wash. 246.

Comment on the facts in criminal cases: See 1 Remington's Digest, pp. 809-812, §§ 255-269; *State v. Walters*, 7 Wash. 246; *State v. Duncan*, 7 Wash. 336; *State v. Carter*, 15 Wash. 121; *State v. Carey*, 15 Wash. 549; *State v. Mitchell*, 22 Wash. 64; *State v. Vance*, 29 Wash. 435; *State v. Fenton*, 30 Wash. 325; *State v. Eubank*, 33 Wash. 293; *State v. Detherage*, 35 Wash. 326; *State v. Nordstrom*, 7 Wash. 506; *State v. Freidrich*, 4 Wash. 204; *State v. White*, 10 Wash. 611; *State v. Gates*, 28 Wash. 689; *State v. Howard*, 33 Wash. 250; *Edwards v. Territory*, 1 W. T. 195; *State v. John Port Townsend*, 7 Wash. 462; *State v. Riddell*, 33 Wash. 324; *State*

v. Stents, 33 Wash. 444; State v. Manderville, 37 Wash. 365; White v. Territory, 4 W. T. 397; State v. Newton, 29 Wash. 373; Leschi v. Territory, 1 W. T. 13; State v. McPhail, 39 Wash. 199; State v. Brooks, 4 Wash. 328; State v. Crotts, 22 Wash. 245.

ARGUMENTS AND CONDUCT OF COUNSEL: See 2 Remington's Digest, pp. 2746-2749, §§ 41-52. It is within the court's discretion to exclude the jury during argument of counsel upon the law of the case, and this does not infringe the constitutional rights of a defendant on trial under a criminal charge: State v. Coella, 3 Wash. 99.

It is the duty of the court to restrain counsel from transgressing the reasonable limits and proprieties of their argument: Skagit Ry. & L. Co. v. Cole, 2 Wash. 57, 74; Leschi v. Territory, 1 W. T. 13; and in all cases to restrict the argument of counsel to the facts in evidence, but counsel may draw their own inferences and conclusions from the facts in evidence and argue therefrom: Sears v. Seattle etc. Ry. Co., 6 Wash. 227, 233; Chezum v. Parker, 19 Wash. 645; State v. Costello, 29 Wash. 366; Taylor v. Ballard, 24 Wash. 191.

Improper statements by counsel in argument, when seasonably restrained, may be cured by instructions to the jury to disregard them: Graves v. Smith, 7 Wash. 14, 22; Skagit R. & L. Co. v. Cole, supra; Bay View Brewing Co. v. Tecklenberg, 19 Wash. 469. Withdrawal or correction of objectionable matter: See Taylor v. Ballard, 24 Wash. 191; State v. Boyce, 24 Wash. 514; Clukey v. Seattle Electric Co., 27 Wash. 70; Graves v. Smith, 7 Wash. 14; Farnandis v. Great Northern R. Co., 41 Wash. 486; Thomson v. Issaquah Shingle Co., 43 Wash. 253; Cady v. Seattle, 42 Wash. 402.

Misconduct on part of attorney and court commented on in State v. Moody, 7 Wash. 395, 397; Abby v. Wood, 43 Wash. 379.

No error can be founded on improper arguments of counsel where no motion is made to strike it, or the court asked to instruct the jury to disregard it: State v. Regan, 8 Wash. 506; Columbia etc. Ry. Co. v. Hawthorne, 3 W. T. 353; State v. Ackles, 8 Wash. 462; State v. Bailey, 31 Wash. 89; Chezum v. Parker, 19 Wash. 645; Shoemaker v. Bryant Lum. etc. Co., 27 Wash. 637; Taylor v. Modern Woodmen, 42 Wash. 304.

The refusal to strike out improper remarks of counsel at the time of their utterance is harmless error when the court later instructs the jury to disregard them: State v. Regan, supra; Graves v. Smith, 7 Wash. 14. It is prejudicial error for counsel to comment in argument to the jury upon matters eliminated from the trial by the rulings of the court, where such argument was duly objected to at the time, with request that it be withdrawn from the jury, and where the court refused such request and subsequently refused to give

properly requested instructions to disregard the same: Haustad v. Canadian Pac. Ry. Co., 44 Wash. 505. Where the evidence shows plaintiff's counsel was not present at a certain time and place, it is not prejudicial error for the counsel in argument to the jury to state that fact as a conclusion without stating that the "evidence shows" such fact: Hammock v. Tacoma, 44 Wash. 623. In an action against a city for personal injuries it is not necessarily prejudicial error, requiring a reversal, for plaintiff's counsel, in replying to comments on the absence of certain witnesses, to state in argument to the jury that they were working for the city and requested not to be called as witnesses, where it does not appear to have in any way affected the result: Id.

Counsel, as a general rule, have the right to comment on the fact that a person shown to be an important witness for the adverse party, and within reach, was not called in his behalf—but the rule is not applicable to a case where diligence has been used in procuring such witness: Mitchell v. T. Ry. & M. Co., 9 Wash. 120, 132; but where there has been no comment in the argument upon the presence of witnesses brought from a distance at a party's expense, the court may properly refuse to charge as to unfavorable inferences touching their credibility: Klepsch v. Donald, 8 Wash. 162. The refusal of a plaintiff in a personal injury case to permit her physicians to testify as to the result of their information obtained in a professional capacity cannot be made the subject of comment to the jury: Lane v. Spokane Falls & N. R. Co., 21 Wash. 119.

Misconduct of counsel in argument in referring to a decision of the supreme court upon a former appeal is not reversible error or ground for a new trial, where, upon objection, the court instructed the jury to disregard the same, and both sides had made repeated reference to the decision, and where no abuse of discretion in refusing a new trial on that ground appears: Brennan v. Seattle, 46 Wash. 427.

Argument of counsel going beyond legitimate limits is not ground for reversal where the trial judge rebuked counsel and removed any prejudice the jury may have received: Barclay v. Puget Sound Lumber Co., 48 Wash. 241.

In personal injury cases, it is prejudicial error for counsel to endeavor to show, over objections, that defendant carries indemnity insurance: See 2 Remington's Digest, p. 2746, § 43; Iverson v. McDonnell, 36 Wash. 73; Lowsit v. Seattle Lumber Co., 38 Wash. 290; Stratton v. Nichols Lumber Co., 39 Wash. 323; Westby v. Washington Brick etc. Co., 40 Wash. 289. But not reversible error that testimony on cross-examination incidentally disclosed such fact: See Edwards v. Burke, 36 Wash. 107.

Argument on matters not in issue or outside of record not prejudicial if corrected by the court: See 2 Remington's Digest,

p. 2747, §§ 46, 47; *Vowell v. Issaquah Coal Co.*, 31 Wash. 103; *State v. Van Waters*, 36 Wash. 358; *Taylor v. Modern Woodmen of America*, 42 Wash. 304.

The practice of reading law to the jury not approved, though not ground for reversal unless prejudicial: See 2 Remington's Digest, p. 2747, § 45; *Phelps v. S. S. City of Panama*, 1 W. T. 518; *State v. Coella*, 8 Wash. 512; *Gallagher v. Buckley*, 31 Wash. 380; *Williams v. Spokane Falls & N. R. Co.*, 39 Wash. 77.

It is not error to refuse to allow counsel to read statutes or judicial decisions as part of his argument to the jury: *Ryan v. Lambert*, 49 Wash. 649.

Defendant having waived his right to argument, it is proper to refuse to allow plaintiff further argument: See *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244.

Under a rule of court, an attorney may be considered as having waived his right to address the jury by being a witness for his client on the merits: See *Voss v. Bender*, 32 Wash. 566.

BURDEN OF PROOF.—As to the burden of proof, in general, see 1 Remington's Digest, pp. 1119, 1120, §§ 31-34, and cross-references. In proceedings for the appropriation of land by railway companies, the burden of proof rests upon the company to show necessity for taking and the reasonable value of the land appropriated: *Bellingham Bay & B. C. Ry. Co. v. Strand*, 4 Wash. 311, 313.

In such proceedings the filing of an answer, where none is required by law, does not shift the burden of proof from petitioner to defendant: *Seattle & M. Ry. Co. v. Murphine*, 4 Wash. 448.

When the defendant has been allowed to open and close the proof, without objection in an action of ejectment, the plaintiff is not thereby entitled to an instruction that the burden of proof is on defendant to show want of title in plaintiff: *Lynch v. Richter*, 10 Wash. 486.

Where the defendant admits the indebtedness alleged but sets up an affirmative defense, thus assuming the burden of the issue, and the undisputed proofs fail to sustain such defense, the jury should be instructed to find for the plaintiff: *Wadhams v. Page*, 6 Wash. 103.

Contributory negligence is a matter to be established by defendant: *N. P. Ry. Co. v. Hess*, 2 Wash. 383; *N. P. Ry. Co. v. O'Brien*, 1 Wash. 599. And on an affirmative defense of due care the burden is on defendant, if the facts proved raise a presumption of negligence: See *Foster v. Pacific Clipper Line*, 30 Wash. 515.

In an action for price of brick, if defendant alleges a warranty or its equivalent, and breach thereof, the burden is on him to prove both warranty and breach: *Tacoma Coal Co. v. Bradley*, 2 Wash. 600.

INSTRUCTIONS—RULES GOVERNING.—As to rules governing instructions, in general, see 2 Remington's Digest, pp. 2754-2769, §§ 66-117.

The giving of a partly written and partly oral charge to the jury is error, where written instructions have been requested; and the fact that a stenographer present in court took down the charge as given by the judge is not a sufficient compliance with the requirements of the statute in that respect: *State v. Miles*, 15 Wash. 534.

Where appellants did not ask for written instructions, nor join respondent in his request therefor, the appellants cannot urge the objection on appeal that they had no knowledge of respondent's having withdrawn his request for written instruction, and that they relied on the instructions being given in that form, and not orally: *Hencke v. Babcock*, 24 Wash. 556. Under the present section the employment of a private reporter who is not subject to the control of the court will not excuse the failure to instruct in writing: *State v. Mayo*, 42 Wash. 540. Where a stenographic report of instructions to the jury is made by a stenographer employed by both parties, he is sufficiently under the control of the court to constitute his report "instructions in writing," within the meaning of this section: *Collins v. Huffman*, 48 Wash. 184; *Schon v. Modern Woodmen*, 51 Wash. 482; *Sturgeon v. Tacoma Eastern R. Co.*, 51 Wash. 124.

The statute requiring instructions to the jury to be in writing, when so requested, is mandatory, and is not complied with by oral instructions taken down by a stenographer employed by the parties: *McIntosh v. Saw Mill Phoenix*, 49 Wash. 152. Overruled in *Schon v. Modern Woodmen*, 51 Wash. 482.

The proviso in this section that injury must be shown to justify a reversal for the refusal of an instruction or ruling, has no application to the requirement that instructions shall be given in writing when so requested: *McIntosh v. Saw Mill Phoenix*, 49 Wash. 152. See 2 Remington's Digest, p. 2758, §§ 80, 81.

It is sufficient to give an instruction but once; reiteration is a fault which should be avoided: *Columbia etc. Ry. Co. v. Hawthorne*, 3 W. T. 353; *Pronger v. Old Nat. Bank*, 20 Wash. 618; *Henry v. Grant St. Elec. R. Co.*, 24 Wash. 246; *Miller v. Dumon*, 24 Wash. 648; *Carstens v. Earles*, 26 Wash. 676; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25; *McDannald v. Washington & Columbia R. Co.*, 31 Wash. 585.

Construction and effect of charge, as a whole: See 2 Remington's Digest, p. 2768, § 116.

Although an instruction standing alone may be erroneous, yet, if the instructions taken as a whole fairly state the law applicable to the facts, it cannot be complained of: *N. P. Ry. Co. v. Hess*, 2 Wash. 383; *Wolf v. Hemrich Bros. Brewing Co.*, 28 Wash. 187; *Fireman's Fund Ins. Co. v. Northern Pac. R. Co.*, 46 Wash. 635.

Where one instruction modifies or explains another, the two should be consid-

ered together: *Sears v. Seattle C. St. Ry. Co.*, 6 Wash. 227, 236.

When a charge to the jury, taken as a whole, fairly states the law, it is sufficient: *McQuillan v. Seattle*, 13 Wash. 600; *Duggan v. Pacific Boom Co.*, 6 Wash. 593; *Brown v. Seattle City R. Co.*, 16 Wash. 465; *Pronger v. Old Nat. Bank*, 20 Wash. 618; *Dow v. Dempsey*, 21 Wash. 86; *Wheeler v. North American Transp. Co.*, 21 Wash. 704; *Henry v. Grant Street Electric Ry. Co.*, 24 Wash. 246; *Miller v. Dumon*, 24 Wash. 648; *Traver v. Spokane St. R. Co.*, 25 Wash. 225.

The objectionable features in instructions are cured by other paragraphs stating the law clearly and correctly: *Cameron v. Union Trunk Line*, 10 Wash. 507.

Instructions must be considered as a whole, and, if they fairly state the law, there is no prejudicial error, although the court may use detached expressions which, if considered independently, would be technically erroneous: *Seattle Gas etc. Co. v. Seattle*, 6 Wash. 101; *Carstens v. Earles*, 26 Wash. 676; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25; *Bell v. Spokane*, 30 Wash. 508; *Gray v. Washington Water P. Co.*, 30 Wash. 665; *Stowe v. La Conner Trad. & Transp. Co.*, 39 Wash. 28; *Niemyer v. Washington Water Power Co.*, 45 Wash. 170; *Starr v. Aetna Life Ins. Co.*, 45 Wash. 128.

The failure of the court, in an action upon an insurance policy by an assignee, to charge the jury that the assignee had no greater rights than his assignors would have had, if suit had been brought by them, is not prejudicial: *Sanford v. Royal Ins. Co.*, 11 Wash. 653.

It is not error to refuse an instruction embodying only an abstract principle of law, which assumes that its premises are proven facts in the case: *Schmieg v. Wald*, 1 W. T. 472. See *Foster v. Seattle Electric Co.*, 35 Wash. 177.

No error can be predicated on refusal to give argumentative instructions: *Eicholtz v. Holmes*, 8 Wash. 71, 73; *Cowie v. Seattle*, 22 Wash. 659; *Sullivan v. Seattle Electric Co.*, 44 Wash. 53.

Errors in instructions cured by withdrawal or giving other instructions: See 2 *Remington's Digest*, p. 2769, § 117, and p. 2761, § 91.

Error in admitting testimony is cured by subsequently instructing the jury to disregard it: *Lyts v. Keevey*, 5 Wash. 606; but an incorrect special instruction is not cured by a correct general instruction on the same subject: *Baxter v. Waite*, 2 W. T. 228; and it is held that an erroneous instruction is not cured by a subsequent correct one on the same subject, unless the latter specifically withdraws the former: *Lockett v. Baxter*, 3 W. T. 350, 353; *Miller v. Vermurie*, 7 Wash. 386; *Elderkin v. Peterson*, 8 Wash. 674; *Gray v. Washington Water Power Co.*, 30 Wash. 665. But an erroneous instruction is harmless if in appellant's favor: See *Tham v.*

Steeb Shipping Co., 39 Wash. 271. A verdict will not be set aside because contrary to an erroneous instruction to the jury: See *Bancroft v. Godwin*, 41 Wash. 253. See, also, *Davis v. Atlas Assur. Co.*, 16 Wash. 232; *Gallagher v. Buckley*, 31 Wash. 380; *State v. Williams*, 36 Wash. 143; *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415; *Sullivan v. Wood & Co.*, 43 Wash. 259.

Where the testimony is conflicting it is error to give throughout the instructions undue prominence to the testimony of one party with only general reference to that of the other: *Sexton v. School Dist.*, 9 Wash. 5; *Mitchell v. T. Ry. & M. Co.*, 9 Wash. 120.

Prejudice will be presumed from repeating to the jury a comment made by the judge as to what anyone with common sense would say as to one of the material issues of fact, and the same would not be cured by instructions that the jury are sole judges of the fact and should disregard indications made by the court or counsel: *Spencer v. Arlington*, 49 Wash. 121.

When there is evidence, based upon an issue raised by the pleadings, which tends to prove a certain state of facts, it is not error for the court to charge the jury on the hypothesis of such state of facts, if further instructions present fairly the position of the adverse party: *Lichty v. Tannatt*, 11 Wash. 37; *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346.

Where instructions are given a jury sufficient to enable them to correctly determine the questions which the evidence in the cause tends to prove or disprove, it is not prejudicial error if any of the instructions given should not be strictly applicable to the material questions involved: *Carstens v. Stetson & Post Mill Co.*, 14 Wash. 644.

Instructions are inadequate where they leave the jury without light on the law governing the material issues of the cause: *N. P. L. & M. Co. v. Kerron*, 5 Wash. 214, 220. Reading judicial decisions to the jury on the complex question of what constitutes a fixture is not to be commended: *Filley v. Christopher*, 39 Wash. 22; and an instruction is erroneous which takes away from the consideration of the jury material points at issue: *Upper v. Lowell*, 7 Wash. 460, 461; and see *Weeks v. Bussell*, 8 Wash. 440; and it is error to refuse a proper request on the law as applicable to the evidence in the case: *Mitchell v. T. R. & M. Co.*, 9 Wash. 120; see *Seattle v. Buzby*, 2 W. T. 26.

Where there was no evidence to support an allegation that the insufficiency of a belt shifter was a proximate cause of the accident, it is reversible error to submit the issue to the jury and to refuse a requested instruction withdrawing the same: *Tergeson v. Robinson Mfg. Co.*, 48 Wash. 294.

When instructions proposed assume facts on which there is no testimony, and are based upon the pleadings and not the evidence, they should be refused: See 2 Remington's Digest, p. 2763, §§ 96, 97; Frost v. Ainslie L. Co., 3 Wash. 241; Bell v. Wash. C. S. Co., 8 Wash. 27, 31; Woodan v. S. E. R. & P. Co., 5 Wash. 466; Washington Iron Works v. McNaught, 35 Wash. 10; Nye v. Kelly, 19 Wash. 73; Einseidler v. Whitman County, 22 Wash. 388.

If an instruction is broader than the issues and brings in matter foreign thereto prejudicial in character, it is erroneous: Bernhard v. Reeves, 6 Wash. 424, 425; Kirby v. Ranier-Grand Hotel Co., 28 Wash. 705.

A charge to the jury that there was no evidence that would entitle defendants to recover any amount under the pleadings is proper when the issue made by defendants was that plaintiff was to pay for certain land in work and labor, and there was no proof introduced to show that the plaintiff refused to continue to perform work and labor in payment therefor: Robertson v. Woolley, 12 Wash. 326.

There is no occasion for instructing the jury as to the fact in issue if there be no evidence respecting it: Brown v. Forrest, 1 W. T. 201, 204.

An instruction inapplicable to the facts in the case is prejudicial error, tending to mislead the jury: See 2 Remington's Digest, p. 2762, § 93; State v. Jones, 3 Wash. 175; Frost v. Ainslie L. Co., 3 Wash. 241; Guley v. N. W. Coal & Tp. Co., 7 Wash. 491, 495; Cole v. Noerdlinger, 22 Wash. 51; Howells v. North American T. & T. Co., 24 Wash. 689. An instruction not pertinent to the issues in the case should not be given: Rowe v. Whatcom County R. & Light Co., 44 Wash. 658. Instructions upon a theory as to an accident are properly refused if there was no evidence to sustain such theory: Suell v. Jones, 49 Wash. 582. Upon refusal to give an instruction because not requested in proper form, it is not prejudicial error to fail to prepare and give another instruction on the same subject: Ramm v. Hewitt-Lea Lumber Co., 49 Wash. 263.

It is error to submit to the jury an issue in regard to which no evidence has been introduced: Tacoma L. & M. Co. v. Tacoma, 1 Wash. 12, 15; Edison v. Nov. Co., 8 Wash. 370; Comegys v. Am. L. Co., 8 Wash. 661; Guley v. N. W. Coal Co., 7 Wash. 491; and an instruction is also misleading which narrows the issue to a single question when other issues exist under the pleadings and evidence: Chamberlin v. Winn, 1 Wash. 501; or in which the language used is so confused and uncertain that it is misleading: Columbia etc. Ry. Co. v. Farrington, 1 Wash. 202, 205; see Blue v. McCabe, 5 Wash. 125; Gottstein v. Seattle L. etc. Co., 7 Wash. 424; Turner v. Great Nor. R. Co., 15 Wash. 213.

That an instruction is not simple and direct does not make it misleading: Carson v. Old Nat. Bank, 37 Wash. 279.

The unnecessary repetition of instructions might be ground for reversal: Chicago etc. R. Co. v. Alexander, 47 Wash. 131.

Where the questions of negligence and contributory negligence are for the jury, each side is entitled to have the same submitted on proper instructions: Gage v. Springston Lumber Co., 47 Wash. 141.

Although instructions as a whole may be correct, the case should be reversed if some parts are confusing and misleading, to the possible prejudice of the appellant: Gage v. Springston Lumber Co., Id.

An instruction, referring to the "facts and circumstances disclosed on the stand by the witnesses," is not misleading when there is also written evidence, when such statement was followed by and connected with the further charge to the jury that "you are the sole judges of the facts. These facts have been given you on the stand through witnesses and exhibits that have been placed in evidence here to enable you to find the facts": Sanford v. Royal Ins. Co., 11 Wash. 653; Carstens v. Earles, 26 Wash. 676; Anderson v. McDonald, 31 Wash. 274; Benson v. Spokane, 39 Wash. 101.

Although an instruction to the jury may have been wrongfully given, it is binding and conclusive upon the jury: Pepperall v. City Park Transit Co., 15 Wash. 176.

The improper use of the word "not" in an instruction, evidently unintentional, will not be regarded as misleading to the jury, when its use is connected with the statement of facts over which there is no controversy: Bokien v. State Ins. Co., 14 Wash. 39. See, also, Armstrong v. Musser Lum. & Mfg. Co., 43 Wash. 584.

The giving of an instruction based upon an hypothesis which is not parallel to the facts in the case is reversible error, where it may have tended to mislead the jury, unless, from the undisputed testimony, it is evident that no other verdict than the one returned could rightfully have been rendered: Martin v. Union Mut. Ins. Co., 13 Wash. 275.

Though separate clauses of an instruction may, in themselves, be misleading, yet, if the instruction, taken altogether, fairly informs the jury as to the law of the case, it will be upheld: Duggan v. Pac. Boom Co., 6 Wash. 593; Croft v. Northwestern S. S. Co., 20 Wash. 175; Smith v. Seattle, 33 Wash. 481. As to charges with reference to "Preponderance of Evidence," see 2 Remington's Digest, p. 2759, § 85.

An instruction that plaintiff must establish all his material allegations by a preponderance of testimony is not misleading because the word "testimony" is used instead of "evidence": Noyes v. Pugin, 2 Wash. 653.

A party, having requested the court to charge that the jury must find certain facts in issue by a preponderance of evi-

dence, cannot complain that the court did not require the evidence on those points to be more clear and positive: *Gottstein v. S. L. & C. Co.*, 7 Wash. 424.

As an example of a charge upon the preponderance of evidence, see *N. P. Ry. Co. v. Holmes*, 3 W. T. 543.

Where an affirmative defense is pleaded, it is error to instruct the jury that "if you believe from the evidence that all the material allegations of plaintiff's complaint have been proven by a preponderance of the evidence, then you will find for plaintiff": *Dignan v. Spurr*, 3 Wash. 309.

An instruction charging the jury to find in a certain way unless the contrary "shall be established by a preponderance of the evidence satisfactory to your minds," is not misleading on the ground of telling the jury that more than a preponderance of evidence is required: *Carstens v. Earles*, 26 Wash. 676.

An instruction requiring proof of a certain fact by the preponderance of the evidence, and authorizing recovery if such fact is proved to the satisfaction of the jury, is not objectionable as authorizing a recovery upon proof to the jury's satisfaction without proof by the preponderance of the evidence: *Childs v. Childs*, 49 Wash. 27.

A charge that the defense of contributory negligence must be proved by defendant, by a preponderance of the evidence, is not objectionable as charging that it must be proved by defendant's evidence: *Prior v. Eggert*, 39 Wash. 481.

It is error to charge that the weight of evidence is with the greater number of unimpeached witnesses: *McCowan v. Northeastern Siberian Co.*, 41 Wash. 675.

An instruction charging that the jury "should be satisfied by a clear preponderance of proof," is not misleading, when the court has just charged that "it is not required in a civil action to establish the facts beyond a reasonable doubt as in a criminal case, but a fair preponderance of proof is all that is required": *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620; see *O. R. & N. Co. v. Owsley*, 3 W. T. 38.

Instructions in a particular case, held misleading, as making the question as to whom materials were sold turn upon the charge in plaintiff's books, and whether it was so charged by mistake: *Sexton v. School Dist.*, 9 Wash. 5; see *Mitchell v. T. Ry. & M. Co.*, 9 Wash. 120; *Warburton v. Ralph*, 9 Wash. 537, 554.

Where a case is tried on the theory of a contract as set up in the answer, without objection, it is error to instruct upon the theory of a sale and apply the statute of frauds thereto, since the instructions ought to have been on the facts rather than the letter of complaint: *Fox v. Utter*, 6 Wash. 299, 301.

When counsel propose a proper charge, if given at all by the court, it ought to be given in the form submitted: *Gottstein v. S. L. & C. Co.*, 7 Wash. 424, 427; but it is

not error to refuse to give proper instructions in the language of requests, when the court, in other instructions, substantially covers them: *Edison Gen. Elec. Co. v. Nav. Co.*, 8 Wash. 370, 40 Am. St. Rep. 910; *State v. Freidrich*, 4 Wash. 204; *Spokane T. & D. Co. v. Hoefer*, 2 Wash. 45; *Seattle v. Buzby*, 2 W. T. 25; *Maling v. Crummey*, 5 Wash. 222; *Downs v. Seattle & M. R. Co.*, 5 Wash. 778, 783; *Curry v. Catlin*, 12 Wash. 323; *Carstens v. Stetson & P. M. Co.*, 14 Wash. 644; *Fleischner v. Beaver*, 21 Wash. 6; *Howay v. Goin-Northrup Co.*, 24 Wash. 88; *Miller v. Dumon*, 24 Wash. 648; *French v. Seattle Traction Co.*, 26 Wash. 264; *Wolf v. Hemrich Bros. Brewing Co.*, 28 Wash. 187; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25; *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244; *Foster v. Pacific Clipper Line*, 30 Wash. 515; *Smith v. Seattle*, 33 Wash. 481; *Hindle v. Holcomb*, 34 Wash. 336; *Young v. O'Brien*, 36 Wash. 570; *Go Fun v. Fidalgo Island Can Co.*, 37 Wash. 238; *McKnight v. Seattle*, 39 Wash. 516; *Cowie v. Seattle*, 22 Wash. 659; *Smith v. Michigan Lumber Co.*, 43 Wash. 402; *Hammock v. Tacoma*, 44 Wash. 623; *Curtis v. Barter Asphalt Paving Co.*, 44 Wash. 334; *Payne v. Whatcom County Railway & Light Co.*, 47 Wash. 342; *Ranous v. Seattle Electric Co.*, 47 Wash. 544; *State v. Johnson*, 47 Wash. 227; *Ramm v. Hewitt-Lea Lumber Co.*, 49 Wash. 263; *Engelker v. Seattle Electric Co.*, 50 Wash. 196; see 2 Remington's Digest, p. 2764, § 101.

Where the court has rightly and fully instructed upon the question of reasonable doubt, it was not error to refuse an instruction upon the same subject asked for by defendant, although the request is correct in law: *Timmerman v. Territory*, 3 W. T. 445; *Brewster v. Baxter*, 2 W. T. 135.

Where instructions given embody all the law necessary for the determination of the material facts in the case, it is not error to refuse requested instructions, even if they correctly state the law applicable to the questions to be decided by the jury: *Carstens v. Stetson & Post Mill Co.*, 14 Wash. 644.

If a counsel desires special instructions adapted to particular phases of the case as presented by the evidence, he should submit requests therefor: See 2 Remington's Digest, p. 2764, § 99; *Wilson v. Waldron*, 12 Wash. 149.

Where one party asks instructions on the whole case, and the court charges as requested, errors of incompleteness are imputable to the party requesting the instructions, and the failure of the other party to ask for more specific instructions does not waive the error: *Mitchell v. T. Ry. & M. Co.*, 9 Wash. 120.

If too general, there must be a request that instructions be made more specific: *Cogswell v. West St. & N. E. Elec. R. Co.*, 5 Wash. 46; *Brown v. Porter*, 7 Wash. 327; *Gottstein v. Seattle Lum. & Com. Co.*, 7 Wash. 424; *Wilson v. Wal-*

dron, 12 Wash. 149; *McQuillan v. Seattle*, 13 Wash. 600; *Dow v. Dempsey*, 21 Wash. 86; *Allend v. Spokane etc. Ry. Co.*, 21 Wash. 324; *Carstens v. Earles*, 26 Wash. 676; *Rush v. Spokane Falls & N. Ry. Co.*, 23 Wash. 501; *Enoch v. Spokane Falls & N. Ry. Co.*, 6 Wash. 393; *Reidt v. Spokane Falls N. & Ry. Co.*, 6 Wash. 623.

While a party may be entitled to have a clause of a requested instruction given in order to make more definite the charge upon a particular point, yet if he couples it with another clause which ought not to be given, the instruction may be refused as a whole: *Duggan v. Pac. Boom Co.*, 6 Wash. 593.

A party cannot complain of the court's addition to an instruction asked by him, as diverting the minds of the jury from the point of the instruction, where the jury have already been properly instructed as to such point: *Cogswell v. West St. etc. Ry. Co.*, 5 Wash. 46.

Appellant cannot avail himself of incomplete and ambiguous instructions given by the court, unless he has first requested the court to make its instructions more full and complete, and it has refused so to do: *Box v. Kelso*, 5 Wash. 360; *McQuillan v. Seattle*, 1 Wash. 600. See, also, *Allend v. Spokane Falls & N. Ry. Co.*, 21 Wash. 324; *Lownsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542; *Eggleston v. Seattle*, 33 Wash. 671; *Howe v. West Seattle L. Imp. Co.*, 21 Wash. 594; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467.

It is not error to fail to instruct specifically that the defendant controverted the material facts of the complaint by denials, where it appears that the jury must have so understood the issues: *Schwaninger v. McNeeley & Co.*, 44 Wash. 447.

In an action upon injunction bonds for damages by reason of being deprived of the control of a business, no prejudice results from the fact that the instructions inadvertently failed to permit recovery of damages for a certain day, where it was not shown that there was any change of conditions or particular damages sustained on such day: *Collins v. Huffman*, 48 Wash. 184.

It is not error to instruct upon the issues raised by evidence admitted without objection, although the same may not have been raised by the pleadings: *Childs v. Childs*, 49 Wash. 27.

It is not erroneous to instruct that, "if you should be satisfied that any witness has knowingly testified falsely in any material matter in this cause, you have a right to reject the whole of the testimony of such witness, unless on any point such testimony was corroborated by other unimpeached testimony," though it may not be aptly expressed on the subject of corroboration: *Lyts v. Keevey*, 5 Wash. 606.

Where counsel in argument to a jury exhibits paid checks of his client, which had not been introduced in evidence, and refers thereto for the purpose of refresh-

ing his recollection as to dates and amounts, it is error for the court to refuse a request for an instruction to the jury to disregard counsel's argument in regard to them: *Cohen v. Drake*, 13 Wash. 102.

An instruction in a case where treble damages could be awarded under § 939, *infra*, that the jury could themselves assess the treble damages is erroneous, as it is for the court to treble the damages after the actual damages are found: *McLeod v. Ellis*, 2 Wash. 117.

Error in admitting incompetent evidence on the measure of damages is not cured by a proper instruction on the question: *Kohne v. White*, 12 Wash. 199.

It is error for the court to refuse to instruct that the fraud charged may be inferred by strong presumptive circumstances, although the only evidence tending to sustain the issue was circumstantial: *McWilliams v. Cascade F. & M. Ins. Co.*, 7 Wash. 48.

Where the complaint is put in evidence as an exhibit, it is error for the court to refuse to charge as to its legal effect as evidence: *Tingley v. Fairhaven L. Co.*, 9 Wash. 34.

If the verdict is unmistakably in accordance with the evidence and consonant with justice, it will not be disturbed on account of erroneous instructions: *Carroll v. Centralia Water Co.*, 5 Wash. 613; *Davis v. Gilliam*, 14 Wash. 206; *Secor v. O. I. Co.*, 15 Wash. 35; *Bay View Brewing Co. v. Techlenberg*, 19 Wash. 469; *Ott v. Press Pub. Co.*, 40 Wash. 308.

It is error to instruct the jury to find a verdict unless the facts are established by undisputed proofs: *Mesterman v. Home Mutual Ins. Co.*, 5 Wash. 524, 526.

The trial court is authorized, after the return of the jury with its verdict, and before its reception, to correct any erroneous instruction given, and send the jury back to deliberate under the instructions as altered: *Jack v. Territory*, 2 W. T. 101.

Where no attack has been made upon an answer to a complaint in the lower court, the defendant is entitled to have the jury charged upon any phase of the case as made by the evidence, which is responsive to the issues: *Secor v. O. S. Co.*, 15 Wash. 35.

The fact that one instruction given by the court had been inadvertently withheld by the clerk, upon a request from the jury during their deliberations to have the instructions sent them, cannot be urged as error, in the absence of any showing that the appellant was prejudiced by such omission: *No. River Boom Co. v. Smith*, 15 Wash. 138.

For examples in actions for damages for personal injuries, see *Spurrier v. Front St. etc. Ry. Co.*, 3 Wash. 659; *Hawkins v. Front St. etc. Ry. Co.*, 3 Wash. 592; *Redford v. Spokane St. Ry. Co.*, 9 Wash. 55; *Bell v. Wash. Cedar etc. Co.*, 8 Wash. 27; *Carroll v. Centralia Water Co.*, 5 Wash. 613; *Woo Dan v. Seattle etc. Ry. etc. Co.*, 5

Wash. 466; Ledyard v. West St. etc. Elec. Ry. Co., 5 Wash. 64; Payne v. Spokane St. Ry. Co., 15 Wash. 522; Richardson v. Carbon Hill Coal Co., 10 Wash. 648; Cameron v. Union Trunk Line, 10 Wash. 507; Mitchell v. Tacoma Ry. & Motor Co., 13 Wash. 560.

An instruction in an action for malicious prosecution, that if the jury find that defendants willfully testified falsely against plaintiff, they may find that there was no probable cause to warrant or excuse prosecution, and that the same was malicious, is not erroneous: Jones v. Jenkins, 3 Wash. 17. And an instruction in such case that the jury may allow plaintiff such sum as will compensate him for injured credit, peace of mind, and mental suffering is not misleading as to use of word "credit": Id.

In an action in which special damages are alleged in a certain sum, and the only specific proof on the subject puts the damages at a less sum, it is error to refuse defendant's request to charge the jury that no greater sum than the amount given in proof could be assessed as damages: Reickhoff v. Irrigation Co., 10 Wash. 139.

A charge to the jury that the burden was on plaintiff to show what amount of damage he had suffered by reason of the failure of the contractor to complete the building in the time fixed by the contract and that they should allow him such amount as they found was established by the evidence is not erroneous, when plaintiff has not specifically requested the court's construction as to whether the amount of damages for each day's delay was liquidated and fixed by the parties in their contract: De Mattos v. Jordan, 15 Wash. 378.

An instruction as to application of payments, to the effect that where the debtor, at the time, neglected to specify the particular debt he desires to have it applied to, the creditor, it was held, had the right to apply it as he preferred: Frazier v. Miller, 7 Wash. 521.

An instruction in a suit for personal services on an order, to the effect that defendants would be liable for the amount named therein, held erroneous as ignoring the necessity of presentation and notice of non-payment: Agee v. Smith, 7 Wash. 471.

The refusal of a request to instruct that a corporation must have authority from its board of directors in order to transfer a note is not error when unaccompanied by other instructions sufficient to inform the jury that such authority may be conferred in many ways: Blue v. McCabe, 5 Wash. 125.

In an action which seeks to charge defendant as a silent partner, not as a partner by holding out, the introduction of proof tending to show that he has made admissions of the partnership, but not to plaintiff or anyone representing it, will not warrant the court in charging the jury that "if you find from the evidence that the defendant, J. A. McGoldrick, has admitted there was a partnership between

him and decedent T. J. Mahoney, and was interested with him in the undertaking business during the times set forth in the complaint, that is, in both the goodwill of such business and stock of goods used in such business, then your verdict should be for the plaintiff": Willamette Casket Co. v. McGoldrick, 10 Wash. 229.

If the evidence concerning the rescission of a contract is conflicting, it is error to refuse to instruct the jury, that if they believe from the evidence that such an agreement for the rescission of the contract set out in the complaint was made as is alleged in defendant's answer, then the parties would be bound by such an agreement, and the jury must find for the plaintiff: Dignan v. Spurr, 3 Wash. 309.

In an action for damages resulting from street grading, instruction held to state the proper rule of damages: Koch v. Investment Co., 9 Wash. 405.

In an action against a bank to recover for payment of a check alleged to be forged, it is not error to charge that a bank need not regard handwriting in the body of the check it pays, but must look to the signature alone: Crane v. Dexter Horton & Co., 5 Wash. 479.

Where there is evidence that a bill of sale under which defendant in replevin claimed title had been given in compromise of a disputed claim, it is error to instruct that such bill of sale conveys no right to the property in question: Chamberlain v. Winn, 1 Wash. 501.

EXCEPTIONS TO INSTRUCTIONS, ETC.: See notes under chapter on Exceptions, *infra*, § 381 et seq. See 2 Remington's Digest, pp. 2766, 2767, §§ 106-115.

Although an instruction may be erroneous, the error is unavailing unless excepted to at the trial: Johnson v. Tacoma C. L. Co., 3 Wash. 722; Smith v. U. S., 1 W. T. 262.

The exceptions taken to a charge must be specific and not general to be availing: Meeker v. Gardella, 1 Wash. 139, 148; Cunningham v. Seattle Elec. Ry. Co., 3 Wash. 471; Freidrich v. Territory, 2 Wash. 358, 368; Maling v. Crummey, 5 Wash. 222.

The refusal of the court to allow counsel to except orally in the presence of the jury to instructions given is not error: State v. Coella, 8 Wash. 512.

Under the act of 1893, page 112, § 4 (§ 384, *infra*), exception can be taken to an instruction by merely specifying the instruction excepted to, without stating the grounds: Sexton v. School Dist., 9 Wash. 5.

Errors alleged as to instructions, in that they improperly state the law, are confusing, conflicting, misleading and present false issues, are too general to be considered, when they do not point out the respects in which they are erroneous: Shoemaker v. Bryant Lum. etc. Co., 27 Wash. 637.

Where the bill of exceptions does not contain all of the instructions given, the

particular instruction objected to, although erroneous, will be presumed to be cured by other parts of the charge: *O. R. & N. Co. v. Galliher*, 2 W. T. 70. Contra: *Payne v. Spokane St. R. Co.*, 15 Wash. 522.

Error in an instruction is ground for reversal unless it affirmatively appears that it was not prejudicial: *McLeod v. Ellis*, 2 Wash. 117; *Gustin v. Jose*, 11 Wash. 348; *Lillie v. Shaw*, 22 Wash. 234. An exception to an instruction is not properly taken where the exception attributes to the court language not used and conveying a different meaning: *Anderson v. Harper*, 30 Wash. 378.

An exception to an instruction giving simply its number, but not specifying any ground is insufficient to raise a question which has been ignored in such instruction: *Patchen v. P. & L. M. Co.*, 6 Wash. 486, 490.

If the instructions given are not numbered, nor so designated that they can be distinguished, a general exception to the giving of the charge will be insufficient: *Cunningham v. Seattle Elec. Ry. Co.*, supra.

A particular form of exception to refusal to instruct as requested sanctioned in *Bell v. Wash. Cedar Shingle Co.*, 8 Wash. 27.

Where instructions consisted of a series of separate propositions, and the exception to the charge was "to the giving of which and to the giving of each part thereof," it is insufficient, as the court cannot say that no part of the charge was sound: *Meeker v. Gardella*, 1 Wash. 139.

The action of the district court in granting or refusing instructions cannot be reviewed, unless there is a bill of exceptions showing the evidence to which the instructions pertain: *Thompson v. Territory*, 1 W. T. 547.

If the record on appeal sets out a proper exception to instructions, and there is nothing to indicate that it was not taken at the time the instructions were given, it will be treated as a definite exception: *Miller v. Vermurie*, 7 Wash. 386.

Where instructions have not been made a part of the record on appeal by a statement of fact or other appropriate action of the court, and had not been sent to the appellate court as part of the record, they will be stricken therefrom: *Medcalf v. Bush*, 4 Wash. 386; *Cunningham v. S. E. Ry. Co.*, 3 Wash. 471.

The appellate court will not examine into the opinion of the court below, to see whether instructions upon abstract propositions of law are correct. The bill of exceptions must show whether the instructions given or refused were pertinent to the case: *Yelm Jim v. Territory*, 1 W. T. 63.

If any particular portion of a charge has been specifically and properly excepted to, and the exceptions allowed, the judge who tried the cause cannot afterward, by interlineations, modify or change the instruc-

tions given as to the matter in dispute: *In re Rosner*, 5 Wash. 488.

The instructions of the lower court transmitted to the appellate court as a separate paper, without the clerk's certificate, will be stricken from the files: *Puget Sound Iron Co. v. Worthington*, 2 W. T. 472.

Where, under all the evidence, it appears that the defendant was entitled to have the jury instructed to find a verdict in his favor, the supreme court will, on reversal of the judgment, direct a dismissal of the action: *Bernhard v. Reeves*, 6 Wash. 424.

Where plaintiff's testimony is sufficient to establish all the allegations of the complaint in issue, and defendant introduces no proof, but rests on a motion for nonsuit, the court is warranted in instructing a verdict for plaintiff: *Clancey v. Reis*, 5 Wash. 371; *Clancey v. Williams*, 5 Wash. 492; writs of error dismissed in the above cases in 154 U. S. 514, 524. See *Columbia etc. Ry. Co. v. Brillard*, 5 Wash. 492.

Where the failure of the court to charge the jury in writing as requested is not excepted to, the error is immaterial: *Warburton v. Ralph*, 9 Wash. 537, 544.

If a request to charge is first made in writing after the evidence is closed, such request is seasonable, notwithstanding a rule of court provides that notice of the intention to so request shall be given at or before the commencement of the trial. Where there is a conflict between the law and a rule of court the former must prevail: *Id.*

EVIDENCE—PRACTICE IN RELATION TO: See 2 Remington's Digest, pp. 2743-2745, §§ 27-33. The order of time in which testimony is presented to the jury is not material: *McKenzie v. O. I. Co.*, 5 Wash. 409, 411.

And it is within the discretion of the trial court to reopen the case for the introduction of additional testimony: *Thorne v. Joy*, 15 Wash. 83; *Bergman v. London etc. Fire Ins. Co.*, 34 Wash. 398. Or after motion for nonsuit: See *Kane v. Kane*, 35 Wash. 517; *Knapp v. Order of Pendo*, 36 Wash. 601. It is within the discretion of the court to reopen a case for the introduction of further testimony, after motion for nonsuit is made, and no abuse appears where no prejudice or surprise is shown: *Richardson v. Agnew*, 46 Wash. 117.

Testimony offered to show diligence in producing a written instrument, as foundation for the introduction of secondary evidence of its contents, is directed to the court and not to the jury: *Tibbals v. Iffland*, 10 Wash. 451.

The question of contributory negligence is for the jury, and it is only in rare cases that the court is justified in withdrawing it from them: *McQuillan v. Seattle*, 10 Wash. 464.

When the facts in regard to the statement of an account are agreed upon, the question of what is a reasonable time within which the account will be presumed to become stated, is one of law; and, when

the facts are not agreed upon, it is a mixed question of law and fact: *Ault v. I. S. & L. Assn.*, 15 Wash. 627.

The construction of a written contract being a question of law, it is not error to refuse to allow the jury to construe it: *Livesley v. O'Brien*, 3 Wash. 546.

Although testimony on trial may be of slight significance, yet when pertinent to the issues it is not error to allow the jury to pass on its weight: *Brown v. Porter*, 7 Wash. 327.

Where plaintiff rested after introducing certain evidence, and the defendant declined to offer evidence, the oral announcement by the court that, while in grave doubt upon certain points, it would find for the defendants, does not prevent the court from reopening the case for further testimony by the plaintiffs, two days later, on due application and notice, before entry of formal judgment, the opening of the case being discretionary under such circumstances: *Reiff v. Coulter*, 47 Wash. 678.

It is discretionary to reopen a case for further evidence upon a showing that it was unknown to counsel, where the opposite party is given an opportunity to rebut the same: *Lueders v. Tenino*, 49 Wash. 521.

Even hearsay evidence, when admitted without objection, and allowed to remain in the case for want of a motion to strike, is some proof of the facts stated: *Easter v. Hall*, 12 Wash. 160. It is not error to exclude hearsay evidence, expressly stating that ground, although the same was only objected to as evidence of conversations with a deceased person: *Richardson v. Agnew*, 46 Wash. 117.

Irrelevant testimony admitted over objection will not justify a reversal when not prejudicial: *Crane v. Dexter Horton & Co.*, 5 Wash. 479; *Woo Dan v. Seattle Elec. Ry. etc. Co.*, 5 Wash. 466; *Earles v. Bigelow*, 7 Wash. 581; *Price v. Scott*, 13 Wash. 574; *Schwede v. Hemrich*, 29 Wash. 124; *Powell v. Nolan*, 27 Wash. 318; *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415.

Any question as to materiality or competency of testimony offered should be raised by objection; but in an equitable action it is not necessary for either party to take an exception to a ruling thereon: *Scully v. Book*, 3 Wash. 182.

Error in permitting leading questions is harmless when upon an immaterial matter: *Pilling v. Morse*, 5 Wash. 797.

And the admission of incompetent evidence in rebuttal of immaterial evidence is harmless error: *Klepsch v. Donald*, 8 Wash. 162; *State v. Nelson*, 13 Wash. 523; *Croft v. Northwestern Steamship Co.*, 20 Wash. 175; *Crooker v. Pacific Lounge etc. Co.*, 34 Wash. 191; *Williams v. Spokane Falls & N. R. Co.*, 42 Wash. 597.

The admission or exclusion of rebuttal evidence being within the court's discretion, the introduction in rebuttal of merely cumulative evidence is not an abuse of such

discretion: *Cogswell v. West St. etc. Elec. Ry. Co.*, 5 Wash. 46; *Ramage v. Littlejohn*, 17 Wash. 386; *Elster v. Seattle*, 18 Wash. 304; *Seattle v. Griffith Realty & Bk. Co.*, 28 Wash. 605; *Gaudie v. Northern Lumber Co.*, 34 Wash. 34. Or where the evidence should have been presented in chief: *See Seattle & M. R. Co. v. Roeder*, 30 Wash. 244.

An objection to the admissibility of evidence is insufficient unless the grounds thereof are stated: *Earles v. Bigelow*, 7 Wash. 581.

When part of a witness' answer to a question is competent, and part incompetent, a general objection to it as a whole should be overruled: *Spurlock v. Pt. T. So. Ry. Co.*, 13 Wash. 29.

Although the ground upon which the trial court has excluded testimony may have been improper, yet if any good reason exists for its exclusion, the court's action will be sustained: *Lyts v. Keevey*, 5 Wash. 606; *Chezum v. Parker*, 19 Wash. 645.

But it is error to refuse to admit competent evidence, not cumulative: *See Schlotsfeldt v. Bull*, 18 Wash. 64. As to plaintiff's evidence in chief regarding defenses disclosed or claimed by defendant, see *Sandquist v. Independent Tel. Co.*, 38 Wash. 313; *Malstrom v. Northern Pac. R. Co.*, 20 Wash. 195.

An objection that testimony is inadmissible under the pleading is properly overruled, where the same testimony has been voluntarily drawn out by the party objecting, although in part from adverse witnesses, whose testimony it failed to contradict: *Tacoma L. & W. Co. v. Huson*, 13 Wash. 124. But error in sustaining objections to evidence is not waived by failing to ask further questions on the same point: *See State v. Shelton*, 16 Wash. 590; *Anderson v. White*, 18 Wash. 658.

Argument of counsel based upon incompetent testimony, not objected to when offered, cannot be reached on appeal: *Sears v. Seattle etc. St. Ry.*, 6 Wash. 227.

Error in refusal to admit testimony is cured by its admission later on: *McKenzie v. O. I. Co.*, 5 Wash. 409.

Or by an instruction withdrawing it from the consideration of the jury: *Lyts v. Keevey*, 5 Wash. 606.

A motion to strike out all the testimony relating to a particular subject is properly denied when some of it is clearly competent: *Yake v. Pugh*, 13 Wash. 78; *Spokane v. Costello*, 42 Wash. 182; *Newman v. Buzard*, 24 Wash. 225.

If a witness has testified positively to a fact it is not competent for the party introducing him to elicit from him a statement as to the reasons which led him to come to the conclusions to which he has testified: *Springer v. Tacoma Traction Co.*, 15 Wash. 660.

Where counsel examine a witness as to facts not admissible in evidence the other party is entitled to re-examine as to the

testimony elicited: *Dutcher v. Howard*, 15 Wash. 693.

The taking of the testimony of a plaintiff, who is unable to attend court at the time of trial, at his residence, in the presence of judge, jury and counsel for the respective parties, while irregular, is not prejudicial error: *Sutton v. Snohomish*, 11 Wash. 24. A party need not try a case by piecemeal: *Warburton v. Ralph*, 9 Wash. 537; *Penn Mortgage Inv. Co. v. Gilbert*, 13 Wash. 684; *Snohomish County v. Ruff*, 15 Wash. 637; *Reef v. Tibbals*, 18 Wash. 656.

Error in admitting a written instrument in evidence for the reason that there was no proof of its execution cannot be urged on appeal, when merely general objections were interposed in the court below that it was incompetent and that no proper foundation had been laid for its introduction: *McElroy v. Williams*, 14 Wash. 627.

A question asking a party as to what arrangement he had in relation to getting his pay for certain property is properly excluded where a written contract has already been put in evidence covering the subject: *Glick v. Weatherwax*, 14 Wash. 560.

The exclusion of evidence tending to establish a fact essential to the plaintiffs' recovery is not prejudicial error, where the fact is not disputed: *Id.*

Objections to evidence should be specific or they will not be considered on appeal: See *State v. Owens*, 15 Wash. 468; *Johnson v. Irwin*, 16 Wash. 652; *Anderson v. New York Life Ins. Co.*, 34 Wash. 616; *Beebe v. Redward*, 35 Wash. 615.

Where upon objection to testimony offer of other proof is made, and the objection is modified in such a way as to lead the court and counsel to believe that the first objection is waived, it cannot be urged as error, although no waiver was intended: *Pearce v. Greek Boys' Mining Co.*, 48 Wash. 38.

An objection to parol evidence of a deed, on the ground that there was no sufficient evidence of its loss, is waived if not made when the parol evidence was offered: *Holly Street Land Co. v. Beyer*, 48 Wash. 422.

Where copies of wills are conceded to be correct copies, and they are treated by court and counsel as being regularly admitted to probate, objection to the want of proper foundation is waived: *Kenney Presbyterian Home v. Kenney*, 45 Wash. 100.

Failure to require filing of a copy of an original judgment read in evidence is not prejudicial: See *Barnes v. Gerberg*, 27 Wash. 126. Where correct copies of original wills were offered in evidence and objections on that ground expressly waived, an objection that the wills were irrelevant and incompetent does not raise the point that no proof of authentication or probate was offered with the wills, the probate thereof being on file in the same court.

and such an objection to the wills cannot be considered for the first time on appeal: *Kenney Presbyterian Home v. Kenney*, 45 Wash. 106.

Separation and exclusion of witnesses rests in discretion of court: See *Griffith v. Ridpath*, 38 Wash. 540. The disobedience of a witness to an order excluding witnesses from the courtroom does not disqualify him, and he should not be prevented from testifying except for a party's connivance in his disobedience: *Hendelman v. Kahan*, 50 Wash. 247.

On limiting number of expert witnesses on value of land, see *Swope v. Seattle*, 36 Wash. 113.

A request for a record in a certain case is not a sufficient offer of proof: *Nason v. Northwestern Milling etc. Co.*, 17 Wash. 142.

Withdrawing evidence erroneously admitted cures the error: See *Yakima Valley Bank v. McAllister*, 37 Wash. 566.

It is not error to refuse to withdraw evidence competent under the theory of the case: See *Johnson v. San Juan Fish & Po. Co.*, 31 Wash. 238.

WITNESSES.—It is error for a judge presiding at the trial of a cause to testify therein, over the objection of a party: *Maitland v. Zanga*, 14 Wash. 92.

If the competency of a witness to testify as an expert is not raised in the lower court, it cannot be urged on appeal: *Robinson v. Marino*, 3 Wash. 434.

In an attempt to sustain the testimony of a witness by showing that he had made statements out of court similar to his affidavit filed in the case, the proper method is for the sustaining witness to testify what the statements were without reference to the affidavit: *State v. Murphy*, 9 Wash. 204.

Latitude in the admission or rejection of evidence, matters of opinion, etc.: See 2 *Remington's Digest*, p. 2895, §§ 57-59; *Crane v. Horton & Co.*, 5 Wash. 479; *State v. Gates*, 28 Wash. 689; *Stossel v. Van de Vanter*, 16 Wash. 9; *Service v. Deming Inv. Co.*, 20 Wash. 658.

Leading questions, hostile witnesses, repetitions of answers, etc.: See 2 *Remington's Digest*, p. 2896, §§ 60-62; *Pilling v. Morse*, 5 Wash. 797; *State v. Elswood*, 15 Wash. 453; *Harris v. Halverson*, 23 Wash. 779; *Schwede v. Hemrich*, 29 Wash. 124; *Edwards v. Burke*, 36 Wash. 107; *State v. Dalton*, 43 Wash. 278; *State v. Roller*, 30 Wash. 692; *Nunn v. Jordan*, 31 Wash. 506; *Jones v. Western Mfg. Co.*, 32 Wash. 375; *Miller v. Denman*, 49 Wash. 217.

Examination by court: See *Knox v. Fuller*, 23 Wash. 34; *Dawson v. Dawson*, 40 Wash. 656.

Responsiveness of answer or remarks by witness: See *Spurlock v. Port Townsend So. R. Co.*, 13 Wash. 29; *Hart v. Cascade Timber Co.*, 39 Wash. 279; *Johnson v. Northport Smelting & Refining Co.*, 50 Wash. 567.

Allowing witness to give his reasons for knowledge or recollection: See *Yelm Jim v. Territory*, 1 W. T. 63; *Sprenger v. Tacoma Traction Co.*, 15 Wash. 660.

REFRESHING MEMORY: See 2 Remington's Digest, p. 2897, §§ 67, 68; *Williams v. Miller*, 1 W. T. 88; *Brotton v. Langert*, 1 Wash. 227; *American Bldg. etc. Assn. v. Hart*, 2 Wash. 594; *Tingley v. Fairhaven Land Co.*, 9 Wash. 34; *Bergman v. Shoudy*, 9 Wash. 331; *State v. Douette*, 31 Wash. 6; *State v. Mann*, 39 Wash. 144; *Kellog v. Scheuerman*, 18 Wash. 293.

It is inadmissible to testify from a memorandum prepared seven months subsequent to deposit of trunk in warehouse, in an action for recovery of value of contents: *Bergman v. Shoudy*, 9 Wash. 331.

Reference to memoranda, if entries were not made at the time as result of matters wholly within witness' own knowledge, but derived from reports of servants, is inadmissible: *Tingley v. Fairhaven Land Co.*, 9 Wash. 34.

A witness will not be permitted to read from a memorandum prepared by his clerks as to items of payments made him, when he does not know how the clerk made up the memorandum: *Bratton v. Langert*, 1 Wash. 227.

Nor refresh his memory from a written list copied by him from an extract of a record made by an under clerk: *American Bldg. etc. Assn. v. Hart*, 2 Wash. 594.

CROSS-EXAMINATION.—The character and extent of cross-examination rests largely in the discretion of the court, and unless abused to the injury of the party complaining, the judgment will not be reversed: *Carroll v. Centralia Water Co.*, 5 Wash. 613.

The refusal to permit further cross-examination, after a subject has once been gone into on cross-examination, and dropped, is not prejudicial error: *Koch v. Investment Co.*, 9 Wash. 405.

A question propounded to a witness on cross-examination is properly excluded where the witness has already been fully examined concerning the matter to which the question relates: *Gilliam v. Davis*, 14 Wash. 183.

A witness called to identify the signature to a receipt claimed to have been given him, as defendant's agent, in full of account, may be cross-examined as to moneys he has received and paid out for and on account of plaintiff: *Patchen v. Parke & Lacy M. Co.*, 6 Wash. 486.

As to order, scope and extent of cross-examination, see 2 Remington's Digest, p. 2298, §§ 71-77; *Birkel v. Chandler*, 26 Wash. 241; *Carroll v. Centralia Water Co.*, 5 Wash. 613; *Fleischner v. Beaver*, 21 Wash. 6; *Gilliam v. Davis*, 14 Wash. 183; *Koch v. Sackman-Phillips Inv. Co.*, 9 Wash. 405; *Nunn v. Jordan*, 31 Wash. 506; *State v. Roller*, 30 Wash. 692; *Stowe v. La Conner Trad. & Transp. Co.*, 39 Wash. 28; *Tibbals v. Iffland*, 10 Wash. 451; *Knox v. Parker*, 2 Wash. 34; *Lynn v. Waldron*,

38 Wash. 82; *Dimmick v. Collins*, 24 Wash. 78; *Coey v. Darknell*, 25 Wash. 518; *Littell v. Saulsberry*, 40 Wash. 550; *White v. Territory*, 1 Wash. 279; *Bell v. Washington Cedar Shingle Co.*, 8 Wash. 27; *State v. Rutten*, 13 Wash. 203.

In a criminal prosecution it is proper to allow cross-examination of the defendant's witnesses tending to discredit their positive statements: *State v. Katon*, 47 Wash. 1.

In a personal injury case, upon cross-examination of plaintiff's husband, who was commonly called "doctor" and who had given to the conductor his address with a handbill advertising his treatment, it is proper to allow questions as to whether witness was a regular physician, and whether he had given treatment to his wife: *Grant v. Spokane Traction Co.*, 47 Wash. 112.

In a prosecution for forgery of an order for witness fees, it is proper to exclude cross-examination of state's witness to show her animosity to the accused by evidence that she was a friend of a party unsuccessfully defended by the accused: *State v. Gilluly*, 50 Wash. 1.

It is proper to exclude cross-examination of a party as to what he would have done under supposed circumstances which did not exist: *Russell v. Schade Brewing Co.*, 49 Wash. 362.

Limitation of cross-examination to subjects of direct examination: See 2 Remington's Digest, p. 2899, § 78; *Freiderich v. Territory*, 2 Wash. 358; *State v. McGilvery*, 20 Wash. 250; *Coey v. Darknell*, 25 Wash. 518; *State v. Hawkins*, 27 Wash. 375; *McNicol v. Collins*, 30 Wash. 318; *Vowell v. Issaquah Coal Co.*, 31 Wash. 103; *Jones v. Western Mfg. Co.*, 32 Wash. 375; *Denny v. Kleeb*, 40 Wash. 634; *Stowe v. La Conner Trad. & Transp. Co.*, 39 Wash. 28.

Limitation to particular subjects of inquiry: See 2 Remington's Digest, p. 2900, §§ 79, 80; *Patchen v. Parke & L. M. Co.*, 6 Wash. 486; *Richardson v. Spangle*, 22 Wash. 14; *Jordan v. Seattle*, 30 Wash. 298; *State v. Coates*, 22 Wash. 601; *State v. Bailey*, 31 Wash. 89.

Cross-examination as to irrelevant, collateral or immaterial matters: See 2 Remington's Digest, p. 2900; *Dutcher v. Howard*, 15 Wash. 693; *Latimer v. Baker*, 25 Wash. 192; *State v. Roller*, 30 Wash. 692; *Dodds v. Gregson*, 35 Wash. 402; *Patchen v. Parke & Lacy Mach. Co.*, 6 Wash. 486; *Walters v. Seattle R. & S. R. Co.*, 48 Wash. 233.

Cross-examination of party: See *Clukey v. Seattle Electric Co.*, 27 Wash. 70.

Questions assuming facts or calling for repetition of answers: See *State v. McCann*, 16 Wash. 249; *State v. Mann*, 39 Wash. 144; *Gilliam v. Davis*, 14 Wash. 183.

Leading questions to defendant under the guise of cross-examination: See *Bishop v. Averill*, 17 Wash. 209.

Redirect examination, scope and extent of: See 2 Remington's Digest, p. 2901, §§ 88-90; *State v. Erving*, 19 Wash. 435; *Latimer v. Baker*, 25 Wash. 192; *State v. Anderson*, 20 Wash. 193; *Green v. Western Am. Co.*, 30 Wash. 87; *State v. Regan*, 8 Wash. 506; *Larsen v. Sedro Wooley*, 49 Wash. 135.

Cross-examination and privilege of witness and of accused in criminal prosecution: See 2 Remington's Digest, pp. 2901-2903, §§ 84, 91-96. Cross-examination of accused: *Thompson v. Territory*, 1 W. T. 547; *State v. Duncan*, 7 Wash. 336; *State v. Armstrong*, 29 Wash. 57; *State v. Melvern*, 32 Wash. 7.

Privilege of witness and of accused: *State v. O'Hara*, 17 Wash. 525; *State v. Duncan*, 7 Wash. 336; *State v. Coella*, 3 Wash. 99; *State v. Barker*, 43 Wash. 69; *Perkins v. North End Bank*, 17 Wash. 100; *State ex rel. Dye v. Reilly*, 40 Wash. 217; *State v. Winnett*, 58 Wash. 93.

EXPERT TESTIMONY AND OPINIONS: See 1 Remington's Digest, pp. 1159-1165, §§ 184-219. Upon the question of the genuineness of a signature, it is competent for experts to make comparisons with admittedly genuine signatures of the same person to papers which are not otherwise properly in evidence in the case: *More v. Palmer*, 14 Wash. 134.

A witness is competent to testify to his opinion as to the genuineness of handwriting, after showing knowledge of the handwriting, founded on adequate means of knowledge, there being no precise standard fixing the degree of knowledge necessary: *Poncin v. Furth*, 15 Wash. 201.

If the disputed signature of a check is in court together with five hundred genuine ones, it is not error to reject photographs of the disputed and certain genuine signatures taken side by side: *Crane v. Dexter Horton & Co.*, 5 Wash. 479.

The opinion of a witness that plaintiff was badly hurt by falling into an excavation negligently left unguarded by defendant is admissible: *Sutton v. Snohomish*, 11 Wash. 24; see *De Wald v. Ingle*, 31 Wash. 616.

In actions for damages for personal injuries the testimony of a physician as to the probable results of such injuries, when founded upon the present condition of the plaintiff, is admissible: *Ah How v. Furth*, 13 Wash. 550; *Taylor v. Ballard*, 24 Wash. 191.

In an action for damages for injuries inflicted by a vicious dog, it is competent to ask witness to tell, from his knowledge as a surgeon and general practitioner, what was the probable cause of the wounds inflicted on plaintiff: *Robinson v. Marino*, 3 Wash. 434.

The general rule that witnesses may not give opinions as to matters of fact does not preclude evidence of common observers, who may state the result of their observations of matters which cannot be

produced to a jury exactly as they were observed by the witnesses: *Sears v. Seattle etc. St. Ry. Co.*, 6 Wash. 227; *Stossel v. Van De Vanter*, 16 Wash. 9; *State v. Stockhammer*, 34 Wash. 262.

Subjects of expert testimony: See 1 Remington's Digest, pp. 1161-1163, §§ 194-207. As to matters involving special knowledge in general: *Jones v. Emerson*, 41 Wash. 33; *Simmons v. Jamieson*, 32 Wash. 619; *Glass v. Buttner*, 39 Wash. 296.

As to bodily condition, see *Stone v. Seattle*, 3 Wash. 645; *Taylor v. Modern Woodmen of America*, 42 Wash. 304; *Peter-son v. Seattle Traction Co.*, 23 Wash. 615.

As to mental condition or capacity: *Clum v. Barkley*, 20 Wash. 103; *In re Gorkow's Estate*, 20 Wash. 563; *Higgins v. Nethery*, 30 Wash. 239.

As to management and operation of vehicles, machinery and appliances, see *Smith v. Dow*, 43 Wash. 407.

As to custom or usage, see *Dossett v. St. Paul etc. Lum. Co.*, 40 Wash. 276.

As to laws of other states or countries, see *Clark v. Eltinge*, 38 Wash. 376.

As to value, see *Johnson v. Tacoma*, 51 Wash. 51; *Lines v. Alaska Commercial Co.*, 29 Wash. 133.

Competency of experts: See 1 Remington's Digest, pp. 1163, 1164, §§ 207½-211.

As to knowledge, experience and skill in general, see *Seattle & M. R. Co. v. Roeder*, 30 Wash. 245.

As to machinery and mechanical devices and appliances, see *Lambert v. La Conner Trad. & Transp. Co.*, 37 Wash. 113; *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253.

As to speed of railroad trains or cars, see *Traver v. Spokane Street Ry. Co.*, 25 Wash. 225; *Halverson v. Seattle Electric Co.*, 35 Wash. 600; *Cook v. Stimson Mill Co.*, 41 Wash. 314.

Examination of experts: See 1 Remington's Digest, pp. 1164, 1165, §§ 212-217; *Czarecki v. Seattle etc. R. Co.*, 30 Wash. 288; *Edwards v. Burke*, 36 Wash. 107.

Hypothetical questions and answers: See *State v. Underwood*, 35 Wash. 558; *Hanstad v. Canadian Pac. R. Co.*, 44 Wash. 405.

Facts forming basis of opinion: See *Miller v. Dumon*, 24 Wash. 648.

Experiments and results thereof: See *Rowe v. Northport S. & R. Co.*, 35 Wash. 101.

As to cross-examination and re-examination, see *In re Gorkow's Estate*, 20 Wash. 563; *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244; *Clukey v. Seattle Electric Co.*, 27 Wash. 70.

A question as to how much a medical expert is paid for testifying in "these cases" is properly excluded as assuming that the witness had testified for the party in other cases than the one on trial, where there was no evidence of such fact: *Rowe v. Whatcom County R. & Light Co.*, 44 Wash. 658.

In an action for personal injuries resulting in alleged curvature of the spine,

whether the test applied by other physicians to determine the fact of the curvature was a fair or proper test is a proper matter of opinion for a medical expert, which it is error to exclude as being a question for the jury to determine: *Id.*

A physician, who testified on plaintiff's case in chief that plaintiff had curvature of the spine, may be asked in rebuttal whether the test applied by other physicians was a fair test, when he was not questioned in chief as to any tests: *Id.*

IMPEACHING WITNESS: See 2 Remington's Digest, pp. 2903-2909, §§ 97-126. A witness cannot be impeached as to his truth and veracity by the testimony of other witnesses that, from their knowledge of his reputation, they would not believe him under oath: *State v. Miles*, 15 Wash. 534.

A witness who has testified at a former trial on the same subject matter may be impeached by the stenographer reading from his notes taken at former trial, after laying the foundation therefor: *Klepsch v. Donald*, 8 Wash. 162.

But a transcript of the stenographer's notes showing the testimony of a witness on a former trial is not competent evidence for impeaching the witness' testimony in a subsequent trial of the same cause: *Redford v. Spokane St. Ry Co.*, 15 Wash. 519.

If error is committed in permitting a question with a view of impeaching a witness, it is harmless where witness denies the imputed declaration and the testimony of the impeaching witness is subsequently stricken out: *Sears v. Seattle etc. St. Ry. Co.*, 6 Wash. 227.

In an action against a city for personal injuries sustained by reason of street work carried on by a contractor, it is not error, on cross-examination of a son of the contractor, for the purpose of showing his interest and discrediting his testimony, to show the fact that the contractor might be ultimately liable to the city for the amount of any recovery against the city: *Perry v. Centralia*, 50 Wash. 670.

JUDICIAL NOTICE: See 1 Remington's Digest, pp. 1114-1116, §§ 1-18. The court will take judicial notice of the officers of counties in which it sits: *State v. Humason*, 5 Wash. 499; of its own records: *Wilkes v. Davis*, 8 Wash. 112; that a railway company is a common carrier: *Boyle v. G. N. Ry. Co.*, 13 Wash. 383; of the distance between Seattle and Puyallup and of their relation to each other, will be taken by the court for the purpose of determining from the market price of cattle in one place what it must be in the other: *Blumenthal v. Pac. Meat Co.*, 12 Wash. 331.

Judicial notice will be taken of the general laws of the United States authorizing national banks, hence the incorporation of such bank may prima facie be established by parol: *Yakima Nat. Bank v. Knipe*, 6 Wash. 348. See *National Bank v. Galland*, 15 Wash. 502.

CUSTOM: See 1 Remington's Digest, pp. 857, 858, §§ 1-6. In an action for services upon a quantum meruit, testimony showing customary price for similar services is competent, where there is a conflict of evidence as to whether there was a rate agreed on: *Noyes v. Pugin*, 2 Wash. 653.

In an action against a railroad company for damages for keeping horses for a number of days upon a plank floor after arrival at destination, evidence of a custom to keep horses upon a plank floor in that locality is admissible: *Moses v. Pt. Townsend etc. Ry. Co.*, 5 Wash. 595.

In an action against a railway company for death of child by reason of an unlocked turntable, evidence of custom of railways to keep turntables unfastened at all times, held inadmissible: *Ilwaco etc. Nav. Co. v. Hedrick*, 1 Wash. 446.

Evidence of custom held admissible to explain ambiguities of contract in *Adamant etc. Co. v. Bank of Commerce*, 5 Wash. 232. But inadmissible in *Vollrath v. Crowe*, 9 Wash. 374, and *Berdwell v. Ziegler*, 3 Wash. 34.

PAROL TO CONTRADICT, VARY, EXPLAIN, ETC., WRITTEN CONTRACTS: See 1 Remington's Digest, pp. 1148-1154, §§ 142-165. If a written contract is full and clear in its terms, without any appearance of ambiguity, it will be presumed that all negotiations leading up to it are merged therein, and parol evidence is inadmissible to vary, alter or add to its terms: *Gurvey v. Morrison*, 12 Wash. 456. See *Gordon v. Parke & Lacy M. Co.*, 10 Wash. 18.

Parol evidence as to representations made before execution cannot be introduced to contradict or enlarge the scope of the contract, unless it is alleged that the same was signed by mistake or fraud, or without full knowledge of the conditions thereof: *Staver & Walker v. Rogers*, 3 Wash. 603.

If it is sought to vary the terms of a written agreement on the ground that through mutual mistake it fails to express the agreement actually made, a mere preponderance of proof will not be sufficient, but the evidence establishing the mutuality of the mistake must be clear, unequivocal and convincing: *Barnes v. Packwood*, 10 Wash. 50; following *Voorhies v. Hennessy*, 7 Wash. 243.

As to admission of oral evidence to explain terms of written contract and situation of the parties, see *Langert v. Ross*, 1 Wash. 250.

In an action upon a judgment of a sister state, want of jurisdiction may be shown by defendant, even to extent of contradicting express recitals in the record of such sister state: *Aultman v. Mills*, 9 Wash. 68; *Ritchie v. Carpenter*, 2 Wash. 512.

If the assignment of a debt is shown to be in writing, it is error to permit parol proof of the transaction until absence of

writing is accounted for: *Voorhies v. Hennessy*, 7 Wash. 243.

ADMISSIBILITY UNDER PARTICULAR ISSUES: See 2 Remington's Digest, pp. 2287-2301, §§ 168-179. Under the general plea of payment, evidence is admissible showing delivery of personal property to the creditor, if it is shown to have been accepted and applied in payment of the demand: *Edmunds v. Black*, 13 Wash. 490.

In an action upon a judgment, defendant's plea of payment is established by evidence that plaintiff had received from defendant's father the plaintiff's own bond for a sum which he stated in a letter to defendant was bigger than the judgment and he thought they were square: *Edmunds v. Black*, 15 Wash. 73.

Proof of special damages is inadmissible when no allegation as to such damages is made in the pleadings: *Kaufman v. Tacoma, Olympia etc. Ry. Co.*, 11 Wash. 632.

Evidence of a failure of consideration is inadmissible in the absence of a plea setting up such defense: *Murray v. Okanogan L. S. etc. Co.*, 12 Wash. 260.

Evidence to establish the illegality of a contract upon which an action is founded cannot be introduced by a defendant who has not put the matter in issue by pleading it: *Maitland v. Zanga*, 14 Wash. 92.

A written contract is always admissible in evidence under a general allegation that a contract had been entered into, without indicating whether it was in writing or not: *Stephens v. Spokane*, 11 Wash. 41; *Arnott v. Spokane*, 6 Wash. 442, distinguished.

A general allegation of ownership of a mining claim is sustained by proof of right to occupy under the mining laws of the United States: *Donahue v. Johnson*, 9 Wash. 188.

In an action to recover for the value of services rendered, defendants cannot, under mere denial of their value, prove that the services were not rendered, but are confined to proof of the value of the services: *Baddress v. Schaffer*, 12 Wash. 310.

Although a waiver of the conditions of a contract may not have been pleaded, still a court of equity is entitled to consider proofs of such waiver which have been admitted in evidence without objection: *Washington Bridge Co. v. Improvement Co.*, 12 Wash. 272.

When fraud is alleged it must have more conclusive proof to warrant the entry of a judgment than mere inferences springing from one or two suspicious circumstances: *Kleeb v. Frazer*, 15 Wash. 517.

In a suit upon a promissory note by the indorsee, in which the maker sets up the defense that the same had been paid in garnishment proceedings as a debt due the original payee, the action of the court in discharging the jury and finding for defendant is unwarranted, when there is conflicting evidence as to whether or not the

indorsee had appeared in the garnishment proceedings: *Wolverton v. Glasscock*, 15 Wash. 279.

In an action upon an open account, in which defendant denied that he ever ordered or received the goods, evidence as to whether he had ever notified plaintiff of his selling out is immaterial: *Wilson v. Waldron*, 12 Wash. 149.

In an action for damages resulting from bite of a dog, where one of the principal issues is whether or not the dog is vicious, it is competent to show that on prior occasions he had bitten or attempted to bite other persons: *Robinson v. Marino*, 3 Wash. 434.

EVIDENCE OF AGENCY: See 2 Remington's Digest, pp. 2320-2322, §§ 1-11. The authority of an agent cannot be established by his own declarations: *Western Security Co. v. Douglass*, 14 Wash. 215; *Weideman v. Tacoma Ry. & Motor Co.*, 7 Wash. 517.

In an action to recover a team of horses sold by plaintiff's agent without authority, as alleged, the declaration of plaintiff that "A. (his agent) wants to sell that team," although not made to purchaser, is admissible as tending to show scope of agent's authority: *McDonald v. Freed*, 3 Wash. 469.

In an action to recover the price of goods sold, the admission of an order therefor, signed in defendant's name by another, directing the shipment of the goods, no agency having been shown, is not reversible error, where it subsequently appears that the person who brought the order to plaintiff had previously obtained goods for defendant, and had been in plaintiff's store with him, and the latter does not deny the receipt of the goods sued for, nor of those previously obtained: *Benson v. Hart*, 10 Wash. 301.

OF BOOK ENTRIES: See 1 Remington's Digest, p. 1144, § 127. In an action for goods sold to defendant, but delivered, under the alleged contract, to a third party, it is error to permit plaintiff to introduce, as proof of the contract, a ledger kept by him in which he had first charged the goods to the third party, and had subsequently written defendant's name above that of the third party: *Bartlett v. Morgan*, 4 Wash. 723.

An account-book of the services rendered, with credits, kept by plaintiff, is admissible in an action for services as a domestic in the family of a decedent: *Ah How v. Furth*, 13 Wash. 550.

PRESUMPTIONS: See 1 Remington's Digest, pp. 1117-1119, §§ 19-30. The rule that a valuable consideration for a note is presumed from the proof of due execution and the production of a note by a plaintiff, applies alike in actions against the maker while alive, and in actions against his administrators upon the rejected claim founded upon such note: *Pocin v. Furth*, 15 Wash. 201.

The presumption is that a note is in the same condition when offered in evidence as when signed, and it is admissible although it show on its face that it had been changed after originally written: *Yakima Nat. Bank v. Knipe*, 6 Wash. 348.

The presumption that an account had been consented to so as to become a stated account is not warranted by proof showing that an attorney had presented his bill for services to a client in another city, and that, some twenty days after the receipt of the letter, the latter had written asking for information in order to determine as to the justness of the account, which the attorney failed to give; and the fact that the client had not denied the bill rendered would not show an agreement thereto, so long as the demand for information had not been complied with: *Ault v. I. S. & L. Assn.*, 15 Wash. 627.

The presumption that a letter duly mailed has reached its destination will have but little weight against positive testimony to the effect that it was never received: *Id.*

OF PARTNERSHIP.—In an action seeking to charge defendant as a silent partner, the books of account kept by the one engaged in carrying on the business in his own name are not admissible in evidence for the purpose of proving that they contain nothing tending to show that defendant was in any way recognized as a partner: *Willamette Casket Co. v. McGoldrick*, 10 Wash. 229.

The admission in evidence of a page in a city directory for the purpose of showing that a defendant was a member of a certain firm, there being no proof that he had authorized the insertion of his name therein, or even that he knew the directory contained such a statement, is erroneous: *First Nat. Bank v. Loggi*, 14 Wash. 699.

JUDGMENTS, WRITTEN INSTRUMENTS, ETC.—A judgment may be introduced in evidence in a subsequent suit involving the same subject matter, when it is between the same parties, but the fact that a person was joined as a defendant in one action and not in the other will not affect the admissibility of the record, when it appears that he was not a real party in interest: *Leggett v. Ross*, 14 Wash. 41.

In an action by husband and wife to recover possession of certain community land, it is admissible to introduce in evidence a judgment involving the same subject matter, although rendered in an action brought by the husband alone, the presumption being that the action was brought with the knowledge and consent of the wife, in the absence of any showing to the contrary: *Id.*

Where the object of an action is to affect a written instrument, only clear and satisfactory proof will justify a decree in favor of the plaintiffs: *Thorne v. Joy*, 15 Wash. 83.

In an action upon a fire insurance policy, plaintiff cannot introduce in evidence let-

ters from the company's local agents to its general agents tending to show that the company had not come to a final determination in regard to the payment of plaintiff's claim of loss, for the purpose of excusing plaintiff from bringing his action within the time limited by the policy: *Hill v. Phoenix Ins. Co.*, 14 Wash. 164.

In an action by the alleged assignee of a note and mortgage to foreclose same, statements of the mortgagee that the mortgagor is indebted to him on a note and mortgage, made in the absence of such assignee, are not admissible in evidence: *Allen v. Swerdfiger*, 14 Wash. 461.

In an action seeking to subject land, which had been conveyed away by an insolvent debtor, to a judgment obtained against him, evidence is admissible for the purpose of showing that the value of the land was greatly in excess of the consideration for the transfer, when it is charged in the complaint, by proper averment, that the transfer was made in fraud of creditors: *Murray v. Shoudy*, 13 Wash. 33.

The declarations of one holding the legal title to real estate, that another has no interest therein, are not admissible: *Reese v. Murnan*, 5 Wash. 373.

In an action to recover a sum of money, which plaintiff had been induced to pay for the purchase of a mine in reliance upon false representations of the defendants, evidence is admissible showing that the defendants had made representations to other parties than plaintiff, and to the people in the vicinity generally, regarding the existence and character of the mine and the value of its ores, such representations being part of one continuous scheme or transaction for the purpose of selling the mine to anyone that could be induced to buy: *Oudin v. Crossman*, 15 Wash. 519.

The receipt and application of a bond by a creditor in payment of his demand is not sufficiently established by testimony of the debtor that the creditor had written to him acknowledging the receipt of the bond and stating that "he guessed they were about square": *Edmunds v. Black*, 13 Wash. 490.

The intention to make machinery a permanent part of the building to which it is attached cannot be proved by testimony as to the actual state of mind of the person attaching it to the real estate at the time of its annexation, but must be gathered from circumstances surrounding the transaction, and from what was said and done at the time: *Washington Nat. Bank v. Smith*, 15 Wash. 160.

In an action upon a promise to pay cost of certain improvements evidence is not admissible to show that the value of the land was not enhanced thereby: *Charvat v. Meyers*, 5 Wash. 799.

Proof of the condition and value of property before and after the date of a bill of sale inadmissible unless it is shown that the condition, value and quantity

thereof remained the same: *Sayward v. Nunan*, 6 Wash. 87, 95.

In an action to recover for labor performed in driving piles for defendant, testimony showing what prices had been charged by plaintiff for driving piles for other persons in the vicinity is immaterial: *Maney v. Hart*, 11 Wash. 67.

In an action against a lumber company for damages for not furnishing a purchaser the grade of lumber he had contracted for, it is not error to permit defendant to in-

roduce in evidence the stencil plates used in marking the lumber when the plaintiff had already introduced testimony as to the marking of the lumber: *Sarstens v. Stetson & Post Mill Co.*, 14 Wash. 643.

Evidence as to the amount of noise made by a cable is admissible in an action for damages for injuries received by reason of the negligence of defendant in running its cable cars: *Ah How v. Furth*, 13 Wash. 550.

§ 340. (4994.) Court may Direct Judgment and Discharge Jury, When.

In all cases tried in the superior court with a jury in which the legal sufficiency of the evidence shall be challenged, and the court shall decide as a matter of law what verdict should be found, the court shall thereupon discharge the jury from further consideration of the case, and direct judgment to be entered in accordance with its decision. [L. '95, p. 64, § 1.]

See *infra*, § 408, judgment of nonsuit.

Cited in 20 Wash. 255, 543; 21 Wash. 331, 513; 22 Wash. 474; 23 Wash. 507, 531; 28 Wash. 176; 31 Wash. 631; 35 Wash. 81.

As to direction of verdicts, see 2 Remington's Digest, pp. 2750-2753, §§ 59-64.

If there is no conflict in the proofs, the court is authorized in taking the case from the jury and rendering judgment for the amount claimed: *Underwood v. Stack*, 15 Wash. 497; *Rinear v. Skinner*, 20 Wash. 541. But not if there are doubtful questions of fact, or court bases its action on evidence brought out on improper cross-examination: See *Spokane & Idaho Lumber Co. v. Loy*, 21 Wash. 501; *Richardson v. Spangle*, 22 Wash. 14.

The plaintiff is entitled to a peremptory instruction charging the jury to find in his favor upon the issues raised by the pleadings, when there is no substantial contradiction of the testimony introduced by him: *Squires v. Zumwalt*, 12 Wash. 241; *Pacific Nat. Bank v. Aetna Indemnity Co.*, 33 Wash. 428; *Green v. Tidball*, 26 Wash. 338; *Lownsdale v. Grays Harbor Boom Co.*, 36 Wash. 198. But the court errs in directing the verdict, when there is sufficient testimony upon the material issues, although contradictory: *Brookman v. State Ins. Co.*, 18 Wash. 308. It is error to direct judgment for defendant where there is a conflict in the evidence upon a valid defense to the action: *Menasha Wooden Ware Co. v. Nelson*, 45 Wash. 543. A challenge to the sufficiency of the evidence should be overruled, if the testimony makes a case for the plaintiff, whether strictly within the pleadings or not: *Meyers v. Syndicate Heat & Power Co.*, 47 Wash. 48.

A challenge to the sufficiency of the evidence does not raise the objection that the jury disregarded an erroneous instruction which was binding on them, and under which there was not evidence to sustain the verdict: *Id.*

Insufficiency of the evidence may be urged after waiver of a nonsuit, by a motion to direct a verdict, or for judgment notwithstanding the verdict: *Adams v. Peterman Mfg. Co.*, 47 Wash. 484. Where the facts are admitted and show no negligence on the part of the defendant, the question is one of law for the court, and a verdict should be directed: *Johnson v. Great Northern R. Co.*, 49 Wash. 98.

Where the evidence would have justified a court in discharging the jury and rendering judgment for plaintiff, the fact that the court directed the jury to bring in a verdict for plaintiff is without prejudice: *National Bank v. Galland*, 14 Wash. 502.

In an action upon promissory notes the court is warranted in directing a verdict for plaintiff, although the defendants interpose the defense of release by subsequent contract, when the evidence thereof is of a vague and uncertain character and there is no showing of a consideration for such subsequent agreement: *Gurney v. Morrison*, 12 Wash. 456.

Failure to state a case fully is not ground for a directed judgment: *Redding v. Puget Sound Iron etc. Co.*, 36 Wash. 642; *Brooks v. McCabe & Hamilton*, 39 Wash. 62.

Under a properly directed verdict for nominal damages, a verdict for \$26 was held erroneous: *Trumbull v. School District*, 22 Wash. 631.

If the court would not be warranted in granting a nonsuit it would not be warranted in directing a verdict for the defendant: *Weir v. Seattle Electric Co.*, 41 Wash. 657.

As to operation and effect of motion or request for directed verdict, see *Knox v. Fuller*, 23 Wash. 34.

As to discharge of jury and decision by court, see 2 Remington's Digest, p. 2764, § 65; *Nat. Bank of Commerce v. Galland*, 14 Wash. 502; *Fidelity Trust Co. v. Palmer*,

27 Wash. 473; *Murray v. Bush*, 29 Wash. 662; *West Seattle Land etc. Co. v. Novelty M. Co.*, 31 Wash. 435. The rule that the trial court is justified in taking a case from the jury where the testimony so strongly predominates that it would have been its duty to set aside a verdict in favor of the plaintiff, does not prevail in this state, since here the granting of a new trial rests in the discretion of the trial court and to concede the same power in

directing a judgment would practically abrogate trial by jury: *Weir v. Seattle Elec. Co.*, 41 Wash. 657.

The trial judge has no power to discharge the jury and render judgment for the defendant because he thought a new trial would be necessary if any other verdict was rendered, unless there is no sufficient legal testimony to sustain a verdict for the plaintiff: *Morris v. Warwick*, 42 Wash. 480.

§ 341. (4995.) Special Findings.

Any party may, when the evidence is closed, submit in distinct and concise propositions the conclusions of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both. They may be written, and handed to the court, or, at the option of the court, oral, and entered in the judge's minutes. [L. '69, p. 56, § 226; Cd. '81, § 22; 2 H. C., § 355.]

See *supra*, § 339, subd. 4, requests for instructions.

As to special interrogatories and findings, see 2 Remington's Digest, pp. 2773-2775, §§ 136-143.

Directing the jury to make special findings or answer special interrogatories rests in the discretion of court, and is not reviewable on appeal: See *Columbia & P. S. R. R. Co. v. Hawthorne*, 3 W. T. 353; *Pencil v. Home Ins. Co.*, 3 Wash. 485; *Bailey v. Tacoma Traction Co.*, 16 Wash. 48; *Walker v. McNeill*, 17 Wash. 582; *Hart Lum. Co. v. Rucker*, 20 Wash. 383; *Morrison v. Northern Pac. R. Co.*, 34 Wash. 70.

Special findings should be required when necessary to fully determine the rights of all parties: *McDougall v. Walling*, 15 Wash. 78.

Where requests for special findings are made the court should, after having determined that the requests are proper, instruct the jury that it is their duty to answer each one of them, and until such requests have been answered by the jury,

without any attempt at evasion, the general verdict should not be received: *Redford v. Spokane St. Ry. Co.*, 9 Wash. 55.

Appellant cannot object that there was no evidence to support a verdict against him, after asking and securing the submission of special interrogatories to the jury upon the supposition that there was testimony on the subject, and where no motion for a nonsuit was made: *Dixon v. Bausman*, 17 Wash. 304; *Mitchell v. Matheson*, 23 Wash. 723.

Requesting the submission of special interrogatories does not make the answers binding, where there was no evidence to sustain the findings, and the defendant had challenged the sufficiency of the evidence by motions for nonsuit and for a directed verdict for insufficiency of the evidence: *Larson v. American Bridge Co.*, 40 Wash. 224.

It is proper to refuse to allow an interrogatory as to a matter not in dispute: See *Wilkie v. Chandon*, 1 Wash. 355.

§ 342. (4996.) Court to Decide What During Trial.

All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. [L. '69, p. 56, § 227; Cd. '81, § 223; 2 H. C., § 356.]

See notes to § 339, *supra*.

§ 343. (4997.) Jury to Decide All Questions of Fact.

All questions of fact, other than those mentioned in the section preceding, shall be decided by the jury, and all evidence thereon addressed to them. [L. '69, p. 56, § 228; Cd. '81, § 224; 2 H. C., § 357.]

Cited in 30 Wash. 325.

§ 344. (4998.) View by Jury of Premises.

Whenever in the opinion of the court it is proper that the jury should have a view of real property which is the subject of litigation, or of the place

in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer, to the place, which shall be shown to them by the judge, or by a person appointed by the court for that purpose. While the jury are thus absent, no person other than the judge, or person so appointed, shall speak to them on any subject connected with the trial. [L. '69, p. 56, § 229; Cd. '81, § 225; 2 H. C., § 358.]

See *infra*, § 2160, view in criminal cases.

Cited in 47 Wash. 245.

As to view and inspection of premises, see 2 Remington's Digest, p. 2739, § 13; and 1 Remington's Digest, p. 799, § 213.

In the trial of a proceeding for the appropriation of land, it is within the discretion of the trial court to permit the jury to view the premises: *Bellingham Bay etc. Ry. Co. v. Strand*, 4 Wash. 311; or in an action for damages: *Kelsch v. Donald*, 4 Wash. 436. Or in criminal actions: *State v. Coella*, 8 Wash. 512; *State v. Hunter*, 18 Wash. 670.

The inspection of the premises by a portion of the jury in an action of unlawful detainer cannot be urged as error on appeal, when the appellant has failed to take an exception to a remark of the court telling them that they might visit the prem-

ises on their own responsibility: *Gilmore v. H. W. Baker Co.*, 12 Wash. 468.

A view by the jury in a condemnation case does not preclude the appellate court from a review of the questions of fact: See *In re East Spring Street*, 41 Wash. 366.

Under this section the court may appoint a person other than an officer to point out a place to be viewed by a jury: *In re Jackson Street*, 47 Wash. 243.

The objections that a person appointed to point out property to a jury in making a view is an interested witness, and was not sworn, are too late if first made on motion for a new trial; and are not ground for reversal unless it is shown that a substantial right of the party was prejudiced: *In re Jackson Street*, 47 Wash. 243.

§ 345. (4999.) Admonitions to Jury.

The jurors [may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case they] may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them. [L. '69, p. 56, § 230; Cd. '81, § 226; 2 H. C., § 359.]

Superseded as to the bracketed words by the next section, except in felony cases.

See *infra*, § 349, manner of keeping jurors while deliberating.

See *infra*, § 2159, prohibition against separation in criminal cases.

Cited in 18 Wash. 45; 19 Wash. 275.

Separation of jurors in criminal actions: See 1 Remington's Digest, p. 825, § 324; *State v. Rogan*, 18 Wash. 43; *State v. Barkuloo*, 18 Wash. 141; *State v. Mason*, 19 Wash. 94; *State v. Burns*, 19 Wash. 52; *State v. Johnny Tommy*, 19 Wash. 270; *State v. Harras*, 22 Wash. 67; *State v. Parker*, 25 Wash. 405; *State v. Stockhammer*, 34 Wash. 262.

Where there is nothing in the record showing the separation of the jury after agreeing upon their verdict, the matter cannot be urged as error on appeal: *Maling v. Crummey*, 5 Wash. 222.

The jury in a criminal prosecution cannot be permitted to separate without defendant's consent: *State v. Place*, 5 Wash. 773.

Separation is only authorized during trial, and cannot be consented to after verdict signed and sealed and before discharge: *Anderson v. State*, 2 Wash. 183; see *Lybarger v. State*, 2 Wash. 552, 561.

Drunkenness of a juror during the progress of a trial, even if he were sober when the testimony was introduced and at the time of rendering the verdict, is such misconduct as to warrant a reversal of the case: *Hedican v. Pennsylvania Fire Ins. Co.*, 21 Wash. 488.

For a juror to talk with one of the parties in a public place during an intermission, on a subject not connected with the case, is not sufficient ground for reversal: See *Vowell v. Issaquah Coal Co.*, 31 Wash. 103.

§ 346. Separation of Jury.

In no action or proceeding whatsoever, except felony cases, shall the jury sworn to try the issues therein be kept together and in custody of the officers of the court, save during the actual progress of the trial, until the

case shall have been finally submitted to them for their decision. Whenever the jury are kept together in custody of the officer, when the trial is not in progress, they shall be supplied with meals at regular hours, and with comfortable sleeping and toilet accommodations. [L. '09, p. 135, § 8.]

SEPARATION OF JURY.—Allowing one direct supervision of the officer, is not a separation: *Edwards v. Washington Territory*, 1 W. T. 195.

§ 347. (5000.) Proceeding in Case Juror Becomes Ill.

If after the formation of the jury, and before verdict, a juror become sick so as to be unable to perform his duty, the court may order him to be discharged. In that case, unless the parties agree to proceed with the other jurors, a new juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterwards formed. [L. '69, p. 56, § 231; Cd. '81, § 227; 2 H. C., § 360.]

See *infra*, § 353, discharge of jury without verdict.

§ 348. (5001.) Juror as Witness.

A juror may be examined by either party as a witness, if he be otherwise competent. If he be not so examined, he shall not communicate any private knowledge or information that he may have of the matter in controversy to his fellow jurors, nor be governed by the same in giving his verdict. [L. '69, p. 57, § 232; Cd. '81, § 228; 2 H. C., § 361.]

See *infra*, § 1210, competency of witnesses.

Cited in 30 Wash. 141.

One whose name had been indorsed on an information as a witness for the state is incompetent to serve as a juror on the

ground of bias, even though he disclaims any, when he has knowledge of material controverted facts in the case: *State v. Stevens*, 30 Wash. 134.

§ 349. (5002.) Care of Jury While Deliberating.

After hearing the charge, the jury may either decide in the jury-box or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his ability, keep the jury thus separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon. [L. '54, p. 166, § 194; L. '69, p. 57, § 233; Cd. '81, § 229; 2 H. C., § 362.]

Custody, control and deliberations of jury: See 2 Remington's Digest, pp. 2769-2771, §§ 118-120.

The jury may be put in charge of a sworn officer of the court who has testified for the state: *Edwards v. Washington Territory*, 1 W. T. 195.

As to manner of arriving at verdict, see 2 Remington's Digest, p. 2770, § 121; *Watson v. Reed*, 15 Wash. 440; *Stanley v. Stanley*, 32 Wash. 489; *Bell v. Butler*, 34 Wash. 131; *Conover v. Neher-Ross Co.*, 38 Wash. 172.

§ 350. (5003.) Expenses of Keeping Jury.

If, while the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court order them to be pro-

vided with suitable and sufficient food and lodging, they shall be so provided by the sheriff, at the expense of the county. [L. '69, p. 57, § 234; Cd. '81, § 230; 2 H. C., § 363.]

§ 351. (5004.) Jury may Take Certain Papers.

Upon retiring for deliberation, the jury may take with them the pleadings in the cause, and all papers which have been received as evidence on the trial (except depositions), or copies of such parts of public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. [L. '54, p. 166, § 195; L. '69, p. 57, § 235; Cd. '81, § 231; 2 H. C., § 364.]

See supra, § 339, instructions may be taken to jury-room.

Cited in 21 Wash. 72; 33 Wash. 359; 52 Wash. 136.

The language of this section appears to authorize only the pleadings and papers received in evidence, except depositions to go to the jury-room.

TAKING EVIDENCE TO JURY-ROOM: See 1 Remington's Digest, p. 826, § 327; State v. Webster, 21 Wash. 64; State v. Yourex, 30 Wash. 611. A hat and blood-stained garments that have been admitted in evidence may be taken

by jurors to the jury-room: Doctor Jack v. Territory, 2 W. T. 101. And they may take a copy of the statutes of the state: Edwards v. Territory, 1 W. T. 195.

Where an original complaint has been superseded by an amended one and is not in issue in the case, it is not error to allow the jury to take it with them to the jury-room: Swadling v. Barneson, 21 Wash. 699.

The jury may take exhibits to the jury-room under this section: State v. Simmons, 52 Wash. 132.

§ 352. (5005.) Jury may have Further Instructions, When.

After the jury have retired for deliberation, if they desire to be informed of any point of law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court the information required shall be given in the presence of or after notice to the parties or their attorneys. [Cf. L. '54, p. 166, § 196; L. '69, p. 57, § 236; Cd. '81, § 232; L. '91, p. 103, § 1; 2 H. C., § 365.]

Where the judge, after the jury has retired, receives from them through the bailiff the form of verdict submitted for plaintiff in which the jury claim there is a mistake, and returns the same, stating that it is in form as intended, such communication between judge and jury is not prejudicial error: Marine S. Bank v. Young, 5 Wash. 394.

The action of the trial court in leaving the bench and entering the jury-room, at the request of that body while in consultation, is such misconduct as to warrant a reversal: State v. Wroth, 15 Wash. 621.

Recalling a jury after it had been deliberating and insinuating what its verdict should be is reversible error: State v. Thield, 36 Wash. 365.

§ 353. (5006.) Discharge of Jury Without Verdict.

The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing. [L. '69, p. 58, § 237; Cd. '81, § 233; 2 H. C., § 366.]

See supra, § 339, and notes, coercing jury.

See supra, § 347, discharge for illness of juror.

Cited in 28 Wash. 622, 29 Wash. 368.

See State v. Costello, 29 Wash. 366.

§ 354. (5007.) If Jury Discharged, Cause Continued for Trial.

In all cases where a jury are discharged or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action shall thereafter be for

trial anew. [Cf. L. '69, p. 58, § 238; Cd. '81, § 234; L. '91, p. 104, § 2; 2 H. C., § 367.]

Cited in 28 Wash. 622.

§ 355. (5008.) Recess of Court While Jury are Deliberating.

While the jury are absent the court may adjourn from time to time, in respect to other business, but it is nevertheless to be deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged. [Cf. L. '54, p. 166, § 197; L. '69, p. 58, § 239; Cd. '81, § 235; 2 H. C., § 368.]

Adjournments should be treated as recesses, as the court is always in session: Const., Art. IV, § 6.

§ 356. (5009.) Proceedings When Jury have Agreed.

When the jury have agreed upon their verdict they shall be conducted into court by the officer having them in charge. Their names shall then be called, and if all do not appear, the rest shall be discharged without giving a verdict. [L. '69, p. 58, § 240; Cd. '81, § 236; 2 H. C., § 369.]

§ 357. (5010.) Manner of Giving Verdict.

If the jury appear, they shall be asked by the court or the clerk whether they have agreed upon their verdict, and if the foreman answer in the affirmative, he shall, on being required, declare the same. [L. '69, p. 58, § 241; Cd. '81, § 237; 2 H. C., § 370.]

See 2 Remington's Digest, pp. 2771, 2772, 5 Wash. 394; Frost v. Ainslie Lbr. Co., 3 §§ 122-132; Marine Sav. Bank v. Young, Wash. 241; State v. Straub, 16 Wash. 111.

§ 358. (5011.) Ten Jurors may Render Verdict in Civil Cases.

In all trials by juries of twelve in the superior court, except criminal trials, when ten of the jurors agree upon a verdict, the verdict so agreed upon shall be signed by the foreman, and the verdict shall stand as the verdict of the whole jury, and have all the force and effect of a verdict agreed to by twelve jurors. [L. '95, p. 59, § 1; Const., Art. I, § 21.]

Cited in 15 Wash. 441.

Upon receiving a verdict in the absence of counsel pursuant to stipulation, where, upon a poll of the jury, at first but nine agree, it is not error for the court, in the absence of counsel, to repeat the instruc-

tions as to the number necessary to agree, and to grant a request of a juror to allow him to change his vote, in case a mistake was made: Rice Fisheries Co. v. Pacific Realty Co., 35 Wash. 535.

§ 359. (5012.) Jury may be Polled.

When the verdict is returned into court either party may poll the jury, and if ten of the jurors answer that it is the verdict said verdict shall stand. In case ten of the jurors do not answer in the affirmative the jury shall be returned to the jury-room for further deliberation. [L. '95, p. 59, § 2.]

Cited in 35 Wash. 542.

After polling the jury as to a general verdict, it is proper to poll them as to

special findings en masse: Norman v. Hopper, 38 Wash. 415.

§ 360. (5013.) Correction of Informal Verdict.

If the verdict be informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may again be sent out. [Cf.

L. '69, p. 58, § 242; Cd. '81, § 238; 2 H. C., § 371; the first clause of this section is repealed by L. '95, p. 59, § 2.]

See last section, polling jury.

See notes to § 399, new trial—excessive verdict.

Cited in 3 Wash. 246; 17 Wash. 563.

If the jury, in an action upon a contract, bring in a verdict which, under the pleadings, is either a mistake or a compromise, the court may refuse to receive it and direct the jury to find the full

sum claimed, or nothing: *Frost v. Ainslie L. Co.*, 3 Wash. 241.

The trial court may reduce a verdict which appears to be excessive, and to have been rendered under the influence of passion or prejudice: *Wilson v. N. P. Ry. Co.*, 5 Wash. 621, 628.

§ 361. (5014.) Receiving Verdict and Discharging Jury.

When the verdict is given, and is such as the court may receive, and if no juror disagree or the jury be not again sent out, the clerk shall file the verdict. The verdict is then complete, and the jury shall be discharged from the case. The verdict shall be in writing, and under the direction of the court shall be substantially entered in the journal as of the day's proceedings on which it was given. [L. '69, p. 59, § 243; Cd. '81, § 239; 2 H. C., § 372.]

Superior court always open except on nonjudicial days: See Const., Art. IV, § 6.

As to form and correction of verdict, see 2 Remington's Digest, p. 2772, §§ 126-132.

The court is deemed always open for the purpose of receiving the verdict of a jury in a cause submitted to them: *Edwards v. Territory*, 1 W. T. 195.

If the jury come into court and request the judge to correct a clerical error in a form of verdict submitted to them, and thereafter agree upon and return such corrected verdict, no error can be predicated: *Marine S. Bank v. Young*, 5 Wash. 394.

A verdict finding for plaintiff in a certain entitled cause, without naming defendant, against whom rendered, is sufficient: *Blue v. McCabe*, 5 Wash. 125.

A verdict, in an action for use and occupation, assessing "damages at \$3,050, and legal interest," is bad for uncertainty, and will not sustain a judgment for any sum except the words "and legal interest" be treated as surplusage: *Mecker v. Gardella*, 1 Wash. 139; *Western M. Co. v. Blanchard*, 1 Wash. 230.

Where the verdict of the jury in an action on a promissory note is merely for the principal and interest thereof, it is not error for the court in rendering judgment to add in the amount of attorney's fee provided for in the note: *Hardy v. Hohl*, 11 Wash. 1; citing *Yakima Nat. Bank v. Knipe*, 6 Wash. 348.

The fact that the court, in an action upon a promissory note, assessed the

amount of attorney's fees due thereon, and added same to the verdict, is not prejudicial error: *Yakima Nat. Bank v. Knipe*, 6 Wash. 348.

A verdict in the form instructed by the court, with the addition of the words "in the above-entitled cause" is in effect the filling in of the form instructed: *Phillips v. Mihran*, 38 Wash. 402.

The verdict of a jury cannot be assailed on the ground that juries are inclined to be prejudiced in cases between individuals and corporations: *Hanstad v. Canadian Pac. R. Co.*, 44 Wash. 505.

A verdict for \$1,472.80 will not be held to be the result of passion or prejudice from the fact that, from certain figures and argument, counsel seemed to have conceded that the amount should not exceed \$1,167.10, but rather of a mistake on the part of the jury, authorizing its correction by the court, where the evidence was very conflicting, many items were in dispute, and the amount found was less than the complaint claimed and which might have been allowed under the instruction: *Richardson v. Agnew*, 46 Wash. 117.

Error cannot be assigned on the action of the court in sending the jury back with the pleadings, to cure an oversight in not sending the same to the jury-room, after the verdict had been read but before it was received or filed, where the jury presently returned with the same verdict, which was received and filed: *Matthews v. Spokane*, 50 Wash. 107.

CHAPTER III.

THE VERDICT.

§ 362. (5019.) General and Special Verdict, Defined.

The verdict of a jury is either general or special. A general verdict is that by which the jury pronounces generally upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court. [L. '54, p. 167, § 198; Cd. '81, § 240; 2 H. C., § 373.]

See last section.

Where a plea of abatement by the death of a party is united with a plea to the merits, a general verdict disposes of both, although no evidence was offered thereon: *State ex rel. Holgate v. Superior Court*, 21 Wash. 33.

§ 363. (5020.) Verdict in Actions for Specific Personal Property.

In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property if their verdict be in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property. [L. '54, p. 167, § 199; Cd. '81, § 241; 2 H. C., § 374.]

See *infra*, § 434, judgments in actions for specific property.

See *infra*, § 573, claim by third party to property levied on, etc.

Cited in 3 Wash. 251; 5 Wash. 279; 22 Wash. 308; 35 Wash. 401; 38 Wash. 403.

See 2 Remington's Digest, p. 2507, § 42.

In an action to recover personal property the jury should assess the value of the property whether the verdict be for plaintiff or defendant: *Meeker v. Johnson*, 3 Wash. 247.

A verdict for plaintiff, which merely assesses the damages, but without finding the value of the property, is prejudicial error: *Id.*; *Quinn v. Parke & Lacy M. Co.*, 5 Wash. 276.

A verdict in replevin is sufficient without being in the alternative, when the point is not raised in the court below: *McGraw v. Franklin*, 2 Wash. 17.

There is no authority in an action of replevin when the verdict is for defendant for entering judgment of any kind against the sureties in plaintiff's bond to secure

possession: *Eidson v. Woolery*, 10 Wash. 225.

Although the verdict, when against claimant on trial of title to property levied upon under attachment, should find that claimant was not the owner and the value thereof, yet the verdict is not defective nor prejudicial when it is in favor of the attaching creditor and within the value of the property as admitted by the pleadings: *Peterson v. Wright*, 9 Wash. 202.

In an action for the recovery of specific personal property, a verdict of the jury that they find for the plaintiff that she is the owner of the property mentioned in the complaint, and that the value of said property is the sum of \$330, is equivalent to the requirements of this section: *Hall v. Law Guarantee etc. Soc.*, 22 Wash. 306.

§ 364. (5021.) Rendition of General or Special Verdict, When.

In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk and entered in the minutes. [L. '54, p. 167, § 200; Cd. '81, § 242; 2 H. C., § 375.]

Cited in 3 Wash. 495; 15 Wash. 82; 17 Wash. 592; 46 Wash. 615.

Special verdicts and findings: See 2 Remington's Digest, p. 2773, § 136.

A special verdict is where the jury find the facts and leave the judgment to the court: Willey v. Morrow, 1 W. T. 474.

A direction to the jury to make special findings is within the discretion of the court, and in the exercise of this discretion a refusal to so direct is not error: Columbia etc. Ry. Co. v. Hawthorne, 3 W. T. 353; Morrison v. Northern Pac. R. Co., 34 Wash. 70; Bailey v. Tacoma Traction Co., 16 Wash. 48; Walker v. McNeil, 17 Wash. 582; Hart Lbr. Co. v. Rucker, 20 Wash. 383. See, also, Mounts v. Goranson, 29 Wash. 262.

The submission of special interrogatories is a matter entirely in the hands of the trial court, and its refusal to submit them cannot be assigned as error: Pencil v. Home Ins. Co., 3 Wash. 485; see 142 U. S. 492.

Questions submitted to a jury for a special finding should call for a direct answer, and should be such that all minds would understand them alike; and if not so framed the court should refuse to submit them: Wilkie v. Chandon, 1 Wash. 355, 358.

Requests for special findings should be so drawn as to call for an answer as direct as the nature of the inquiry will admit, and should generally admit of an answer by yes or no: Redford v. Spokane St. Ry. Co., 9 Wash. 55, 61.

When requests for special findings are made, the court should, when the requests are proper, instruct the jury that it is their duty to answer each of them, and the general verdict should not be received until such requests have been answered without evasion: Id., 55.

If the jury make a special finding and it affirmatively appears that an instruction given was harmless in the light of such finding, the same is not prejudicial, although erroneous: Eicholtz v. Holmes, 8 Wash. 71; Brasen v. Seattle, L. S. & E. Ry. Co., 4 Wash. 754.

It is not error to submit two forms for a general verdict in an action of ejectment, in the absence of any request for special findings as provided by this section: Stangair v. Roads, 46 Wash. 613.

A judgment for plaintiff notwithstanding a verdict for the defendant is properly entered where the plaintiff's case was established and defendant's evidence was too vague to constitute a defense: Fishburne v. Robinson, 49 Wash. 271.

§ 365. (5022.) Special Verdict Controls.

When a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly. [L. '54, p. 167, § 201; Cd. '81, § 243; 2 H. C., § 376.]

Cited in 1 Wash. 522; 15 Wash. 366; 25 Wash. 77; 34 Wash. 41.

As to findings inconsistent with general verdict, see 2 Remington's Digest, p. 2774, §§ 141-143.

Special findings control when they are inconsistent with the general verdict: Willey v. Morrow, 1 W. T. 474; Stewart v. Walla Walla etc. Pub. Co., 1 Wash. 521; Pepperall v. City Park Transit Co., 15 Wash. 176; Ottison v. Edmunds, 15 Wash. 362; Gerhard v. Warrell, 20 Wash. 492; Mitchell v. Matheson, 23 Wash. 723; Engstrom v. Merriam, 25 Wash. 73; Hobert v. Seattle, 32 Wash. 330. When special verdict susceptible of two constructions, such construction should be given as will support the general verdict: Mercier v. Travelers' Ins. Co., 24 Wash. 147; McCorkle v. Mallory, 30 Wash. 632. A special finding must be irreconcilably inconsistent with the general verdict to warrant setting the latter aside: Gaudie v. Northern Lumber Co., 34 Wash. 34; Byrne v. Funk, 38 Wash. 506; Abby v. Wood, 43 Wash. 379.

While ordinarily special findings control a general verdict when inconsistent with it, a finding which involves the expression of an opinion upon a legal propo-

sition will not be allowed to control the fact found by a general verdict or be held to vitiate it: Silsby v. Frost, 3 W. T. 388.

Answering an interrogatory "doubtful" may be equivalent to a negative finding: See Norman v. Hopper, 38 Wash. 415. An answer to a special interrogatory, to the effect that plaintiff had not "walked around" a manhole three or four times and did not know of its location, is proper where it simply appeared that she had passed by and knew of its general location, and the same is not inconsistent with a general verdict for plaintiff: Perry v. Centralia, 50 Wash. 670.

In an action by a trespasser for personal injuries sustained in being put off a moving freight train, a special verdict finding that the brakeman did not strike the plaintiff and knock him off the side of the car is inconsistent with a general verdict for the plaintiff, where there was no evidence of any other ground of recovery to sustain the general verdict; and it is error to deny defendant's motion for judgment: Crowley v. Northern Pac. R. Co., 46 Wash. 85. See, also, Boucher v. O. R. & N. Co., 50 Wash. 627; Grant v. Spokane Traction Co., 47 Wash. 512.

§ 366. (5023.) Jury to Assess Amount of Recovery.

When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a setoff for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the pleadings. [Cf. L. '54, p. 167, § 202; Cd. '81, § 244; L. '91, p. 104, § 3; 2 H. C., § 377.]

See *infra*, § 411, judgment by default.

Cited in 35 Wash. 480.

Where a verdict is returned without assessment of the amount of the recovery, but there was no disputed question of fact and the amount is known, the court could either direct a verdict or discharge the jury and enter the judgment: *Casety v. Jamison*, 35 Wash. 478.

A verdict for a specified sum, "with interest," is not void for uncertainty, where the action was for money loaned at a certain date, and both the amount and date were admitted in the answer: *Brown v. Gillett*, 39 Wash. 495. See, also, *Lincoln County v. Brock*, 37 Wash. 14.

CHAPTER IV.

TRIAL BY THE COURT.

§ 367. (5029.) Findings and Conclusions, How Made.

Upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly. [L. '54, p. 168, § 205; Cd. '81, § 246; 2 H. C., § 379.]

See Const., Art. IV, § 20, decision of court must be rendered within ninety days.

See *infra*, § 399, grounds for new trial.

See *infra*, § 402, notice of intention to move for new trial.

Cited in 1 Wash. 371, 375, 376, 406; 5 Wash. 185; 8 Wash. 590; 9 Wash. 465; 11 Wash. 459; 12 Wash. 562; 21 Wash. 142; 25 Wash. 620; 26 Wash. 455; 27 Wash. 215; 35 Wash. 66; 40 Wash. 3, 4; 47 Wash. 47; 49 Wash. 364.

As to findings of facts and conclusions of law, see 2 Remington's Digest, p. 2277, §§ 150-158.

The object of this section is for the protection of the court as well as the parties; it gives the court opportunity to place its views of the law and facts in definite form, and to the parties the means of an inexpensive review of the case: *Bard v. Kleeb*, 1 Wash. 370.

Findings are necessary in actions at law tried by the court without a jury: *Id.*; *Kilroy v. Mitchell*, 2 Wash. 407; and no judgment can be rendered until the findings have been filed: *Sadler v. Niesz*, 5 Wash. 182. Special findings of fact by the court are unnecessary, when its decree is one dismissing the action: *Murray v. Shoudy*, 13 Wash. 33; *Noyes v. King County*, 18 Wash. 417. See, also, *Walsh v. Bushell*, 26 Wash. 576; *Wilson v. Aberdeen*, 25 Wash. 615; *Knowles v. Rogers*, 27 Wash. 211.

An appeal taken immediately after the filing of findings and before the entry of

judgment thereon is premature and will be dismissed: *Bartlett v. Reichennecker*, 5 Wash. 369.

The decision of the court is the findings of law and fact, and the judgment must be in accordance therewith. The facts found and conclusions of law must be separately stated: *Willey v. Morrow*, 1 W. T. 474, 478.

The findings of fact are deemed a special verdict and are subject to the same rules; and that they may be found is a substantial right: *Bard v. Kleeb*, *supra*.

They answer to a special verdict, while the conclusions of law are in the nature of a general verdict: *Willey v. Morrow*, 1 W. T. 474, 479; and the findings being inconsistent with the conclusions, the former should control: *Id.*

Findings of fact, either legal or equitable, should cover all the issues, and not merely such as will support the judgment: *Potwin v. Blasher*, 9 Wash. 460.

Where the findings of fact are not commensurate with the issues, or are insufficient to sustain the conclusions of law, the remedy is by motion in the lower court for further findings and not by appeal: *Eakin v. McCraith*, 2 W. T. 112; *Slayton v. Felt*, 40 Wash. 1.

If the substantial rights of the parties are not prejudiced by meager findings the judgment will not be disturbed on appeal, following the rule of statute in § 307, *supra*: *Id.* Or for failure to make requested findings where the result would have been the same: See *Carstens & Earles v. Hine*, 39 Wash. 498.

When a jury is waived and trial had by the court, the findings may be amended at any time before judgment: *Calhoun v. Gilliland*, 2 W. T. 174. Findings and conclusions may be under one cover if separately set forth: See *Shepard v. Gove*, 26 Wash. 452; *Barnham's Estate, In re*, 41 Wash. 570. Findings of fact and conclusions of law may be stated upon the same page, if segregated, especially in an equitable action: *Peirce v. Wheeler*, 44 Wash. 326.

Formal findings of fact are not necessary for a review of an order allowing or disallowing exceptions to the final accounting of an administrator: *Horton v. Barto*, 17 Wash. 675. Unless exception noted, objections to form are waived: *Ach v. Carter*, 21 Wash. 140.

Where findings are made by the lower court and immediately thereafter judgment is entered, the opposite party is given no opportunity to move for a new trial; and hence the findings may be reviewed on direct appeal: *Kennedy v. Derickson*, 5 Wash. 289.

The fact that the court rendered judgment immediately upon the filing of the findings of fact cannot be raised on appeal: *Main v. Johnson*, 7 Wash. 321.

A conclusion of law that plaintiff is entitled to judgment as prayed for in complaint is sufficient, when based upon findings of fact made by the court upon issues which are not complicated: *Gaffney v. McGrath*, 11 Wash. 456; see this case for findings in an action of unlawful detainer held sufficient.

A recital in the court's order "that there is not sufficient evidence to support the allegations of plaintiff's complaint, and that defendant's allegations are true," is not a finding of fact: *King Co. v. Hill*, 1 Wash. 404.

The recital in a judgment that "the court finds the matters and things set forth in the complaint are true," is not a sufficient finding of facts, particularly when the reply admits that one of the allegations of the complaint is untrue: *Bard v. Kleeb*, *supra*.

It is not an abuse of the discretionary powers of a trial court to reopen a case after its submission and receive further testimony, when due notice is given to the complaining party: *Rogers v. Miller*, 13 Wash. 82.

As to necessity of findings of fact, see 1 *Remington's Digest*, p. 124, § 162.

In actions at law: *Kilroy v. Mitchell*, 2 Wash. 407; *Enos v. Wilcox*, 3 Wash. 14; *Wintermute v. Carner*, 8 Wash. 585;

Knowles v. Rogers, 27 Wash. 211; *White Crest Canning Co. v. Sims*, 30 Wash. 374; *Slyfield v. Willard*, 43 Wash. 179.

Otherwise in equity: See *Bard v. Kleeb*, 1 Wash. 370; *Kilroy v. Mitchell*, 2 Wash. 407; *King County v. Hill*, 1 Wash. 404; *Sadler v. Niesz*, 5 Wash. 182; *Potwin v. Blasher*, 9 Wash. 460; *Wilson v. Aberdeen*, 25 Wash. 614.

Upon the trial of a cause before a court without a jury, testimony offered should be liberally received, to avoid the necessity of a reversal in case of a trial *de novo* on appeal: *Degginger v. Martin*, 48 Wash. 1.

In view of this section, the oral opinion of the court, delivered at the conclusion of the testimony, that judgment should go for the defendant, does not preclude the court from afterward deciding to enter written findings and a judgment in favor of the plaintiff; as until the decision is made in writing it is under the control of the court: *Russell v. Schade Brewing Co.*, 49 Wash. 362.

IN EQUITY CASES.—While the act of 1893 (§ 381 et seq., *infra*) did not expressly make this section applicable to equity causes, the implication is strong that it should be so applied: *Potwin v. Blasher*, 9 Wash. 460, 465.

In decisions prior to the laws of 1893, findings of fact and conclusions of law were held to be proper in a suit in equity, but not essential to the validity of the judgment: *Kilroy v. Mitchell*, 2 Wash. 407; see § 451 of the Code of 1881, held to apply to equitable suits: *Id.* The rule was otherwise, however, in divorce cases: § 996, *infra*.

And it was said that this section had no application to equitable actions in *Wintermute v. Carner*, 8 Wash. 585. See, also, *Bard v. Kleeb*, 1 Wash. 370; *Kilroy v. Mitchell*, 2 Wash. 407; *Enos v. Wilcox*, 3 Wash. 44, 46; explained in *Rice v. Stevens*, 9 Wash. 298, 301; *White Crest Canning Co. v. Sims*, 30 Wash. 374.

In the trial of equity causes on appeal, the supreme court is not bound by the findings of the lower court: *Yesler v. Hochstettler*, 4 Wash. 349.

Equity causes will not be reviewed on the findings alone: *Stenger v. Roeder*, 3 Wash. 412.

In an equity case in which the court dismisses the action, it is not error to refuse to make findings of fact: *Bluett v. Wilce*, 43 Wash. 492.

ON APPEAL.—On appeal, the written opinion of the trial judge, not purporting to be a finding of facts, will, on motion, be stricken out: *King Co. v. Hill*, 1 Wash. 63.

The failure to include the findings in the record on appeal will be fatal to a review of the judgment: *State v. Rohde*, 8 Wash. 362.

Although findings of fact should be made to sustain a judgment, yet an ap-

peal will not be dismissed for want thereof on motion of the party who should have caused them to be made: *Greer v. Squire*, 9 Wash. 359.

The party aggrieved must except to findings in order to raise any question thereon in the appellate court, under §§ 382, 383, 387, 1736, *infra*: *Rice v. Stevens*, *supra*.

The findings of the lower court will not be disturbed where the testimony is conflicting, and there is evidence to support the findings: *Drown v. Ingels*, 3 Wash. 424.

A finding of fact will be upheld by the appellate court so long as there is evidence tending to support it, although from the evidence the appellate court would make a different finding were the question presented to it as to the lower court:

Baker v. McAllister, 2 W. T. 48. See, also, *Shelton Logging Co. v. Gosser*, 26 Wash. 126.

Unless a finding is so clearly unfounded as to warrant its being set aside if made by a jury, it should not be disturbed on appeal. It stands as a special verdict and must be so treated: *Reynolds v. Dexter Horton & Co.*, 2 Wash. 185; *Fisher v. Quigley*, 2 Wash. 327; *Kilroy v. Mitchell*, 2 Wash. 407.

If it appears from the findings of fact that, although incompetent and immaterial testimony had been admitted, they were not based thereon, the error is not prejudicial: *Merchants' Nat. Bank v. Peet*, 9 Wash. 237.

§ 368. (5030.) Order of Proceedings—Findings Deemed Verdict.

The order of proceedings on a trial by the court shall be the same as provided in trials by jury. The finding of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reason, as far as applicable, and a new trial granted. [L. '69, p. 60, § 251; Cd. '81, § 247; 2 H. C., § 380.]

See notes to last section.

See *infra*, § 399, setting aside findings for insufficiency of evidence.

Cited in 2 Wash. 190; 20 Wash. 495; 35 Wash. 66; 49 Wash. 364.

The findings of the court upon the facts are deemed a verdict: *Willey v. Morrow*,

1 W. T. 474, 478; *Enos v. Wilcox*, 3 Wash. 44; and must be supported by the testimony: *Sheehan v. Levy*, 1 Wash. 149.

CHAPTER V.

TRIAL BY REFEREES.

§ 369. (5033.) Reference by Consent.

All or any of the issues in the action, whether of fact or law, or both, may be referred upon the written consent of the parties; but either party shall have the right in an action at law, upon an issue of fact, to demand a trial by jury. [Cf. L. '54, p. 168, § 206; Cd. '81, § 248; 2 H. C., § 381.]

See *supra*, § 82, referees defined.

See *supra*, § 83 et seq., court commissioners.

See note to next section as to reference without consent.

Cited in 1 Wash. 405; 16 Wash. 385.

As to reference and referees, see 2 Remington's Digest, p. 2486, §§ 1-11.

Disputed questions of fact in an equity case cannot be litigated in the supreme court on affidavits. The right practice is

for the trial court to refer such matters to a referee to take testimony and report the same to the court as provided in the next section: *Lammon v. Giles*, 3 W. T. 117.

§ 370. (5034.) Reference Without Consent, When.

When the parties do not consent, the court or judge may, upon the application of either [or of its own motion], direct a reference in all cases formerly cognizable in chancery in which reference might be made:—

1. When the trial of an issue of fact shall require the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or

2. When the taking of an account shall be necessary for the information of the court, before judgment upon an issue of law, or for carrying a judgment or order into effect; or

3. When a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action; or

4. When it is necessary for the information of the court in a special proceeding. [L. '54, p. 168, § 207; Cd. '81, § 249; 2 H. C., § 382.]

See note to § 375.

§ 371. (5035.) To Whom Reference may be Ordered.

A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge may appoint one or more, not exceeding three. [L. '54, p. 168, § 208; L. '69, p. 61, § 254; Cd. '81, § 250; 2 H. C., § 383.]

§ 372. (5036.) Qualifications of Referees.

When the appointment of referees is made by the court or judge, each referee shall be,—

1. Qualified as a juror as provided by statute;
2. Competent as juror between the parties;
3. A duly admitted and practicing attorney. [L. '54, p. 169, § 209; Cd. '81, § 251; 2 H. C., § 384.]

See supra, §§ 94, 97, 324 et seq., qualifications and competency of jurors.

§ 373. (5037.) Challenges to Referees.

When the referees are chosen by the court, each party shall have the same right of challenge as to such referees, which shall be made and determined in the same manner and with like effect as in the formation of juries, except that neither party shall be entitled to a peremptory challenge. [L. '69, p. 61, § 256; Cd. '81, § 252; 2 H. C., § 385.]

See supra, § 324 et seq., challenges to jurors.

§ 374. (5038.) Trial by Referees.

Subject to the limitations and directions prescribed in the order of reference, the trial by referees shall be conducted in the same manner as a trial by the court. They shall have the same power to grant adjournments, administer oaths, preserve order, punish all violations thereof upon such trial, compel the attendance of witnesses, and to punish them for nonattendance or refusal to be sworn or testify, as is possessed by the court. [Cf. L. '54, p. 169, § 210; L. '69, p. 62, § 257; Cd. '81, § 253; 2 H. C., § 386.]

See 2 Remington's Digest, p. 2486, §§ 4, 5.

If a jury has been waived in an action, and trial had before a referee, the waiver holds good for a retrial of the cause after reversal on appeal: *Park v. Mighell*, 7 Wash. 304.

If a cause has been referred to a referee to take proofs and report the same to the

court, the refusal of the referee to grant a request for an adjournment, which was not objected to at the time, nor upon the trial before the court subsequently upon the report of the referee, cannot be raised as ground of error for the first time on appeal: *Tacoma Grocery Co. v. Draham*, 8 Wash. 263.

§ 375. (5039.) Referee's Report shall Contain What.

The report of the referees shall state the facts found, and when the order of reference includes an issue of law, it shall state the conclusions of law

separately from the facts. The referees shall file with their report the evidence received upon the trial. If evidence offered by either party shall not be admitted on the trial, and the party offering the same except to the decision rejecting such evidence at the time, the exceptions shall be noted by the referees, and they shall take and receive such testimony and file it with the report. Whatever judgment the court may give upon the report, it shall, when it appears that such evidence was frivolous and inadmissible, require the party at whose instance it was taken and reported to pay all costs and disbursements thereby incurred. [Cf. L. '54, p. 169, § 210; L. '69, p. 62, § 258; Cd. '81, § 254; 2 H. C., § 387.]

See *infra*, § 377, judgment on report of referee.

See notes to § 370, *supra*.

Cited in 3 Wash. 471; 7 Wash. 123.

As to report and findings of referees, see 2 Remington's Digest, p. 2486, §§ 7-11.

Where an action at law is tried before a referee, charged to find facts and law, he should find the facts in detail; and, in case of a counterclaim, he should state clearly the items allowed for and against each party: *Park v. Mighell*, 3 Wash. 737.

A court commissioner may, on the order of the court, after filing his report in a cause, make supplemental report concerning stipulations entered into between the parties before him: *Wheeler, Osgood & Co. v. Ralph*, 4 Wash. 617.

If a case has been reversed on appeal on the ground that it was tried before referee and no findings of fact had been made by him, and had been remanded upon an order that the cause be heard by the same referee upon the testimony already taken, he is not disqualified by reason of his proceedings in the former

trial from making his findings of fact upon the testimony previously taken: *Park v. Mighell*, 7 Wash. 304.

The stenographer's longhand notes of the testimony taken before the referee in an action at law, and attached to and made a part of the referee's report, are sufficient on appeal: *Bash v. Culver Gold M. Co.*, 7 Wash. 122; see *Healy v. Seward*, 5 Wash. 319.

Under the appeal act of 1890, depositions taken by a referee in an equity case will not be considered by the supreme court, unless settled by a statement of facts and certified by the court or judge trying the cause: *Likens v. Cain*, 4 Wash. 307.

Where the referee employs a stenographer and typewriter in taking testimony, his fees cannot be increased to more than twenty cents per folio for writing testimony, under § 483, *infra*: *Polk v. Migheli*, 3 Wash. 737.

§ 376. (5040.) Filing Report and Proceedings Thereon.

The report shall be filed with the clerk. Either party may, within such time as may be prescribed by the rules of the court, or by special order, move to set the same aside, or for judgment thereon, or such order or proceeding as the nature of the case may require. [Cf. L. '69, p. 62, § 259; Cd. '81, § 255; 2 H. C., § 388.]

§ 377. (5041.) Judgment on Referee's Report.

The court may affirm or set aside the report, either in whole or in part. If it affirms the report, it shall give judgment accordingly. If the report be set aside, either in whole or in part, the court may make another order of reference, as to all or so much of the report as is set aside, to the original referees or others, or it may find the facts and determine the law itself and give judgment accordingly. Upon a motion to set aside a report, the conclusions thereof shall be deemed and considered as the verdict of the jury. [L. '69, p. 62, § 260; Cd. '81, § 256; 2 H. C., § 389.]

See *infra*, § 483, fees of referee.

Cited in 1 Wash. 405, 407; 2 Wash. 341; 5 Wash. 731.

The court may affirm or set aside the referee's report: *King Co. v. Hill*, 1 Wash. 404.

Findings of fact made by a referee in an equity cause may be set aside and others made by the court, they being merely advisory: *Pratsch v. Aberdeen Packing Co.*, 7 Wash. 346; *Horr v. Aber-*

deen Packing Co., 7 Wash. 354; Fairhaven L. Co. v. Jordan, 5 Wash. 729.

Where the court sets aside the referee's report, and orders the cause to be retried before it, the admission of evidence on such retrial which adds nothing material to plaintiff's case is not prejudicial error: Fairhaven L. Co. v. Jordan, *supra*.

The appellate court will assume, in the absence of the evidence, that the facts found by the referee are true, and that they were warranted by the evidence: Ferry v. King Co., 2 Wash. 337.

If a cause has been referred, and the record shows that the issues were settled before testimony was taken, and it does not appear that the findings were reported prior to completion of testimony, objection that the cause was referred before the issues were made up, and that the facts were found and reported before testimony was taken will be disregarded on appeal: Wheeler Osgood & Co. v. Ralph, 4 Wash. 617.

CHAPTER VI. AGREED CASES.

§ 378. (5044.) Submission of Controversies Without Action.

Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case and render judgment thereon as if an action were pending. [L. '69, p. 73, § 300; Cd. '81, § 298; 2 H. C., § 421.]

See *infra*, § 431, manner of taking and entering judgments.

Cited in 33 Wash. 540.

When a case is tried upon an agreed statement of facts, respondents cannot avoid any relief to which the agreed facts show the appellant entitled: Northern Pacific Ry. Co. v. Miller, 20 Wash. 21.

§ 379. (5045.) Judgment as in Other Cases.

Judgment shall be entered in the judgment-book as in other cases, but without costs for any proceedings prior to the trial. The case, the submission, and a copy of the judgment shall constitute the judgment-roll. [L. '69, p. 74, § 301; Cd. '81, § 299; 2 H. C., § 422.]

See *infra*, § 431 et seq., manner of taking and entering judgments.

§ 380. (5046.) Judgments Enforced as in Other Cases.

The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be in the same manner subject to appeal. [L. '69, p. 74, § 302; Cd. '81, § 300; 2 H. C., § 423.]

See *infra*, §§ 510-519, exemptions.

CHAPTER VII. EXCEPTIONS.

§ 381. (5050.) Definition.

An exception is a claim of error in a ruling or decision of a court, judge or other tribunal, or officer exercising judicial functions, made in the course of an action or proceeding or after judgment therein. [L. '93, p. 111, § 1.]

See *infra*, §§ 2186, 2224, exceptions in criminal cases.

See *infra*, Title XI, "Appeals."

For former laws on the subject of this chapter, see L. '54, p. 169, §§ 211-214; L. '77, §§ 261-267; Cd. '81, §§ 257-263; L. '85, pp. 70-73, §§ 1-8; L. '90, p. 333; L. '91, p. 348, §§ 25-27; 2 H. C., §§ 390-398.

Cited in 3 Wash. 122; 7 Wash. 362, 363; 11 Wash. 336, 410; 12 Wash. 26, 68, 336; 9 Wash. 299, 465, 573; 10 Wash. 154, 165; 28 Wash. 615.

§ 382. (5051.) When to be Taken.

It shall not be necessary or proper to take or enter an exception to any ruling or decision mentioned in the last section which is embodied in a written judgment, order or journal entry in the cause. But this section shall not apply to the report of a referee or commissioner, or to findings of fact or conclusions of law in a report or decision of a referee or commissioner, or in a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury. [L. '93, p. 112, § 2.]

Cited in 13 Wash. 202; 29 Wash. 43; 32 Wash. 452; 34 Wash. 584; 39 Wash. 49; 50 Wash. 697.

The evidence in an equity case or in an action tried by the court without a jury will not be reviewed on appeal, when no exceptions were taken to the findings of the court, nor other or different findings requested: *Forest v. Gilchrist*, 14 Wash. 4, and cases cited; *Irwin v. Water Co.*, 12 Wash. 112; *Brick Co. v. Adler*, 12 Wash. 24; *Montesano v. Blair*, 12 Wash. 188; *Rice v. Stevens*, 9 Wash. 298; *McKee v. Whitworth*, 15 Wash. 536.

Under this section it is not necessary to take any exception to a judgment: See 1 Remington's Digest, p. 122, § 151: *Woodhurst v. Cramer*, 29 Wash. 40; *Doremus v. Root*, 23 Wash. 710; *Murray v. Shoudy*, 13 Wash. 33; *McAllister v. McAllister*, 28 Wash. 613; *Spencer v. Commercial Co.*, 36 Wash. 374.

But an exception to judgment for want of findings must be called to attention of court below: See *Walsh v. Bushell*, 26 Wash. 576.

Refusing to allow the filing of a supplemental complaint is reviewable without exception: See *Burnett v. Ewing*, 39 Wash. 45.

Objection to judgment for costs against plaintiff's sureties on a cost bond, upon dismissal of an action of ejectment, may be first made on appeal without moving below to retax the costs, as no exceptions to a judgment are necessary: *Hamilton v. Witner*, 50 Wash. 689.

As to necessity for exceptions to decision or findings in general, see 1 Remington's Digest, pp. 119, 120, § 145; *Rice v. Stevens*, 9 Wash. 298; *Montesano v. Blair*, 12 Wash. 188; *Murray v. Okanogan Livestock etc. Co.*, 12 Wash. 259; *Stoddard v. Seattle Nat. Bank*, 12 Wash. 658; *Forrest v. Gilchrist*, 14 Wash. 4; *Hill v. Lowman*, 15 Wash. 503; *McKee v. Whitworth*, 15 Wash. 536; *Philadelphia Mortgage etc. Co. v. New Whatcom*, 19 Wash. 225; *Cole v. Price*, 22 Wash. 18; *Cedar Canyon Con. Min. Co. v. Yarwood*, 27 Wash. 271; *High v. Emerson*, 23 Wash. 103; *Reilly v. Anderson*, 33 Wash. 58; *Carstens v. Alaska Steamship Co.*, 39 Wash. 229; *Corbett v. Civil Service Com. of Seattle*, 33 Wash. 190; *Adams v. Casey*, 39 Wash. 37; *Shaw v. Benesh*, 37 Wash. 457; *Poor v. Cudihee*, 37 Wash. 609; *Smith v. Glenn*, 40 Wash. 262.

Exceptions to findings are unnecessary where proper and timely exceptions are taken to findings proposed by appellant and refused by the court: *Home Sav. etc. Assn. v. Burton*, 20 Wash. 688.

Exceptions to a cost bill cannot be reviewed where the evidence on the hearing was not brought up by a bill of exceptions or statements of facts, and counsel do not agree as to what matters were considered by the court: *Ames v. Farmers and Mechanics' Bank*, 48 Wash. 328.

Where no exceptions are taken to findings of fact in an equitable action, and the findings support the conclusions and the judgment, the findings cannot be reviewed, and the statement of facts will be struck out on motion and the judgment affirmed: *Hoeschler v. Bascom*, 44 Wash. 673.

Errors committed upon an inquisition of lunacy cannot be reviewed where no exceptions were taken: *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248.

Where no exceptions are taken to findings of fact, the evidence cannot be reviewed: *Bybee v. Bybee*, 45 Wash. 187; *Pierce v. Pettit*, 46 Wash. 668; *Lauridsen v. Lewis*, 50 Wash. 605.

Necessity of exceptions to review errors of law: See 1 Remington's Digest, p. 120, § 146; *Washington Brick etc. Mfg. Co. v. Adler*, 12 Wash. 24; *McPherson v. Smith*, 14 Wash. 226; *Schlotfeldt v. Bull*, 18 Wash. 64; *Lewis v. McDougall*, 19 Wash. 388; *Schlotfeldt v. Bull*, 17 Wash. 6; *Rowe v. Whatcom County R. & Light Co.*, 44 Wash. 658.

Where no exceptions are taken to the findings, the only question is whether the findings support the conclusions and judgment: *Hannegan v. Roth*, 12 Wash. 65; *Willamette Casket Co. v. Cross Undertaking Co.*, 12 Wash. 190; *Moyer v. Van de Vanter*, 12 Wash. 377; *Griswold v. Case*, 13 Wash. 623; *Carstens & Earles v. Leidigh etc. Lumber Co.*, 18 Wash. 450; *Brown v. Kern*, 21 Wash. 211; *In re Clifford*, 37 Wash. 460.

Error cannot be assigned upon the exclusion of evidence the materiality of which does not appear from the questions, unless the party informs the court what he expected to prove thereby so that the court could determine its materiality: *Chlopeck v. Chlopeck*, 47 Wash. 256. In the absence of exceptions to the findings they are conclusive, and the evidence cau-

not be reviewed: *Ferdig v. Simpson*, 47 Wash. 475; *Mantle v. Dabney*, 47 Wash. 394.

The findings of a trial judge who heard all the witnesses, will not be disturbed on appeal where the evidence is conflicting, and there is unquestionable testimony to support the findings: *Coates v. Teabo*, 44 Wash. 271; *Carr v. Cohn*, 44 Wash. 586; *Sorrill v. McGougan*, 44 Wash. 558.

If there is no contention as to findings, or judgment is on the pleadings, no exception is necessary: See *Cathcart v. Bryant*, 28 Wash. 31; *Payette v. Ferrier*, 31 Wash. 43.

Exception to sufficiency of pleadings not necessary when question previously raised: See *Travis v. Ward*, 2 Wash. 30; *Cook v. Tibbals*, 12 Wash. 207; *Fremont Milling Co. v. Denny*, 12 Wash. 251; *State ex rel. Swerdfiger v. Whitney*, 12 Wash. 420; *Jackson v. McAuley*, 13 Wash. 298; *Arey v. Arey*, 22 Wash. 261; *Hathaway v. McDonald*, 27 Wash. 659.

As to striking statement for failure to except, see 1 Remington's Digest, p. 120, § 147; *Peters v. Lewis*, 33 Wash. 617; *Horrell v. California-Oregon etc. Assn.*, 40 Wash. 531; *Lilly v. Eklund*, 37 Wash. 532; *Bringgold v. Bringgold*, 40 Wash. 121; *Smith v. Glenn*, 40 Wash. 262; *Crowe & Co. v. Brandt*, 50 Wash. 499.

As to necessity for exceptions to conclusions of law, see 1 Remington's Digest, p. 120, § 148; *Woodhurst v. Cramer*, 29 Wash. 40; *Robins v. Paulson*, 30 Wash.

459; *Adams v. Washington etc. Co.*, 38 Wash. 243; *First Nat. Bank v. Coles*, 40 Wash. 528; *Gerhard v. Worrell*, 20 Wash. 492.

As to necessity of objections in criminal cases, see 1 Remington's Digest, pp. 838-840. §§ 384-392.

Objections to evidence: See *State v. Melvern*, 32 Wash. 7.

Objections to indictment or information: See *State v. Rogan*, 18 Wash. 43; *State v. Anderson*, 20 Wash. 193.

Objections to proceedings at trial: See *State v. Straub*, 16 Wash. 111; *State v. Gates*, 28 Wash. 689.

Objections to rulings on evidence: See *State v. Craemer*, 12 Wash. 217; *State v. Hyde*, 22 Wash. 551.

Objections to arguments and conduct of counsel, and to form of verdict: See *State v. Regan*, 8 Wash. 506; *State v. McCann*, 16 Wash. 249; *State v. Fenton*, 30 Wash. 325; *State v. Bailey*, 31 Wash. 89; *State v. Snider*, 32 Wash. 299.

Necessity of exceptions in criminal cases: See 1 Remington's Digest, p. 839, § 391; *Smith v. United States*, 1 W. T. 262; *Freidrich v. Territory*, 2 Wash. 358; *State v. Williams*, 13 Wash. 335; *State v. Carter*, 15 Wash. 121; *State v. Crotts*, 22 Wash. 245.

A general exception to an instruction in a criminal case containing several propositions is insufficient if the instruction is in part correct: *State v. Gohl*, 46 Wash. 408.

§ 383. (5052.) Manner of Taking in Cases Tried by Court.

Exceptions to the report of a referee or commissioner, or to findings of fact or conclusions of law in a report or decision of a referee or commissioner, or in a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury, may be taken by any party, either by stating to the judge, referee or commissioner when the report or decision is signed, that such party excepts to the same, specifying the part or parts excepted to (whereupon the judge, referee or commissioner, shall note the exceptions in the margin or at the foot of the report or decision); or by filing like written exceptions within five days after the filing of the report or decision, or, where the report or decision is signed subsequently to the hearing and in the absence of the party excepting, within five days after the service on such party of a copy of such report or decision or of written notice of the filing thereof. [L. '93, p. 112, § 3.]

Cited in 9 Wash. 466; 12 Wash. 26, 68, 113; 15 Wash. 137; 16 Wash. 337; 17 Wash. 291; 23 Wash. 260; 26 Wash. 8; 27 Wash. 698; 29 Wash. 20; 31 Wash. 174; 33 Wash. 60; 34 Wash. 584; 40 Wash. 123.

As to time and manner of taking exceptions, see 1 Remington's Digest, p. 122, § 151½.

Where exceptions to findings of fact and conclusions of law are not taken within five days after their filing, they are insufficient to secure a review in the

appellate court of the evidence upon which they are based: *National Bank v. Vinegar Works*, 15 Wash. 126.

The court has no power to extend the time for taking exceptions to findings of fact and conclusions of law: *Id.*

Under this section, written exceptions to findings must be filed within five days after notice of the decision: *Rice v. Stevens*, 9 Wash. 298; *Irwin v. Olympia Waterworks*, 12 Wash. 12; *Ballard v. First Nat. Bank*, 13 Wash. 670. When notice of the filing of findings not served, ex-

ceptions must be taken within five days after acquiring notice in any way: *Irwin v. Olympia Waterworks*, 12 Wash. 112; *Fisher v. Kirschberg*, 17 Wash. 290; *Mann v. Provident Life etc. Co.*, 42 Wash. 581; *Kinkade v. Witherop*, 29 Wash. 10. See *Brooks v. James*, 18 Wash. 335.

An order striking exceptions to findings is proper where the record sustains its recitals that the exceptions were not filed within five days after service of a copy: *Fulton v. Methow Trading Co.*, 45 Wash. 136.

Exception, not taken in time, will not be noticed: See *Home Sav. etc. Assn. v. Burton*, 20 Wash. 688.

Error cannot be assigned in the failure of the court to make findings of fact and conclusions of law in mandamus proceedings, where no request therefor was made below: *State ex rel. Cicoria v. Corgiat*, 50 Wash. 95.

As to form and sufficiency of exceptions to findings, see 1 *Remington's Digest*, p. 121, § 149; *Ach v. Carter*, 21 Wash. 140; *Bignold v. Carr*, 24 Wash. 413; *Young v. Borzone*, 26 Wash. 4; *Burrows v. Kinsley*, 27 Wash. 694; *Ranahan v. Gibbons*, 23 Wash. 255; *Fremont Milling Co. v. Denny*, 12 Wash. 251; *Robins v. Paulson*, 30 Wash. 459; *Humphries v. Sorenson*, 33 Wash. 563; *Bank v. Doherty*, 42 Wash. 317.

Sufficiency of general exceptions to findings: See 1 *Remington's Digest*, p. 121, § 150.

A general exception to the several findings of fact is insufficient to bring up for

review any question upon the evidence: *Hannegan v. Roth*, 12 Wash. 65; *Cook v. Tibbals*, 12 Wash. 207; *Moyer v. Van De Vanter*, 12 Wash. 377; *Schoonover v. Condon*, 12 Wash. 475; *Irwin v. Olympia Waterworks*, 12 Wash. 112; *Ballard v. Keane*, 13 Wash. 201; *Payette v. Willis*, 23 Wash. 299; *Woodhurst v. Cramer*, 29 Wash. 40.

Unless all the findings are erroneous: *Washington Liquor Co. v. Northwest Livestock Co.*, 18 Wash. 71; *Brown v. Coey*, 12 Wash. 659 (mem.); *Neeley v. Democratic Pub. Co.*, 12 Wash. 659; *Peters v. Lewis*, 33 Wash. 617; *Lilly v. Eklund*, 37 Wash. 532.

A general exception to findings of facts is insufficient to secure a review of the evidence: *Smith v. Glenn*, 40 Wash. 262; *Horrell v. California-Oregon etc. Assn.*, 40 Wash. 531; *Mason v. McLean*, 6 Wash. 31; *Bringgold v. Bringgold*, 40 Wash. 121; *Spaulding v. Burke*, 33 Wash. 679. One general exception to all findings of fact made or refused is insufficient to secure a review of the evidence; and in such case the statement will be struck out when no error is assigned on the exclusion of evidence, and the judgment affirmed if supported by the findings: *Pederson v. Ullrich*, 50 Wash. 211; *Peters v. Lewis*, 33 Wash. 617.

One general exception to the refusal of proposed findings of fact and conclusions of law is insufficient to secure a review of the findings made: *Crowe & Co. v. Brandt*, 50 Wash. 499.

§ 384. (5053.) Manner of Taking in Jury Cases.

Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court, after the jury shall have retired to consider of their verdict, and, if practicable, before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or otherwise the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the judge shall note the exceptions in the minutes of the trial, or cause the stenographer (if one is in attendance) so to note the same. [L. '93, p. 112, § 4.]

Exceptions to instructions may be taken at any time before the hearing of a motion for a new trial: See *supra*, § 339.

Cited in 9 Wash. 7; 15 Wash. 244, 260; 29 Wash. 473; 37 Wash. 580.

Instructions, and failure or refusal to give instructions: See 1 *Remington's Digest*, p. 118, § 142; *Smith v. United States*, 1 W. T. 262; *Brown v. Forest*, 1 W. T. 201; *Seattle Land Co. v. Day*, 2 Wash. 451; *Blumberg v. McNear*, 1 W. T. 141; *Johnson v. Tacoma Cedar Lumber Co.*, 3 Wash. 722; *Blumenthal v. Pacific Meat Co.*, 12 Wash. 331; *State v. Williams*, 13 Wash. 335; *Pepperall v. City Transit Co.*, 15 Wash. 176; *Anderson v. Crothers*, 18 Wash. 520; *State v. McGilvery*, 20 Wash. 240; *State v. Anderson*, 20 Wash. 193; *Rei-*

ner v. Crawford, 23 Wash. 669; *Dodds v. Gregson*, 35 Wash. 402; *Hawkins v. Casey*, 38 Wash. 625; *Duteau v. Seattle Elec. Co.*, 45 Wash. 418; *Austin v. Bellingham*, 45 Wash. 460.

Where exceptions were dictated to the stenographer by an attorney in his place at the attorney's table, with the presiding judge upon the bench, it cannot be objected that the judge could not hear the exceptions, since it was his duty to do so: *Ongaro v. Twohy*, 49 Wash. 93.

Manner of taking and entering exceptions: See 2 *Remington's Digest*, p. 2766, §§ 107, 108; *McDonough v. G. N. Ry. Co.*,

15 Wash. 244; *Miller v. Vermurie*, 7 Wash. 386; *State v. Coella*, 8 Wash. 512. See, also, *Goetzinger v. Rosenfeld*, 16 Wash. 392.

As to sufficiency of general exceptions to instructions, see 1 *Remington's Digest*, p. 118, § 143; *Sexton v. School Dist. No. 34*, 9 Wash. 5; *Bell v. Washington Cedar Shingle Co.*, 5 Wash. 27; *Meeker v. Gardella*, 1 Wash. 139; *Cunningham v. Seattle El. R. Co.*, 3 Wash. 471; *Maling v. Crummev*, 5 Wash. 222; *McDonough v. Great Northern R. Co.*, 15 Wash. 244; *State v. Katon*, 47 Wash. 1; *Rowe v. Whatcom Co. R. & Light Co.*, 44 Wash. 658; *Allend v. Spokane Falls etc. R. Co.*, 21 Wash. 324; *Rush v. Spokane Falls etc. R. Co.*, 23 Wash. 501; *Gallamore v. Olympia*, 34

Wash. 379; *Dow v. Dempsey*, 21 Wash. 86. See, also, 2 *Remington's Digest*, p. 2766, § 109, and cases cited.

As to specific exceptions to instructions, see 1 *Remington's Digest*, p. 119, § 144; *State v. Robinson*, 12 Wash. 491; *Patchen v. Parke & Lacy Mach. Co.*, 6 Wash. 486; *Sweeney v. Pacific Coast Elevator Co.*, 14 Wash. 562; *Edmunds v. Black*, 15 Wash. 73; *Rush v. Spokane Falls etc. R. Co.*, 23 Wash. 501.

In the absence of a bill of exceptions or statement of facts showing all the instructions, and of any exceptions to the instructions given, error in instructions cannot be reviewed: *State v. Rourk*, 44 Wash. 464.

§ 385. (5054.) **How Entered in Minutes.**

Exceptions to any ruling upon an objection to the admission of evidence, offered in the course of a trial or hearing, need not be formally taken, but the question put or other offer of evidence, together with the objection thereto and the ruling thereon, shall be entered by the court, judge, referee or commissioner (or by the stenographer, if one is in attendance) in the minutes of the trial or hearing, and such entry shall import an exception by the party against whom the ruling was made. [L. '93, p. 112, § 5.]

Cited in 16 Wash. 354; 52 Wash. 183.

Under this section an exception is not necessary where an objection is interposed

and a ruling made on the offer of evidence: *Nelson v. Western Steam Nav. Co.*, 52 Wash. 177.

§ 386. (5055.) **Manner of Taking and Entry.**

Exceptions to any ruling or decision made in the course of a trial or hearing, or in the progress of a cause, except those to which it is provided in this chapter that no exception need be taken and those to which some other mode of exception is in this chapter prescribed, may be taken by any party by stating to the court, judge, referee or commissioner making the ruling or decision, when the same is made, that such party excepts to the same; whereupon such court, judge, referee or commissioner shall note the exception in the minutes of the trial, hearing or cause, or shall cause the stenographer (if one is in attendance) so to note the same. [L. '93, p. 113, § 6.]

Cited in 42 Wash. 328.

§ 387. (5056.) **Review on Appeal.**

Alleged error in any order, ruling or decision to which it is provided in this chapter that no exception need be taken, or in any report, finding of fact, conclusion of law, charge, refusal to charge, or other ruling or decision which shall have been excepted to by any party as prescribed in this chapter, shall be reviewed by the supreme court, upon an appeal taken by the party against whom any such ruling or decision was made, or in which he has joined, from any other appealable order or from the final judgment in the cause, where such error, if found to exist, would materially affect the correctness of the judgment or order appealed from: Provided, the ruling or decision, the alleged error in which is sought to be so reviewed, together with the exception thereto, if any, was a matter of record in the cause in the first instance, or before the hearing of the appeal has been brought into the rec-

ord in the manner prescribed in this chapter. And any such alleged error shall also be considered in the court wherein or by a judge whereof the same was committed, upon the hearing and decision of a motion for a new trial, a motion for judgment notwithstanding a verdict, or a motion to set aside a referee's report or decision, made by a party against whom the ruling or decision to be reviewed was made, whether the alleged erroneous ruling or decision is a part of the record or not, where the alleged error, if found to exist, would materially affect the decision of the motion. But no exception to any appealable order or to any final judgment shall be necessary or proper in order to secure a review of such order or judgment upon direct appeal therefrom. [L. '93, p. 113, § 7.]

See *supra*, § 339, manner of conducting trial.

Cited in 8 Wash. 185; 12 Wash. 26, 68; 31 Wash. 560.

No statement of facts is necessary on appeal when the only matter to be determined is whether the lower court ruled correctly upon the questions of law presented: *Watson v. Sawyer*, 12 Wash. 35; *State v. McQuade*, 12 Wash. 554; *Howard v. Shaw*, 10 Wash. 151; *Railway Co. v. Johnson*, 7 Wash. 97.

Where the only error assigned is the judgment of dismissal of a complaint, which is substantially the sustaining of a demurrer thereto, there is no necessity for a bill of exceptions: *Long v. Billings*, 7 Wash. 267.

Where the judgment recites that it was rendered upon the pleadings and oral admissions of the parties in open court, it will not be disturbed on appeal where the record does not set forth the oral admissions, the presumption being that the judgment was sustained by the facts presented to the lower court: *Byers v. Rothschild*, 11 Wash. 296; *Gay v. Havermale*, 30 Wash. 622.

A verdict will not be disturbed on appeal if there is sufficient evidence to support it upon any theory, where no exceptions were taken to the instructions to the jury of the lower court: *Blumenthal v. Meat Co.*, 12 Wash. 331.

Findings of fact and exceptions thereto are unnecessary to obtain a review of the facts in the case where the trial court ordered a judgment of nonsuit: *Murray v. Shoudy*, 13 Wash. 33.

Exceptions to findings of fact taken nearly a year after their filing, and nearly three months subsequent to notice of appeal, will not be considered by the appellate court: *Ballard v. Bank*, 13 Wash. 670.

Where there is no exception to a finding of the court that a lien notice was sufficient, or a refusal by the court to find it insufficient, the question of its sufficiency cannot be raised on appeal, even though it was admitted in evidence over the appellant's objection: *McPherson v. Smith*, 14 Wash. 226; *Wash. Mfg. Co. v. Adler*, 12 Wash. 24.

An erroneous instruction, when not complained of and excepted to, constitutes on

appeal the law of the case, and the record will not be examined at the instance of the respondent for the purpose of determining wherein it is erroneous: *Pepperal v. Transit Co.*, 15 Wash. 176.

Errors not raised in the court below cannot be urged on appeal: *State v. Owens*, 15 Wash. 468.

NECESSITY OF PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.—Presentation in general, nature and theory of cause: See 1 Remington's Digest, p. 108, §§ 108-110; *Eakin v. McCraith*, 2 W. T. 112; *Sweeney v. Pacific Elevator Co.*, 14 Wash. 562; *Moran Bros. Co. v. Northern Pac. R. Co.*, 19 Wash. 266; *Guarantee Loan etc. Co. v. Galliher*, 12 Wash. 507; *Gustin v. Jose*, 11 Wash. 348; *Rose v. Pierce County*, 25 Wash. 119; *Bates v. Drake*, 28 Wash. 447; *Schmidt v. Olympic Light etc. Co.*, 40 Wash. 131; *Collins v. Fidelity Trust Co.*, 33 Wash. 136; *Morrison v. Steenstra*, 45 Wash. 175; *Schmidt v. Olympia Light etc. Co.*, 46 Wash. 360.

As to grounds of defense or opposition and objections to jurisdiction, parties, etc., see 1 Remington's Digest, p. 109, §§ 111-116.

Grounds of defense or opposition: See *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415; *Rose v. Pierce County*, 25 Wash. 119; *Herrick v. Niesz*, 16 Wash. 74; *Fitzgerald v. School Dist. No. 20*, 5 Wash. 112; *Neis v. Farquharson*, 9 Wash. 508; *Peterson v. Dillon*, 27 Wash. 78.

Objections to jurisdiction, parties, etc.: *Sligh v. Shelton S. W. R. Co.*, 20 Wash. 16; *Payson v. Jacobs*, 38 Wash. 203; *State v. Holmes*, 12 Wash. 169; *State v. King*, 12 Wash. 288; *Loos v. Rondema*, 10 Wash. 164.

When objections to pleadings must be made in lower court: See 1 Remington's Digest, p. 110, § 117; *Hammock v. Tacoma*, 40 Wash. 539; *Jones v. St. Paul M. & M. Co.*, 16 Wash. 25; *Bishop v. Averill*, 17 Wash. 209; *State ex rel. Sander v. Jones*, 20 Wash. 576; *Island County v. Babcock*, 17 Wash. 438; *Wannenstein v. Aberdeen*, 39 Wash. 189; *Hardin v. Mullen*, 16 Wash. 647; *Herrick v. Niesz*, 16 Wash. 74; *O'Toole v. Faulkner*, 29 Wash. 544; *Attorney Gen-*

eral v. Seattle Gas etc. Co., 28 Wash. 488; Selby v. Vancouver Waterworks Co., 32 Wash. 522; Sligh v. Shelton S. W. R., 20 Wash. 16; Moran Bros. Co. v. Northern Pac. R. Co., 19 Wash. 266; Olsen v. Mansfield, 21 Wash. 706; Harris v. Halverson, 23 Wash. 779; Livingston v. Lovgren, 27 Wash. 102; Board of Church Erec. Fund etc. v. First Presbyterian Church, 19 Wash. 455; Stein v. Waddell, 37 Wash. 634; Ellsworth v. Layton, 37 Wash. 340; Mitchell v. Jordan, 36 Wash. 645; Creech v. Aberdeen, 44 Wash. 72; Sturtevant v. McDougall, 45 Wash. 532.

As to necessity of presentation of objections to answer or reply, see 1 Remington's Digest, p. 112, §§ 118, 119.

To answer: Wilson v. Aberdeen, 25 Wash. 614; Shephard v. Gove, 26 Wash. 452; Tibbals v. Mount Olympus Water Co., 16 Wash. 480; Roberts v. Washington Water Power Co., 19 Wash. 392; Schwede v. Hemrich, 29 Wash. 124; Howard v. Hibbs, 22 Wash. 513; Brown v. Northern Pac. R. Co., 44 Wash. 1; Hynes v. Plastino, 45 Wash. 190; State ex rel. American Freehold-Land Mtg. Co. v. Tanner, 45 Wash. 348; Johansen v. Mulligan 45 Wash. 529.

To reply: Asplund v. Mattson, 15 Wash. 328; Ritchie v. Carpenter, 2 Wash. 512.

Of objections to mode and conduct of trial or hearing: See 2 Remington's Digest, p. 112, § 121 and cases cited.

See, also, State v. Clem, 49 Wash. 273.

Necessity of raising objections to evidence or admission of evidence, in court below: See 1 Remington's Digest, p. 112, §§ 122, 123; State v. Webb, 20 Wash. 500; Brown v. Gillett, 33 Wash. 264; State v. Champoux, 33 Wash. 339; Knapp v. Order of Pendo, 36 Wash. 601; Young v. O'Brien, 36 Wash. 570; Anderson v. Hilker, 38 Wash. 632; Uren v. Golden Tunnel Mining Co., 24 Wash. 261; Titlow v. Cascade Oatmeal Co., 15 Wash. 652; Coleman v. Montgomery, 19 Wash. 610; McElroy v. Williams, 14 Wash. 627; Washington Mill Co. v. Marks, 27 Wash. 170; Imhoof v. Northwestern Lumber Co., 43 Wash. 387; Collins v. Fidelity Trust Co., 33 Wash. 136; Bright v. Hanover Fire Insurance Co., 48 Wash. 60.

Necessity of specification of objections to evidence in lower court: See 1 Remington's Digest, p. 113, § 124; Kroenert v. Falk, 32 Wash. 180; Sackman v. Thomas, 24 Wash. 660; Anderson v. New York Life Ins. Co., 34 Wash. 616; State v. Pittam, 32 Wash. 137; Wagner v. Mahrt, 32 Wash. 542; Dewald v. Ingle, 31 Wash. 616; State v. Patchen, 37 Wash. 24; State v. Nelson, 39 Wash. 221; State v. Poole, 42 Wash. 192.

Objections to insufficiency of evidence or arguments of counsel: See 1 Remington's Digest, p. 114, §§ 126, 127. Insuffi-

ciency of evidence: Green v. Finnell, 22 Wash. 186; Olsen v. Snake River Valley R. Co., 22 Wash. 139; Sweeney v. Pac. Coast Elevator Co., 14 Wash. 562; Tacoma Grocery Co. v. Barlow, 12 Wash. 21; Wheeler, Osgood & Co. v. Ralph, 4 Wash. 617; Dearborn Foundry Co. v. Augustine, 5 Wash. 67.

Arguments of counsel: Skagit R. etc. Co. v. Cole, 2 Wash. 57; State v. Van Waters, 36 Wash. 358; Taylor v. Modern Woodmen of America, 42 Wash. 304; Jackson v. Mercantile Mutual Fire Ins. Co., 45 Wash. 244.

Requests and failure to give instructions: See 1 Remington's Digest, p. 115, § 129; Wilson v. Waldron, 12 Wash. 149; Dow v. Dempsey, 21 Wash. 86; Sproul v. Seattle, 17 Wash. 256; Allend v. Spokane Falls etc. R. Co., 21 Wash. 324; Rush v. Spokane Falls etc. R. Co., 23 Wash. 501; Brown v. Porter, 7 Wash. 327; Box v. Kelso, 5 Wash. 360; McQuillan v. Seattle, 13 Wash. 600; but see Mitchell v. Tacoma R. etc. Co., 9 Wash. 120.

Objections to verdict and findings by jury and findings by court: See 1 Remington's Digest, p. 115, §§ 130, 131; Rawson v. Ellsworth, 13 Wash. 667; McClellan v. Gaston, 18 Wash. 472; State v. Greer, 11 Wash. 244; Moran Bros. Co. v. Northern Pac. R. Co., 19 Wash. 266; Dossett v. St. Paul etc. Lumber Co., 28 Wash. 618; Wilson v. Aberdeen, 25 Wash. 614; Bank of California v. Dyer, 14 Wash. 279; Walsh v. Bushell, 26 Wash. 576; Ach v. Carter, 21 Wash. 140; Miller v. Lake Irr. Co., 33 Wash. 12.

Of objections to the judgment: See 1 Remington's Digest, p. 116, § 135; Main v. Johnson, 7 Wash. 321; Kinkade v. Witherop, 29 Wash. 10; Belles v. Carroll, 6 Wash. 131; Grantnam v. Gilson, 41 Wash. 125; State ex rel. Hennessy v. Huston, 32 Wash. 154; Wilcox v. Smith, 38 Wash. 585; Hubenthal v. Spokane etc. R. Co., 43 Wash. 677; Jenkins v. Powe, 19 Wash. 113; Bringgold v. Spokane, 19 Wash. 333.

As to necessity of motion for new trial, see 1 Remington's Digest, pp. 123, 124, §§ 153-161; Jones v. Jenkins, 3 Wash. 17; Burns v. Commencement Bay Land & Improvement Co., 4 Wash. 558; Sultan Water & P. Co. v. Weyerhaeuser Timber Co., 31 Wash. 558; Crooker v. Pacific Lounge etc. Co., 34 Wash. 191; Rowe v. Northport Smelting & Ref. Co., 35 Wash. 101; Dubcich v. Grand Lodge A. O. U. W., 33 Wash. 651; Sound Inv. Co. v. Fairhaven Land Co. 55 Wash. 262, and other cases cited.

Necessity of motion for new trial or in arrest of judgment in criminal cases: See 1 Remington's Digest, p. 840, § 392; Lybarger v. State, 2 Wash. 552; State v. Nichols, 15 Wash. 1; State v. Straub, 16 Wash. 111.

§ 388. (5057.) Bill of Exceptions, What Constitutes.

Any party to any action or proceeding may, at any stage thereof, have any rulings or decisions of the court, or a judge, referee or commissioner

thereof, in the cause, together with the necessary evidence, papers or proceedings connected therewith or on which the same were based, and the exceptions thereto, if any, not already a part of the record in the cause, or so much of all or any thereof as is not already a part of the record, made a part of the record in the cause, by the certifying of a bill of exceptions as in this chapter provided. And any such party may, after the making of an appealable order or the final judgment in the cause, have all rulings, decisions, evidence, papers, proceedings and exceptions in the cause, or so much thereof as may be material to an appeal from such appealable order or from the final judgment, as the case may be, not already a part of the record, made a part of the record in the cause by the certifying of a statement of facts, as in this chapter provided. The certifying of a bill of exceptions or statement of facts shall not prevent the subsequent certifying of other bills of exceptions or statements of facts, or both, comprising other matters in the cause, at the instance of the same or another party; but only one bill of exceptions or statement of facts can be settled or certified after the rendition of the final judgment in the cause. [L. '93, p. 114, § 8.]

Cited in 15 Wash. 94; 21 Wash. 368; 47 Wash. 596.

Although a transcript on appeal is properly certified, yet where the bill of exceptions accompanying it is a detached paper without authentication, the supreme court will ignore the errors shown in the bill: *Stinson v. Sachs*, 8 Wash. 391.

Where the record contains an exception to the refusal of the court to grant a new trial on the ground of insufficiency of the evidence, and a bill of exceptions is made a part thereof for the purpose of bringing the evidence into the record, it is unnecessary that the bill of exceptions contain any assignment of error: *Shotwell v. Dodge*, 8 Wash. 337.

As to matters necessary to be shown by the record for the purpose of review, see 1 Remington's Digest, pp. 155, 156, §§ 245-249; *Hall v. Union Cent. Life Ins. Co.*, 23 Wash. 610; *Waite v. Wingate*, 4 Wash. 324; *State v. Biles*, 6 Wash. 186; *Hall v. Woolery*, 20 Wash. 440; *Smith v. Dow*, 43 Wash. 407; *Smith v. Michigan Lum. Co.*, 43 Wash. 402; *Roberts v. Shelton S. W. R. Co.*, 21 Wash. 427; *Buckley v. Conley*, 16 Wash. 338.

As to scope and contents of record, see 1 Remington's Digest, pp. 157-159, §§ 250-261.

Pleadings and proceedings: See *Chase Nat. Bank of New York v. Hastings*, 20 Wash. 433; *Waite v. Wingate*, 4 Wash. 234; *Seattle & Walla Walla R. Co. v. Ah Kow*, 2 W. T. 36; *Ewing v. Van Wagenen*, 6 Wash. 39; *Long v. Billings*, 7 Wash. 267; *Tullis v. Shannon*, 7 Wash. 267; *Huggins v. Sutherland*, 39 Wash. 552.

Stipulated facts: See *Asher v. Sekofsky*, 10 Wash. 379; *Yakima etc. Co. v. Hathaway*, 18 Wash. 377; *Townsend Gas & Elec. Light Co. v. Hill*, 24 Wash. 469.

Interlocutory motions, orders and judgments: See *Miskel v. Stone*, 1 W. T. 229; *Swift v. Stine*, 3 W. T. 518; *Tullis v.*

Shannon, 3 Wash. 716; *Seattle M. & R. Co. v. Johnson*, 7 Wash. 97. As to findings, see *State v. Rohde*, 8 Wash. 362.

As to form, arrangement and purpose of bill or statement, see 1 Remington's Digest, p. 159, § 262: *Puget Sound Iron Co. v. Worthington*, 2 W. T. 472; *Jones v. Jenkins*, 3 Wash. 17; *Stenger v. Roeder*, 3 Wash. 412; *Collins v. Seattle*, 2 W. T. 354; *Corbett v. Civil Service Com. of Seattle*, 33 Wash. 190; *Greely v. Newcomb*, 21 Wash. 357; *Smith v. Glenn*, 40 Wash. 262; *Bringgold v. Bringgold*, 40 Wash. 121; *Schell v. Walla Walla*, 44 Wash. 43.

In an equity case where the decision is based upon evidence, an appeal is dismissed or the judgment affirmed unless there is a statement of facts bringing up all the evidence: See 1 Remington's Digest, p. 160, § 264; *Swift v. Stine*, 3 W. T. 18; *United States v. Lone Fisherman*, 3 W. T. 316; *Caton v. Switzler*, 3 W. T. 242; *Kenyon v. Knipe*, 3 W. T. 243; *Snyder v. Kelso*, 3 Wash. 181; *Enos v. Wilcox*, 3 Wash. 44; *Cadwell v. First Nat. Bank*, 3 Wash. 188; *McNatt v. Harmon*, 3 Wash. 432; *Wheeler v. Lager*, 3 Wash. 732; *Likens v. Cain*, 4 Wash. 307; *Whittier v. Cadwell*, 4 Wash. 819; *Tacoma Foundry & Mach. Co. v. Wolff*, 4 Wash. 818; *Link v. Bosse*, 5 Wash. 491; *American Asphalt Co. v. Gribble*, 8 Wash. 255; *Bartlett v. Reicheneker*, 6 Wash. 168; *Bently v. Port Townsend Hotel & Imp. Co.*, 6 Wash. 296; *Kirby v. Collins*, 6 Wash. 297; *Bernier v. Bernier*, 17 Wash. 689.

Even though the court below has made and filed full findings of fact: *Stenger v. Roeder*, 3 Wash. 412; *McKinnon v. Kingston Land & Imp. Co.*, 4 Wash. 535; *McCarty v. Hayden*, 4 Wash. 537.

Findings of fact are presumed to be supported by the evidence, if the findings are not brought up: *Wilson v. Aberdeen*, 25 Wash. 614; *Gay v. Havermale*, 27 Wash. 390; *Gay v. Havermale*, 30 Wash. 622;

Byers v. Rothschild, 11 Wash. 296; Cunningham v. Lakin, 50 Wash. 394; Corbin v. McDermott, 33 Wash. 612; Dawson v. Dawson, 40 Wash. 656.

Error in admitting or excluding evidence cannot be considered in the absence of a bill of exceptions or statement of facts: Rice v. Knostman & Franke, 45 Wash. 282; Ramsdell v. Ramsdell, 47 Wash. 444.

When evidence not necessary in equity: See 1 Remington's Digest, p. 161, § 265; Ferry v. King County, 2 Wash. 337; Blackwell v. McLean, 9 Wash. 301; Brown v. Kern, 21 Wash. 211; Zindorf Construction Co. v. Western Am. Co., 27 Wash. 31; Gay v. Havermale, 27 Wash. 390; Gay v. Havermale, 30 Wash. 622; Watson v. Sawyer, 12 Wash. 35; Howard v. Shaw, 10 Wash. 151; Fitz Henry v. Munter, 33 Wash. 629; Seattle v. Smithers, 37 Wash. 119; Carstens v. McReavy, 1 Wash. 359; State ex rel. Orr v. Fawcett, 17 Wash. 188.

As to evidence necessary to be set out in bill or statement in actions at law, see 1 Remington's Digest, p. 161, § 267; Bruce v. Foley, 18 Wash. 96; Seattle v. Buzby, 2 W. T. 35; Jones v. Jenkins, 3 Wash. 17; Murray v. Shoudy, 13 Wash. 33; Shotwell v. Dodge, 8 Wash. 337; State v. Robinson, 12 Wash. 491; State v. Zettler, 15 Wash. 625; Pincus v. Puget Sound Brewing Co., 18 Wash. 108; State v. Pittam, 32 Wash. 137; Tatum v. Boyd, 11 Wash. 712; State v. Morgan, 20 Wash. 708; Greely v. Newcomb, 21 Wash. 357; Osborn v. Pioneer Mut. Ins. Assn., 36 Wash. 695; Dibble v. Seattle Electric Co., 33 Wash. 596; Schlottfeldt v. Bull, 22 Wash. 362; Thacker Wood & Mfg. Co. v. Mallory, 27 Wash. 670; State v. Dunn, 22 Wash. 67; Swope v. Seattle, 36 Wash. 113; Spencer v. Commercial Co., 36 Wash. 374; Collier v. Great Northern R. Co., 40 Wash. 639; Hotel Co. v. Merchants' Ice etc. Co., 41 Wash. 620; Smith v. Glenn, 40 Wash. 262.

Evidence in special proceedings, or on motion for new trial must be included: See 1 Remington's Digest, pp. 162, 163, §§ 268, 269. Special proceedings: See State ex rel. Cook v. Reed, 36 Wash. 638; Kubillus v. Ewert, 40 Wash. 38; Whitehouse v. Nelson Dry Goods Co., 40 Wash. 189; Port Townsend v. Lewis, 34 Wash. 413.

Motion for new trial: See Pincus v. Puget Sound Brewing Co., 18 Wash. 108; Linder v. Newman, 18 Wash. 481; Nelson v. Seattle Traction Co., 25 Wash. 602.

As to record evidence, see Nunn v. Jordan, 31 Wash. 506.

As to incorporating matters of record, exhibits, affidavits, and other documents, see 1 Remington's Digest, pp. 163-166, §§ 272-275.

Affidavits introduced in evidence at the trial are not properly a part of the transcript, but must be included in the state-

ment of facts or they cannot be considered: State v. Humason, 5 Wash. 499; Heffner v. Board of County Commrs., 16 Wash. 273; Jacobson v. Lunn, 16 Wash. 487; Shorno v. Doak, 45 Wash. 613; Gray v. Granger, 48 Wash. 442. The same is true upon a hearing to discharge an attachment: Windt v. Banniza, 2 Wash. 147; Anderson v. State, 2 Wash. 183; Shuey v. Holmes, 27 Wash. 489; Griggs v. MacLean, 33 Wash. 244; State v. Yandell, 34 Wash. 409; Rice Fisheries Co. v. Pacific Realty Co., 35 Wash. 535; Taylor v. Modern Woodmen of America, 42 Wash. 304; State v. Dalton, 43 Wash. 278.

Or to vacate a judgment: Whidby Land & Dev. Co. v. Nye, 5 Wash. 301; Chevalier & Co. v. Wilson, 30 Wash. 227; Whitney v. Knowlton, 33 Wash. 319; Sellars v. Pacific Wrecking etc. Co., 34 Wash. 111.

Or upon appointment of a receiver: Clay v. Selah Valley Irr. Co., 14 Wash. 543; Norfor v. Busby, 19 Wash. 450; Hannon v. Millichamp, 40 Wash. 118.

Or upon application for a writ of habeas corpus: Armstrong v. Van de Vanter, 21 Wash. 682.

Or upon application for a continuance: Fox v. Territory, 2 W. T. 297; State v. Anderson, 20 Wash. 193; State v. Howard, 15 Wash. 425; State v. Johnny Tommy, 19 Wash. 270; Soder v. Adams Hardware Co., 38 Wash. 607; Gray v. Granger, 48 Wash. 442. See, also, Anderson v. McGregor, 36 Wash. 124; Spokane Falls v. Curry, 2 Wash. 541; Brandenstein v. Way, 17 Wash. 293; Griffith v. Maxwell, 25 Wash. 658; Flood v. Libby, 38 Wash. 366; Buchanan v. Laber, 39 Wash. 410; State v. Wood, 33 Wash. 290; Carstens v. Alaska Steamship Co., 39 Wash. 229; Allen v. Baxter, 42 Wash. 434.

Affidavits used upon a hearing to quash a service of summons must be brought up on appeal by bill of exceptions or statement of facts, or appeal from the order will be dismissed: McCart v. Racine Woolen Mills, Blake & Co., 48 Wash. 314.

But if the affidavits are attached to motions or the certificate shows that affidavits were considered, they need not be included in statement of facts: See Richardson v. Richardson, 43 Wash. 634; State v. Hyde, 22 Wash. 551; State v. Vance, 29 Wash. 435; Templeman v. Evans, 35 Wash. 302.

Prejudicial error cannot be claimed in admitting in evidence a letter, where the same is not made part of the record on appeal: Cozard v. Cozard, 48 Wash. 124.

As to incorporating depositions, and referee's reports, see 1 Remington's Digest, p. 165, § 273; Likens v. Cain, 4 Wash. 307; Healy v. Seward, 5 Wash. 319; Bash v. Culver Gold Mining Co., 7 Wash. 122; Demaris v. Barker, 33 Wash. 200; State ex rel. Richardson v. Superior Court, 41 Wash. 439.

As to incorporating exhibits, see 1 Remington's Digest, p. 165, § 274; State ex

rel. *Quade v. Allen*, 2 Wash. 470; *Stinson v. Sachs*, 8 Wash. 391; *Chapin v. Bokee*, 4 Wash. 1; *Douthitt v. MacCulsky*, 11 Wash. 601; *Pennsylvania Mtg. Inv. Co. v. Gilbert*, 18 Wash. 667; *O'Neile v. Ternes*, 32 Wash. 528; *Morse v. Ely*, 21 Wash. 708; *Plumley v. Simpson*, 31 Wash. 147; *Gehres v. Wallace*, 38 Wash. 101; *Thornley v. Andrews*, 40 Wash. 580.

As to setting forth objections, rulings and exceptions, see 1 Remington's Digest, pp. 166-168, §§ 276-281; objections and proceedings at trial: See *Greely v. Newcomb*, 21 Wash. 357; *Winsor v. McLachlan*, 12 Wash. 154; *Caughey v. Rien*, 37 Wash. 296; *State v. Pakenham*, 40 Wash. 403; *State v. Bush*, 41 Wash. 13; *Meyer v. Beyer*, 43 Wash. 368; *Yelm Jim v. Territory*, 1 W. T. 63; *Carstens v. McReavy*, 1 Wash. 359; *Crane v. Dexter Horton & Co.*, 5 Wash. 479.

As to arguments, admissions, or misconduct of counsel at trial, see *Johnson v. Spokane*, 29 Wash. 730; *Byers v. Rothchild*, 11 Wash. 296; *Ballard v. Mitchell*, 38 Wash. 239; *State v. Young*, 13 Wash. 584; *State v. Greer*, 11 Wash. 244; *State v. McGonigle*, 14 Wash. 594; *State v. Anderson*, 20 Wash. 193.

As to objections to jurors, see *Hartigan v. Territory*, 1 W. T. 447; *McAllister v. Territory*, 1 W. T. 360; *State v. Holmes*, 12 Wash. 169; *State v. Shuck*, 38 Wash. 270.

As to incorporating instructions given or refused, see 1 Remington's Digest, p. 167, § 280; *Yelm Jim v. Territory*, 1 W. T. 63; *Cunningham v. S. E. Co.*, 3 Wash. 471; *Metcalf v. Bush*, 4 Wash. 386; *Liebenthal v. Price*, 8 Wash. 206; *Brown v. Forrest*, 1 W. T. 201; *Hall v. Union Cent. Life Ins. Co.*, 23 Wash. 610; *Haas v. Glad-dis*, 1 Wash. 89; *Brown v. Gillett*, 33 Wash. 264; *Lemman v. Spokane*, 38 Wash. 98; *Swope v. Seattle*, 36 Wash. 113.

Statement or bill when necessary to review orders or judgments: See 1 Remington's Digest, p. 168, §§ 282-284. As to orders in general, see *Mason v. McLean*, 6 Wash. 31; *Timm v. Stegman*, 6 Wash. 13; *Barto v. Stanley*, 36 Wash. 150; *Cole v. Price*, 22 Wash. 18; *Farnham's Estate*, In re, 41 Wash. 570; *Kane v. Miller*, 43 Wash. 354.

As to defaults and judgments, see *Mason v. McLean*, 6 Wash. 31; *Ferguson v. Hoshi*, 25 Wash. 664; *Wilson v. Aberdeen*, 25 Wash. 614; *Carpenter v. Barry*, 26 Wash. 255; *Pierce v. Fawcett*, 31 Wash. 271.

Under this and the next section, the respondent may propose and have certified a statement of facts or bill of exceptions, although the same is unnecessary to present appellant's case; but if the respondent has not appealed or excepted to the findings, the statement serves no useful purpose, and will be struck out: *Lauridsen v. Lewis*, 47 Wash. 594.

§ 389. (5058.) Bill of Exceptions—Amendments—Notice to Settle.

A party desiring to have a bill of exceptions or statement of facts certified must prepare the same as proposed by him, file it in the cause and serve a copy thereof on the adverse party, and shall also serve written notice of the filing thereof on any other party who has appeared in the cause. Within ten days after such service any other party may file and serve on the proposing party, any amendments which he may propose to the bill or statement. Either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the cause is pending or was tried, at a time and place specified, the time to be not less than three nor more than ten days after service of the notice, to settle and certify the bill or statement; and at such time and place, or at any other time or place specified in an adjournment made by order or stipulation, the judge shall settle and certify the bill or statement. If the judge is absent at the time named in a notice or fixed by adjournment, a new notice may be served. If no amendment shall be served within the time aforesaid, the proposed bill or statement shall be deemed agreed to and shall be certified by the judge at the instance of either party, at any time, without notice to any other party on proof being filed of its service, and that no amendments have been proposed; and if amendments be proposed and excepted [accepted], the bill or statement as so amended shall likewise be certified on proof being filed of its service and the service and acceptance of the amendments. [L. '93, p. 114, § 9.]

Cited in 7 Wash. 362, 363; 9 Wash. 540, 543; 10 Wash. 153; 11 Wash. 70, 410; 15 Wash. 425; 19 Wash. 375; 25 Wash. 154; 27 Wash. 328; 30 Wash. 62; 31 Wash. 189;

32 Wash. 72, 534; 35 Wash. 118, 407; 40 Wash. 432, 465, 547; 44 Wash. 345; 47 Wash. 596; 49 Wash. 407; 51 Wash. 240.

Service upon a respondent of a proposed statement of facts prior to its filing is insufficient to give the court jurisdiction: *Erickson v. Erickson*, 11 Wash. 76; and the statement of facts will be stricken from the files where it appears in the record that the copy was served before the original was filed: See 1 Remington's Digest, p. 170, § 286; *Boyle v. Railway Co.*, 13 Wash. 383; *Barkley v. Barton*, 15 Wash. 33; *State v. Yandell*, 34 Wash. 409.

A statement of facts will not be stricken by the appellate court upon the ground that it was served before filing, when the only showing to that effect is an affidavit presented to the appellate court alleging that fact: *State v. Moss*, 13 Wash. 42; *Chandler v. Shingle Co.*, 13 Wash. 89.

And the same is true as to proposed amendments: See *Standard Furniture Co. v. Anderson*, 38 Wash. 582.

A bill of exceptions will be stricken from the transcript, upon motion, when no notice of its settlement had been given to the adverse party: See 1 Remington's Digest, p. 172, § 292; *State v. Howard*, 15 Wash. 425; *Caton v. Switzler*, 3 W. T. 242; *Kenyon v. Knipe*, 3 W. T. 243; *United States v. Lone Fisherman*, 3 W. T. 316; *Taylor v. Osborn*, 1 Wash. 189; *Emigh v. State Ins. Co.*, 3 Wash. 122; *State v. Hoyt*, 4 Wash. 818; *Bowen v. Cain*, 7 Wash. 469; *American Asphalt Co. v. Gribble*, 8 Wash. 255; *First Nat. Bank of Aberdeen v. Andrews*, 11 Wash. 409; *Cuschner v. Longbehn*, 44 Wash. 546.

As to notice of filing and service of copy, see 1 Remington's Digest, p. 171, § 289.

Failure to serve written notice of filing of a proposed statement of facts upon a party who has appeared in a cause, while not such an irregularity as to work a loss of jurisdiction, is ground for striking the statement, and for affirmance of the judgment when there is no question for review outside the statement: *First Nat. Bank v. Andrews*, 11 Wash. 409; *McQuillan v. Seattle*, 7 Wash. 331.

Service of notice of the settlement of a statement of facts by mail is not sufficient where both parties reside in the same place: *Bowen v. Cain*, 7 Wash. 469. As to service upon attorneys, see *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492.

Where the notice of settlement designates no place at which application therefor is to be heard, the statement will be stricken on the ground that it was settled and certified without notice to respondent: *Asphalt Co. v. Gribble*, 8 Wash. 255.

The fact that notice of the settlement was given prior to the rendition of judgment is not ground for striking the statement, when the notice designated a day subsequent to the judgment as the time when application for the settlement would be made: *Phillips v. Port Townsend*, 8 Wash. 529.

Where a notice was given for the settlement of a statement of facts and bill of exceptions, and a statement was prepared and filed at the time notice was given, the fact that the court, after consideration, finally settled the objections of appellant by bill of exceptions, is not error: *Miller v. Vermurie*, 7 Wash. 386.

Where respondent does not appear at the settlement of the statement of facts, and there is no copy of the notice of the settlement in the record, the statement will be stricken on motion: *Ward v. Tucker*, 7 Wash. 399.

A respondent who was present at the time of the settlement of a statement of facts, and who fails to object that it was not noted for settlement upon the date, cannot raise such objection for the first time on appeal: *McGlaughlin v. Merriam*, 7 Wash. 111.

Where respondents have had an opportunity to propose amendments to the statement of facts, and have neglected to do so, they will not be permitted to bring into the record a supplemental statement: *In re Hill's Heirs*, 7 Wash. 421.

Where a statement has been settled on the day set therefor, and no amendments have been proposed within the required time, the court cannot subsequently alter or amend the statement and then amend his certificate so as to make it conform to the statement thus altered: *Warburton v. Ralph*, 9 Wash. 537.

Where an amendment has erroneously been made to a statement of facts, the proper remedy is by mandamus to compel the lower court to settle a proper statement: *Scott v. Bourn*, 13 Wash. 471; *Warburton v. Ralph*, 9 Wash. 537.

Notice of the filing is waived by the filing of a motion to strike out the statement: *Hansen v. Nilson*, 17 Wash. 606.

Upon service of a proposed statement, notice of the filing is not necessary except as to the other parties appearing: See *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431.

As to time required for notice of settlement, see *Martin v. Sunset Telephone etc. Co.*, 18 Wash. 260.

Copy served need not contain filing mark, but service upon the clerk of an attorney while he himself is present in his office is not sufficient: See *Spokane & Idaho Lum. Co. v. Loy*, 21 Wash. 501; *Times Printing Co. v. Seattle*, 25 Wash. 149.

As to notice where no amendments are filed, see 1 Remington's Digest, p. 173, § 293. Where no amendments or objections to a statement of facts have been served by the respondent on the appellant, the statement may be certified by the judge in the absence and without notice to the respondent: *Maney v. Hart*, 11 Wash. 67; *Ward v. Huggins*, 7 Wash. 617; *Bruce v. Foley*, 18 Wash. 96; *Ward v. Huggins*, 7 Wash. 617; *Sadler v. Niesz*, 5 Wash.

182; Hansen v. Nilson, 17 Wash. 606; Home Savings & Loan Assn. v. Burton, 20 Wash. 688; O'Neile v. Ternes, 32 Wash. 528. The settlement of a statement is valid and legal upon the day set for hearing, when no amendments have been proposed within the prescribed time, although the court, by an order prior to said date, has extended the time for settlement for the purpose of allowing amendments to be proposed: Warburton v. Ralph, 9 Wash. 537.

When a case is heard upon an agreed statement of facts, stipulated to be all the facts in the case, and the decree is based thereon, no other statement of facts is necessary on appeal: Asher v. Sekofsky, 10 Wash. 379.

Notice once properly given is sufficient: See Dodds v. Gregson, 35 Wash. 402.

As to proof of service of notice, see 1 Remington's Digest, p. 174, § 298; Davies v. Cheadle, 31 Wash. 168; Mooney v. State, 2 Wash. 487; Snyder v. Kelso, 3 Wash. 181; Johnston v. Gerry, 34 Wash. 524; State v. Hinchley, 5 Wash. 326.

If first notice of settlement is insufficient, new notice may be served: See Prospector's Development Co. v. Brook, 31 Wash. 187.

A notice that fails to name the place where the application for settlement will be made is insufficient, and warrants striking the statement: See 1 Remington's Digest, p. 174, § 300; Coats v. West Coast Fire & M. Ins. Co., 4 Wash. 375; American Asphalt Co. v. Gribble, 8 Wash. 255; Merchants' Nat. Bank of Seattle v. Ault, 14 Wash. 701; Kroenert v. Gustason, 19 Wash. 373.

As to necessity for settlement in general, see 1 Remington's Digest, p. 175, § 301; Scott v. Bourn, 13 Wash. 471; Bank of Shelton v. Willey, 7 Wash. 535; Oliver v. Lewis, 9 Wash. 572; Wintermute v. Carner, 8 Wash. 585; Madigan v. West Coast etc. Ins. Co., 3 Wash. 454; Taylor v. City

Council of Tacoma, 15 Wash. 92; Sprague v. Meagher, 32 Wash. 62.

By whom and where to be settled: See 1 Remington's Digest, p. 175, §§ 302, 303; Hanson v. Tompkins, 2 Wash. 508; Rauh v. Scholl, 19 Wash. 30; Anderson v. Provident Life & Trust Co., 26 Wash. 192; Nelson v. Seattle Traction Co., 25 Wash. 602; Hill v. Young, 7 Wash. 33; Graton v. McKnight Mfg. Co. v. Redelsheimer, 28 Wash. 370.

Where settlement to be made: Prospectors' Development Co. v. Brooks, 31 Wash. 187; Downs etc. Assn. v. Pioneer Mut. Ins. Assn., 41 Wash. 372; O'Neile v. Ternes, 32 Wash. 528.

The statement or bill may be settled after ninety days, but must be filed within that time: See Dodds v. Gregson, 35 Wash. 402; Floding v. Denholm, 40 Wash. 463. See, also, Wollin v. Smith, 27 Wash. 399.

As to determining the facts at the settlement, see 1 Remington's Digest, p. 177, § 306; Madigan v. West Coast etc. Ins. Co., 3 Wash. 454; Howard v. Ross, 3 Wash. 292; State ex rel. Quade v. Allyn, 2 Wash. 470; In re Rosner, 5 Wash. 488; Jones v. Jenkins, 3 Wash. 17; Doyle v. McLeod, 4 Wash. 732; U. S. Savings etc. Co. v. Jones, 9 Wash. 434. Upon a dispute in the settlement of statement of facts by a successor in office, the judge who tried the case can be subpoenaed and compelled to testify: Gunderson v. Cochrane, 3 Wash. 476; Watt v. O'Brien, 6 Wash. 415; Hallam v. Tillinghast, 19 Wash. 20.

As to power of lower court to correct statement after settlement, see 1 Remington's Digest, p. 178, § 308; In re Hill's Heirs, 7 Wash. 421; Warburton v. Ralph, 9 Wash. 537; Anderson v. Northern Pac. R. Co., 19 Wash. 340; State ex rel. Hersner v. Arthur, 7 Wash. 358; State ex rel. Royal v. Linn, 35 Wash. 116; State ex rel. Fetterly v. Griffin, 32 Wash. 67; State ex rel. Klein v. Superior Court, 36 Wash. 44; In re Holburte's Estate, 38 Wash. 199.

§ 390. (5059.) How Written Evidence Certified.

Depositions and other written evidence on file shall be appropriately referred to in the proposed bill or statement, and when it is certified the same or copies thereof, if the judge so direct, shall be attached to the bill or statement and shall thereupon become a part thereof. [L. '93, p. 115, § 10.]

See notes to § 388, supra.

Cited in 11 Wash. 78; 11 Wash. 602; 32 Wash. 532; 40 Wash. 582.

Exhibits and written evidence introduced upon the trial need not be attached to the statement of facts upon appeal until it is certified, if appropriate reference to the exhibits has been made in the copy of the statements served upon the respondents: Douthitt v. MacCulsky, 11 Wash. 601.

A statement of facts which refers to certain exhibits received in evidence as in-

cluded in the record is insufficient, where such exhibits are not attached to the statement nor among the papers transmitted to the supreme court: State v. Directors, 14 Wash. 222.

Where it was stipulated upon the trial that certain evidence introduced in another action should be admitted as a part of the case and considered by the court, such evidence must be included in the statement of facts, and a failure to so in-

clude it will render the statement insufficient: *Id.*

In order that affidavits, claimed to have been used on the hearing below, may be considered a part of the record on appeal, there must be a certificate of some sort to show that they in fact were presented or read to the lower court: *Clay v. Irrigation*

Co., 14 Wash. 543; *Winsor v. McLachlan*, 12 Wash. 154.

In order that affidavits used on a motion for a new trial or on a motion for a continuance may be heard on appeal they must be made a part of the record by a proper bill of exceptions or statement of facts: *State v. Howard*, 15 Wash. 425.

§ 391. (5060.) Certificate, What to Contain—How Signed.

The judge shall certify that the matters and proceedings embodied in the bill or statement, as the case may be, are matters and proceedings occurring in the cause and that the same are thereby made a part of the record therein; and, when such is the fact, he shall further certify that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein, or (as the case may be) such thereof as the parties have agreed, to be all that are material therein. The certificate shall be signed by the judge, but need not be sealed; and thereupon all the matters and proceedings embodied in the bill of exceptions or statement of facts, as the case may be, shall become and thenceforth remain a part of the record in the cause, for all the purposes thereof and of any appeal therein. The judge may correct or supplement his certificate according to the fact, at any time before an appeal is heard. And if the judge refuse to settle or certify a bill of exceptions or statement of facts, or to correct or supplement his certificate thereto, in a proper case, he may be compelled so to do by a mandate issued out of the supreme court, either pending an appeal or prior thereto. [L. '93, p. 115, § 11.]

Cited in 7 Wash. 363, 654; 9 Wash. 542, 543; 26 Wash. 162; 32 Wash. 532; 34 Wash. 529; 35 Wash. 524; 36 Wash. 45; 38 Wash. 201; 45 Wash. 693.

Where it appears that the testimony is without any certificate showing that it is all the testimony in the case, and was not served upon the respondents, it will be stricken from the record: See 1 Remington's Digest, p. 182, § 317; *Case v. Ham*, 9 Wash. 54; *Collins v. Seattle*, 2 W. T. 354; *Zenkner v. Northern Pac. R. Co.*, 3 W. T. 60; *Kirby v. Collins*, 6 Wash. 297; *Taylor v. City Council of Tacoma*, 15 Wash. 92; *State ex rel. Miller v. Seattle*, 45 Wash. 691.

A trial judge cannot be compelled to certify that the statement "contains what the parties have agreed and accepted to be all the material facts, matters and proceedings heretofore occurring in the cause, and not already a part of the record," when in fact only a part of the testimony has been incorporated therein: *State v. Parker*, 9 Wash. 653.

The appellate court will not disregard the certificate of the trial judge that the statement of facts and the attached exhibits contain all the material facts, matters, things and proceedings occurring at the trial, merely because the statement is in a narrative form: *Murray v. Shoudy*, 13 Wash. 33. See, also, *Thompson v. Huron Lum. Co.*, 5 Wash. 527; *Case v. Ham*, 9 Wash. 54; *Parker v. Esch*, 5 Wash. 296.

As to what included in "all the material facts," see 1 Remington's Digest, p. 182, § 318; *Jones v. Jenkins*, 3 Wash. 17; *Doyle v. McLeod*, 4 Wash. 732; *Thompson v. Huron Lum. Co.*, 5 Wash. 527; *Bruce v. Foley*, 18 Wash. 96; *Warburton v. Ralph*, 9 Wash. 537; *Kellog v. Bradley*, 3 Wash. 429.

What is equivalent to certifying all the material facts: See 1 Remington's Digest, p. 182, § 319; *King County v. Hill*, 1 Wash. 63; *Miller v. Wash. Savings Bank*, 5 Wash. 200; *Schlaechter v. Miller*, 4 Wash. 463; *Demaris v. Barker*, 33 Wash. 200; *Clark-Harris Co. v. Douthitt*, 4 Wash. 465; *Small v. Geddis*, 4 Wash. 518; *State v. Carey*, 4 Wash. 424; *Holm v. Gilchrist*, 7 Wash. 615; *Kane v. Kane*, 35 Wash. 517.

As to conclusiveness of certificate as to all the facts, see 1 Remington's Digest, p. 183, §§ 320-322; *State v. Dunn*, 22 Wash. 67; *Reilley v. Anderson*, 33 Wash. 58; *Holburte's Estate, In re*, 38 Wash. 199; *Swift v. Swift*, 39 Wash. 600; *State ex rel. Van Name v. Board of Directors, Dist. No. 3*, 14 Wash. 222; *Nickeus v. Lewis County*, 23 Wash. 125.

As to agreed facts, see *Nickens v. Lewis Co.*, 23 Wash. 125; *Powell v. Nolan*, 27 Wash. 318; *State v. Maines*, 26 Wash. 160.

As to effect of supplemental certificate: *Christofferson v. Pfennig*, 16 Wash. 491; *Littlejohn v. Miller*, 5 Wash. 399; *Medcalf v. Bush*, 4 Wash. 386.

An appeal will not be dismissed for insufficient certificate: See *Cunningham v. Spokane Hydraulic M. Co.*, 20 Wash. 450; *O'Neile v. Ternes*, 32 Wash. 528. The judge alone can make the certificate, and a certificate from the clerk of the court cannot take its place: See *Howard v. Ross*, 3 Wash. 292; *Chapin v. Bokee*, 4 Wash. 1; *State v. Brew*, 4 Wash. 95; *Demaris v. Barker*, 33 Wash. 200.

Upon dispute between appellant and the lower court as to what should be incorporated in the statement or bill, the supreme court may order a reference to determine the matter: See *Van Lehn v. Morse*, 16 Wash. 219; *Hallam v. Tillinghast*, 19 Wash. 20.

Where the judge refuses to settle or certify a proper statement of facts, the supreme court will compel him to act by

mandamus: *Rosner, In re*, 5 Wash. 488; *Warburton v. Ralph*, 9 Wash. 537; *Scott v. Bourn*, 13 Wash. 471; *State v. Maines*, 26 Wash. 160; *State ex rel. Klein v. Superior Court*, 36 Wash. 44; *State ex rel. Richardson v. Superior Court*, 41 Wash. 439; *Holburte's Estate, In re*, 38 Wash. 199.

The court will not be compelled by mandate to insert matters not considered or outside of issues: See *Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176; *State ex rel. Dutch Miller Min. etc. Co. v. Superior Court*, 30 Wash. 43. Nor to permit the withdrawal, correction, and re-filing of a statement after it is agreed to, although the time for filing and proposing a statement has not expired: *State ex rel. Royal v. Linn*, 35 Wash. 116.

§ 392. (5061.) How Certified upon Change or Death of Judge.

If the judge before whom the cause was pending or tried shall from any cause have ceased to be such judge he shall, notwithstanding, settle and certify, as the late judge, any bill of exceptions or statement of facts that it would be proper for him to settle and certify if he were still such judge, and such acts on his part shall have the same effect as if he were still in office; and he may be compelled by mandate so to do, as if still in office. If such judge shall die or remove from the state while in office or afterwards, within the time within which a bill of exceptions or statement of facts, in a cause that was pending or tried before him, might be settled and certified under the provisions of this chapter, and before having certified such bill or statement, such bill or statement may be settled by stipulation of the parties with the same effect as if duly settled and certified by such judge while still in office. But if the parties cannot agree, and if such judge, when removed from the state, does not attend within the state and settle and certify a bill of exceptions or statement of facts in case one has been duly proposed, his successor in office shall settle and certify such bill or statement in the manner in this chapter provided, and in so doing he shall be guided, so far as practicable, by the minutes taken by his predecessor in office, or by the stenographer, if one was in attendance on the court or judge, and may, in order to determine any disputed matter not sufficiently appearing upon such minutes, examine under oath the attorneys in the cause who were present at the trial or hearing, or any of them. [L. '93, p. 116, § 12.]

See note to § 389, *supra*.

Cited in 7 Wash. 364; 19 Wash. 21; 26 Wash. 164.

The judge before whom a case is begun and who disposes of the main issues in the case is the only one authorized to settle and certify a statement of facts, notwithstanding that during the trial the case was transferred to a judge sitting with a jury for the purpose of disposing of certain

questions of fact: *Hill v. Young*, 7 Wash. 33.

The act of 1893 authorizing certain judges whose term of office had expired to settle and certify statements of fact, did not empower such judges to transfer the matter to their successors in office: *Michigan Co. v. Saunders*, 7 Wash. 302.

§ 393. (5062.) When to be Filed—Effect of Irregularity.

A proposed bill of exceptions or statement of facts must be filed and served either before or within thirty days after the time begins to run within

which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill or statement is proposed: Provided, that the time herein prescribed may be enlarged either before or after its expiration, once or more, but not for more than sixty days additional in all, by stipulation of the parties, or for good cause shown and on such terms as may be just, by an order of the court or judge wherein or before whom the cause is pending or was tried, made on notice to the adverse party. And the certifying of a bill of exceptions or statement of facts provided for by this chapter, and the filing and service of the proposed bill or statement, the notice of application for the settlement thereof, and all other steps and proceedings leading up to the making of the certificate, shall be deemed steps and proceedings in the cause itself, resting upon the jurisdiction originally acquired by the court in the cause, and no irregularity or failure to pursue the steps prescribed by this chapter on the part of any party, or the judge, shall affect the jurisdiction of the judge to settle or certify a proper bill of exceptions or statement of facts. [L. '93, p. 116, § 13.]

Cited in 8 Wash. 587; 9 Wash. 574; 21 Wash. 369; 25 Wash. 146; 26 Wash. 306; 27 Wash. 34; 30 Wash. 62; 31 Wash. 217; 38 Wash. 674; 32 Wash. 318; 32 Wash. 533; 33 Wash. 198; 35 Wash. 65; 35 Wash. 406; 51 Wash. 474.

Notice of settlement of the statement of facts given within thirty days after the filing of a judgment is sufficient, although the judgment bears an earlier date: *McGlaughlin v. Merriam*, 7 Wash. 111.

A statement of facts, which was received by the clerk on the thirtieth day after the rendition of the judgment, will not be stricken from the record when filed by the clerk as received on the day following its actual receipt: *Bank v. Willey*, 7 Wash. 535.

Where a statement of facts is not filed within thirty days after judgment, although handed to the bailiff of the court to be carried to the clerk within the required time, it will be stricken: *McQuillan v. Seattle*, 7 Wash. 331.

The service of a proposed statement of facts upon the only parties adverse to the appellant is sufficient, although there are other parties to the action who do not join in the appeal: *Howard v. Shaw*, 10 Wash. 151.

A statement of facts filed ninety-one days after final judgment will, upon motion, be stricken from the files: *Loos v. Rondema*, 10 Wash. 164.

The objection that the statement of facts was not filed within the time required by statute, being a jurisdictional question, may be raised for the first time in the appellate court: *Id.* See *Thomas v. Lincoln County*, 32 Wash. 317.

The time within which a statement of facts must be settled cannot be extended unless notice of the application is given to the adverse party, or a sufficient excuse for failing to give such notice is shown: *McQuestion v. Morrill*, 12 Wash. 335.

As to time of filing, and the extension thereof, see 1 Remington's Digest, p. 170, §§ 287, 288. A statement of facts must be filed within thirty days under this section, and it will be stricken from the files if filed thereafter without any extension of time having been made: *Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31; *Baker v. Washington Iron Works*, 11 Wash. 335; *Tatum v. Boyd*, 11 Wash. 712; *State v. Landes*, 26 Wash. 325; *Jones v. Herrick*, 33 Wash. 197; *State v. Yandell*, 34 Wash. 409; *Driscoll v. Dufur*, 45 Wash. 494; *State v. Aschenbrenner*, 45 Wash. 125.

The supreme court will not review the discretion of the lower court in granting an extension of time within which to file a proposed statement of facts: *State ex rel. Bickford v. Benson*, 21 Wash. 365; *Greely v. Newcomb*, 21 Wash. 357; *Fulton v. Methow Trading Co.*, 45 Wash. 136.

Time for filing may be extended by written stipulation but not beyond the ninety days: See *Dodds v. Gregson*, 35 Wash. 402; *Thomas v. Lincoln County*, 32 Wash. 317; *Humes v. Hillman*, 39 Wash. 107; *Driscoll v. Dufur*, 45 Wash. 494; *Brown v. Kinney*, 48 Wash. 448; *Owen v. Casey*, 48 Wash. 673; *State v. Seaton*, 26 Wash. 305; *Crowley v. McDonough*, 30 Wash. 57; *Hotel Co. v. Merchants' Ice Co.*, 41 Wash. 620.

As to when time begins to run where motions are made for new trial or to vacate judgments irregularly entered, see *State ex rel. Payson v. Chapman*, 35 Wash. 64; *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535; *State ex rel. Hennessy v. Huston*, 32 Wash. 154; *Hennessy v. Tacoma Smelt. & Ref. Co.*, 33 Wash. 423; *Lamona v. Cowley*, 31 Wash. 297.

As to effect of striking out statement or bill, see 1 Remington's Digest, p. 183, § 334, and cases cited.

§ 394. (5063.) Return of Bill—Extension of Time for Brief.

The copy of a proposed bill or statement which is served as in this chapter prescribed, shall be returned to the party serving the same upon the bill or statement being certified, if he has appealed to the supreme court, or upon his thereafter appealing, for his use in preparing his brief on the appeal, and the time limited by any law or rule of court for the service and filing of his brief shall be enlarged by any delay in returning such copy as herein required to the extent of such delay; and when he serves his brief he shall return such copy to the party on whom it was originally served, and his brief shall not be deemed served till such copy is so returned by him. [L. '93, p. 117, § 14.]

Cited in 31 Wash. 218.

§ 395. (5064.) What shall be Part of Record.

All reports of referees or commissioners, with the testimony and other evidence returned into court therewith, all findings of fact and conclusions of law made in writing by a judge, referee or commissioner and signed by him, all charges to a jury made wholly in writing, all instructions requested in writing to be given as part of a charge, all verdicts, general or special, and all rulings and decisions embodied in a written judgment, order or journal entry in the cause, together with all exceptions, if any, taken to any thereof, as well as all papers and matters hitherto deemed a part of the record, shall be deemed and are hereby declared to become, upon being filed in the cause, or, as the case may be, embodied in a journal entry, a part of the record in the cause, for all the purposes thereof and of any appeal therein; and it shall not be necessary or proper, for any purpose, to embody the same in any bill of exceptions or statement of facts. [L. '93, p. 117, § 15.]

See notes to §§ 388, 389, supra.

Cited in 12 Wash. 324; 14 Wash. 545; 33 Wash. 212; 48 Wash. 299.

A stenographer's longhand notes of testimony taken before a referee in an action at law, and attached to and made a part of the referee's report, is sufficient on appeal, without the filing of a state-

ment of facts: *Bash v. Mining Co.*, 7 Wash. 122.

Testimony taken before commissioners and not returned with their report must be included in the statement of facts: *State ex rel. Richardson v. Superior Court*, 41 Wash. 439.

§ 396. (5065.) How Certified When Cases Consolidated.

When two or more causes shall have been consolidated it shall not be necessary, for any purposes of an appeal which concerns only one or more, and not all of the original causes, to embody in a bill of exceptions or statement of facts any fact, matter or proceeding that relates solely to an original cause with which the appeal is not concerned; and the bill or statement shall be certified as in this act prescribed, notwithstanding the omission therefrom of such facts, matters and proceedings. [L. '93, p. 118, § 16.]

The fact that an appeal involves two separate causes which had been consolidated will not warrant the supreme court in entertaining jurisdiction of the appeal from a single decree entered therein, when some of the defendants have not been

served with notice of appeal, although there may have been a proper service upon all the defendants in one of the causes as originally instituted: *Cornell v. Hotel Co.*, 15 Wash. 433.

§ 397. (5066.) Construction of Chapter.

This chapter shall apply to and govern all civil actions and proceedings, both legal and equitable, and all criminal causes, in the superior courts, but shall not apply to courts of justices of the peace or other inferior courts or

tribunals from which an appeal does not lie directly to the supreme court. This chapter shall govern proceedings had after it shall take effect, in actions then pending as well as those in actions thereafter begun; but it shall not affect any right acquired or proceeding had prior to the time when it shall take effect, nor restore any right or enlarge any time then already lost or expired. And except as above provided all acts and parts of acts inconsistent with the provisions of this act are hereby repealed. [L. '93, p. 118, §§ 17, 18.]

Cited in 8 Wash. 586; 9 Wash. 575.

Where the law governing appeals is changed, the settlement of a statement of facts on a pending appeal must be governed by the provisions of the new

law, although judgment had been rendered and notice of appeal given prior to its taking effect: *Wintermute v. Carner*, 8 Wash. 585.

CHAPTER VIII.

NEW TRIALS.

§ 398. (5070.) **New Trial, Defined.**

A new trial is a re-examination of an issue [of fact] in the same court after a trial and decision by a jury, court, or referees. [L. '54, p. 170, § 215; Cd. '81, § 275; 2 H. C., § 399.]

Cited in 12 Wash. 2; 17 Wash. 602; 26 Wash. 329; 28 Wash. 624; 35 Wash. 66.

§ 399. (5071.*) **When New Trial may be Granted.**

The former verdict or other decision may be vacated and a new trial granted, on the motion of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

2. Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

6. Error in the assessment of the amount of recovery, whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

7. Insufficiency of the evidence to justify the verdict or the decision, or that it is against law;

8. Error in law occurring at the trial and excepted to at the time by the party making the application. [L. '09, p. 53, §1. Cf. L. '54, p. 170, § 216; L. '69, p. 67, § 278; Cd. '81, § 276, 2 H. C., § 400.]

See *supra*, §§ 339, 360, and notes.

See notes to §§ 387-390, *supra*.

See *supra*, § 362 et seq., verdict.

See *supra*, § 367, findings, etc., in trial by court.

See *infra*, § 2181 et seq. and notes, new trial and arrest of judgment in criminal cases.

See *infra*, § 465, new trial for reasons occurring after verdict, etc.

See *infra*, § 1716, subd. 6, authorizing appeals from an order granting a new trial.

Cited in 3 Wash. 21; 8 Wash. 185; 9 Wash. 53; 11 Wash. 34; 12 Wash. 2; 12 Wash. 617; 15 Wash. 440; 18 Wash. 347; 19 Wash. 280; 22 Wash. 682; 26 Wash. 329; 28 Wash. 624; 34 Wash. 335; 35 Wash. 67; 42 Wash. 8; 42 Wash. 481.

A motion for a new trial is not necessary, except to call the attention of the court to and obtain a ruling upon matters not previously presented, and which there had been no opportunity to present at the trial: See 1 Remington's Digest, p. 123, § 153; *Jones v. Jenkins*, 3 Wash. 558; *Burns v. Commencement Bay L. I. Co.*, 4 Wash. 558; *Sultan W. & P. Co. v. Weyerhaeuser Timber Co.*, 31 Wash. 558.

The making of a motion below for a new trial upon the statutory grounds does not save an objection going to the form of the action, in that the testimony shows a variance or a failure of proof, where no objection was made to the admission of the evidence, nor any motion for nonsuit on account of failure of proof, nor any request for an instruction to find for the appellant for such reason: *Sweeney v. Pacific Coast Elevator Co.*, 14 Wash. 562.

The granting of a new trial on statutory grounds is discretionary: See 2 Remington's Digest, p. 2146, § 3; *State v. Buhmann*, 16 Wash. 700; *State v. Symes*, 17 Wash. 596; *McBroom & Wilson Co. v. Gandy*, 18 Wash. 79; *Holgate v. Parker*, 18 Wash. 206; *Langston v. Ephriam*, 21 Wash. 282; *Callihan v. Washington Water P. Co.*, 27 Wash. 154; *Dunkle v. Spokane Falls & N. R. Co.*, 20 Wash. 254; *Gardner v. Lovegren*, 27 Wash. 356; *Gray v. Washington Water etc. Co.*, 27 Wash. 713; *Kohler v. Fairhaven & N. W. R. Co.*, 8 Wash. 452; *Doyle v. Great Northern R. Co.*, 43 Wash. 558; *Sharp v. Greene*, 22 Wash. 677.

The granting or refusal of a new trial is matter within the discretion of the trial court: *Smith v. United States*, 1 W. T. 262; *Rinehart v. Watson*, 11 Wash. 526; *Rotting v. Cleman*, 12 Wash. 615.

The refusal of the trial court to set aside the verdict and grant a new trial is an exercise of discretion, not reviewable by the appellate court, unless the discretion has been abused, or there is a great preponderance of the evidence against the verdict: *Page v. Rodney*, 2 W. T. 461; affirming *Gove v. Moses*, 1 W. T. 7; *Corbitt v. Harrington*, 14 Wash. 197; *Rinehart v. Watson*, *supra*.

Granting new trial cannot be considered an abuse of discretion, where there is a substantial conflict in the testimony: See 2 Remington's Digest, p. 2150, § 23. See, also,

1 Remington's Digest, p. 219, § 406; *Bender v. Rinker*, 21 Wash. 636; *Trumbull v. School District No. 7*, 22 Wash. 631; *O'Rourke v. Jones*, 22 Wash. 629; *Friedman v. Manley*, 21 Wash. 43; *Sharp v. Greene*, 22 Wash. 677; *Tacoma v. Tacoma Light & W. Co.*, 16 Wash. 288. But see, *Id.*, 17 Wash. 458; *Clark v. Great Northern R. Co.*, 37 Wash. 437; *Latimer v. Black*, 24 Wash. 231.

Courts are reluctant to set aside verdicts of juries, even where they have themselves heard the testimony, and they should be more reluctant to disturb the verdict when as an appellate court they have not heard the testimony, hence the appellate court will not set aside the verdict unless there is no evidence to sustain it: *Williams v. Miller*, 1 W. T. 88, 91.

The court may extend the time in which to file a motion for a new trial after the time fixed by statute has expired; and this may be done so as to validate a motion ineffectual because not filed in time: See 1 Remington's Digest, p. 2155, § 44; *Bailey v. Drake*, 12 Wash. 99; *Leavenworth v. Billings*, 26 Wash. 1; *Bullock v. White Star Steamship Co.*, 30 Wash. 448; *Kreielsheimer v. Nelson*, 31 Wash. 406.

Renewal of motion for: See *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363.

As to when verdict should be set aside, see 1 Remington's Digest, p. 222, § 412.

An erroneous ruling that works no prejudice to a party is not cause for a new trial: *Newberg v. Farmer*, 1 W. T. 182; but a verdict manifestly against the evidence and contrary to law should be set aside: *King Co. v. Collins*, 1 W. T. 469.

A new trial may be awarded though the verdict be supported by some evidence, when it appears that it is insufficient to support the verdict: *Pederson v. Seattle etc. St. Ry. Co.*, 6 Wash. 202; *Welever v. Advance Shingle Co.*, 34 Wash. 331.

As to when verdict should not be set aside, see 1 Remington's Digest, p. 223, § 412, and cases cited.

If there is sufficient legal testimony to support the verdict of a jury, although the testimony may be conflicting, the verdict should not be disturbed: *Puget Sound etc. Ry. Co. v. Ingersoll*, 4 Wash. 675; *Brasen v. S. L. etc. Ry. Co.*, 4 Wash. 754; *Dillon v. Folsom*, 5 Wash. 439; *Booth v. Columbia etc. Ry. Co.*, 6 Wash. 531; *Burden v. Cropp*, 7 Wash. 198; *Noyes v. Pugin*, 2 Wash. 653; *Lybarger v. State*, 2 Wash. 553; *Graves v. Griffith R. etc. Co.*, 3 Wash. 742; *Rotting v. Cleman*, 12 Wash. 615.

The verdict of a jury will not be disturbed where there is sufficient evidence to establish all the facts necessary to sustain the issue made by the successful party, although the court may be of the opinion that the evidence on the other side is of greater weight: *Burden v. Cropp*, 7 Wash. 198; *Dougan v. Abbott*, 7 Wash. 370; *Harper v. Sinclair*, 7 Wash. 373, 376.

If the jury disregard the law as given by the court, it is the court's duty to instantly set aside the verdict: *N. P. Ry. Co. v. Hess*, 2 Wash. 383, 393.

A verdict which, under the pleadings, is either a mistake or a compromise, should not be received, but the jury should be directed to find the full sum or nothing: *Frost v. Ainslie L. Co.*, 3 Wash. 241.

As to review of the granting of new trial or rehearing, see 1 *Remington's Digest*, p. 219, § 406, and cases cited.

The action of the lower court in granting a new trial will not be reversed on appeal, if there is any theory upon which such action can be sustained: *Trumbull v. Jackman*, 9 Wash. 524; *Tilden v. Gordon & Co.*, 25 Wash. 593; *Anderson v. McDonald*, 31 Wash. 274; *Bracka v. Fish*, 28 Wash. 410; *McBroom & Wilson Co. v. Gandy*, 18 Wash. 79.

Where the verdict has been rendered against defendants jointly and the evidence shows a separate and not a joint employment, the granting of a new trial is not an abuse of discretion: *Id.*

Assuming that the trial judge should not have undertaken to tell the jury upon what state of facts defendants would be deemed negligent, yet, having done so, and having drawn a correct conclusion from the facts stated, a new trial will not be granted on that ground, for the reason that no injury could result therefrom: *Carroll v. Centralia W. Co.*, 5 Wash. 613.

PRACTICE.—A motion for a new trial need only present such grounds as arise or are ascertained subsequent to the trial, which the party had no opportunity to or could not raise during the trial: *Jones v. Jenkins*, 3 Wash. 17, 22.

Where the record shows that the motion for a new trial was made on several grounds, but does not show upon which of them the ruling of the court was based, the order will not be reversed if it was within the sound discretion of the court to make it upon any of the grounds stated: *Rotting v. Cleman*, 12 Wash. 615.

The allegations of the grounds of a motion for a new trial in the language of the statute is sufficient under this section: *Id.*, 21.

Under former statutes, held, that a motion for a new trial, not specifically stating the grounds relied on save in the statutory language, was properly denied: *Dawson v. Baum*, 3 W. T. 464; *Bradshaw v. Territory*, 3 W. T. 265.

The granting of a motion for a new trial, in which over fifty distinct assignments of error are alleged, without specifying the grounds upon which the order is based, cannot be urged as *res adjudicata* upon any of the grounds assigned: *State v. Largent*, 9 Wash. 691.

Where there was no motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict, the question cannot be raised on appeal from an order denying defendant's motion for judgment upon special issues submitted to the jury: *Tingley v. Fairhaven L. Co.*, 9 Wash. 34.

A new trial may be granted as to defendants who answer, and denied as to a defaulting defendant, although the motion is made on behalf of all: *Ex parte Lowman etc. Co.*, 2 Wash. 427; *State ex rel. Holgate v. Superior Court*, 19 Wash. 114.

EXCESSIVE VERDICT.—As to what considered excessive damages, see 1 *Remington's Digest*, p. 881, §§ 79-94. Where a verdict is larger than is warranted by the evidence it is excessive, and it is error to deny a motion for a new trial: *Brotton v. Langert*, 1 Wash. 227; *Wait v. Robertson Mortgage Co.*, 37 Wash. 282; *Prosch v. Seattle*, 46 Wash. 553.

A verdict of \$15,000 for injuries to a child of nine years of age, necessitating the amputation of one of his legs, is not excessive: *Roth v. Union Depot Co.*, 13 Wash. 525.

A verdict for \$1,000 is not excessive in an action for damages as result of a collision in which plaintiff was injured and bruised, her wagon destroyed, and contents seriously damaged and horses injured: *Spurrier v. Front St. etc. Ry Co.*, 3 Wash. 659.

Verdict for \$15,000 in action for personal injuries held not excessive in *Sears v. Seattle etc. St. Ry. Co.*, 6 Wash. 227.

A verdict for \$13,625 is not excessive for injuries received through the negligence of defendant when it appears that the plaintiff was a healthy man prior to the injury; that as a result of the accident he received a scalp wound, an injury to the small of the back, and probably a resultant injury to the kidneys; that the lower extremities are partially paralyzed, and that he cannot walk without crutches; that he suffers much pain, sleeps but little, and will never be able to do work as a turner and millwright, or any other kind of labor, and will probably not live longer than a year: *Sutton v. Snohomish*, 11 Wash. 24.

If the trial court finds that a portion of the damages assessed by the jury is excessive, it is not required to grant a new trial, but may properly direct a remission of the excessive portion of the verdict: See 1 *Remington's Digest*, p. 898, § 133; *McDonough v. Gt. No. Ry. Co.*, 15 Wash. 244; *Winter v. Shoudy*, 9 Wash. 52; *Kohler v. Fairhaven etc. Ry. Co.*, 8 Wash.

452; *Rigney v. Tacoma L. & W. Co.*, 9 Wash. 245; *Bailey v. Cascade Timber Co.*, 35 Wash. 295; *Hughes v. Dexter Horton Co.*, 26 Wash. 110; *Waite v. Robertson Mtg. Co.*, 37 Wash. 282; *McOwen v. Seattle El. Co.*, 48 Wash. 362.

Verdict for \$7,000 in action for personal injuries reduced to \$5,000 in *Cogswell v. West St. etc. Elec. St. Ry. Co.*, 5 Wash. 47.

A verdict of \$30,000 for injuries inflicted upon a child of tender years through defendant's negligence in the operation of its cable car is excessive, and should be reduced to \$12,000, though the injuries were severe and the results to the plaintiff very serious: *Mitchell v. Tacoma Ry. & Motor Co.*, 13 Wash. 560.

Where a party refuses to comply with the order of the court requiring a remission of a portion of the verdict as a condition for granting a new trial, the order will not be reversed unless the trial court clearly abused its discretion: *Kohler v. Fairhaven etc. Ry. Co.*, 8 Wash. 452; *Rigney v. Tacoma L. & W. Co.*, 9 Wash. 247.

A verdict for \$750 for slander by the utterance in a public street in the presence of numerous persons of words questioning the chastity of a woman is not excessive: *Childs v. Childs*, 49 Wash. 27.

NEW TRIAL FOR ERRORS AND IRREGULARITIES.—For failure of justice, see *Brennan v. Seattle*, 39 Wash. 640. Error of court in giving judgment on account of variance instead of allowing amendments: See *Ernst v. Fox*, 26 Wash. 526.

It is not a valid reason for a new trial that the judge was a nonresident of the city and unacquainted with real estate values, or that he was personally acquainted with some of the witnesses: *Sharp v. Greene*, 22 Wash. 677.

Errors occurring at trial and not excepted to are not grounds for new trial: *State v. Owens*, 15 Wash. 468.

As to grounds for new trial in general, see 2 Remington's Digest, pp. 2147-2151, §§ 6-33; *Mitchell v. Matheson*, 23 Wash. 723; *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288; *Clark v. Great Northern R. Co.*, 37 Wash. 537; *Sharp v. Greene*, 22 Wash. 677; *Wallerich v. Puget Sound Warehouse Co.*, 38 Wash. 501.

NEWLY DISCOVERED EVIDENCE: See 2 Remington's Digest, pp. 2152-2154, §§ 34-40. Where newly discovered evidence would tend to produce a different verdict than the one rendered, it is error to refuse a new trial: *Lafond v. Smith*, 8 Wash. 26. See, also, *Binns v. Emery*, 45 Wash. 215.

A new trial should not be granted for newly discovered evidence unless the court is satisfied that the legitimate effect of such evidence would be to change the verdict rendered; mere cumulative or corroborative evidence is not sufficient. What

the newly discovered evidence is must be made clearly to appear: *McKilver v. Manchester*, 1 W. T. 255; *Leschi v. Territory*, 1 W. T. 13; *Tolmie v. Dean*, 1 W. T. 46.

A new trial will not be granted on the ground of newly discovered evidence in order that a witness may elaborate his testimony on matters which would contradict his previous testimony: *State v. Nordstrom*, 7 Wash. 506.

Where it appears that evidence assigned as newly discovered is material and could not have been previously discovered with diligence, it is an abuse of discretion to refuse a new trial: *State v. Stover*, 3 Wash. 206; *State v. John Port Townsend*, 7 Wash. 462; *State v. Webb*, 20 Wash. 500.

The denial of a motion for a new trial based upon newly discovered evidence is not erroneous, when neither the materiality of the evidence nor the exercise of due diligence in attempting to secure it are reasonably made to appear from the affidavit supporting the motion: *Wilson v. Waldron*, 12 Wash. 149.

As to diligence in procuring evidence, see 2 Remington's Digest, p. 2152, § 35; *Reeder v. Traders' Nat. Bank*, 28 Wash. 139; *Bullock v. White Star Steamship Co.*, 30 Wash. 448; *Booth v. Columbia etc. R. Co.*, 6 Wash. 531; *Jordan v. Seattle*, 30 Wash. 298; *Colins v. Bacon*, 38 Wash. 80; *Brennan v. Seattle*, 39 Wash. 640; *Dumontier v. Stetson & Post Mill Co.*, 39 Wash. 264; *State v. Vance*, 29 Wash. 438.

A new trial for newly discovered evidence is properly denied where no diligence was shown: *Goodrich v. Kimble*, 49 Wash. 516.

Discretion is involved in the granting of a new trial for newly discovered evidence where the evidence was conflicting or insufficient, and the same will not be disturbed on appeal where no abuse of discretion appears: *Cummings v. Sunich*, 44 Wash. 665.

It is discretionary to deny a new trial on the ground that the stenographer had lost his notes, the appellant offering to pay all costs in order to get a correct record: *Moylan v. Moylan*, 49 Wash. 341.

When evidence is merely cumulative: See 2 Remington's Digest, p. 2153, § 37; *Wiseman v. Eastman*, 21 Wash. 163; *Benson v. Hamilton*, 34 Wash. 201; *O'Toole v. Faulkner*, 34 Wash. 371; *State v. Underwood*, 35 Wash. 558; *Thayer v. Spokane County*, 36 Wash. 63; *Shannon v. Tacoma*, 41 Wash. 220; *Brennan v. Seattle*, 39 Wash. 640.

New trial should not ordinarily be granted to impeach or attack credibility of witnesses: See *Seattle Lum. Co. v. Sweeney*, 43 Wash. 1; *Harvey v. Ivory*, 35 Wash. 397.

As to sufficiency and probable effect of newly discovered evidence in causing different result, see 2 Remington's Digest, p. 2154, § 40; *Tyler v. North Amer. Trad.*

etc. Co., 24 Wash. 252; *Pierson v. Pierce*, 42 Wash. 164.

A new trial for newly discovered evidence as to the location of a lost corner is properly denied where such evidence is vague and indefinite: *Strunz v. Hood*, 44 Wash. 99.

SURPRISE: See 1 Remington's Digest, pp. 2150, 2151, §§ 26-33. Surprise cannot exist as ground for a new trial when the pleadings put the parties on notice of the matters claimed as a surprise: *Booth v. Columbia etc. Ry. Co.*, 6 Wash. 531.

In an action for goods sold and delivered to which the defendant had filed a general denial, plaintiff is not entitled to a new trial on the ground of surprise, because of the testimony of the defendant denying that he had ever ordered or received the goods: *Wilson v. Waldron*, 12 Wash. 149. See, also, *Friedman v. Manley*, 21 Wash. 43; *Czarecki v. Seattle & S. F. R. & N. Co.*, 30 Wash. 288. As to power and duty of court in general, see *State v. John Port Townsend*, 7 Wash. 462; *La Fond v. Smith*, 8 Wash. 26; *Allen v. Chambers*, 18 Wash. 341; *Pincus v. Puget Sound Brew. Co.*, 18 Wash. 108; *Friedman v. Manley*, 21 Wash. 43.

When witness not subpoenaed, his absence will not be held surprise: *Clemans v. Western*, 39 Wash. 290; *Woods v. Globe Nav. Co.*, 40 Wash. 376.

Surprise by the overruling of a decision of the supreme court entitles party to a new trial: *Hull v. Vining*, 17 Wash. 352; *Allen v. Chambers*, 18 Wash. 341.

Payment of costs may be imposed as condition for granting new trial for inadvertence or surprise: See *O'Toole v. Phoenix Ins. Co.*, 39 Wash. 688; *Seaton v. Cook*, 45 Wash. 27.

But not where court erroneously construed the pleadings: See *Casey v. Maldore*, 19 Wash. 279.

MISCONDUCT OF COUNSEL, JURY, OR JUDGE: See 2 Remington's Digest, pp. 2147, 2148, §§ 11-17. Counsel may be permitted to draw their own inferences or conclusions from the particular facts in evidence, and illogical or incorrect inferences in argument do not constitute grounds for a new trial: *Sears v. Seattle C. St. Ry. Co.*, 6 Wash. 227, 233.

Certain acts of the presiding judge during the trial held misconduct and entitling defendant in a criminal case to a new trial: *State v. Coella*, 3 Wash. 99. See *State v. Coella*, 8 Wash. 513.

A new trial should be granted when it is shown that the successful litigant and one jurymen during the trial had been walking the streets and conversing together and were also playing cards and drinking together in a saloon: *Vollrath v. Crowe*, 9 Wash. 374. See, also, *Shannon v. Tacoma*, 41 Wash. 220; *Hedican v. Pennsylvania Fire Ins. Co.*, 21 Wash. 488; *Buchanan v. Laber*, 39 Wash. 410.

When a jury has determined upon a verdict in favor of a plaintiff in an action for the recovery of damages, there is no impropriety in the jury's resorting to lot to find the average sense of the jury upon the amount of the verdict to be returned, when there is no agreement to be bound thereby and the minds of the jurors are free to deliberate and act upon the result, using the same as a basis of discussion in arriving at the amount of the recovery they should award: *Watson v. Reed*, 15 Wash. 440. See, also, *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535; *Conover v. Nehrer-Ross Co.*, 38 Wash. 172.

A verdict arrived at by chance is such misconduct as requires a new trial: *Goodman v. Cody*, 1 W. T. 329, 34 Am. Rep. 815, 816, and extended note. As to further misconduct of jury, see *Schultz v. Simmons Fur Co.*, 46 Wash. 555; *Brennan v. Seattle*, 46 Wash. 427.

Neither perjury nor failure to suggest evidence is ordinarily sufficient grounds for a new trial: *McDougall v. Walling*, 21 Wash. 478; *Friedman v. Manley*, 21 Wash. 675.

It is not misconduct on the part of the plaintiff, in a personal injury case, which would warrant a new trial, that, during an extended argument to the jury on behalf of the defendant, plaintiff, who was very nervous as a result of her injuries, burst into a crying spell, and was taken out of court in view of the jury: *Connell v. Seattle, Renton & Southern R. Co.*, 47 Wash. 510.

It is misconduct of the prevailing party requiring a new trial, for his counsel, in argument to the jury, to repeat a prejudicial comment on the evidence made by the judge when the jury was not present, counsel stating that the same was "said here by one who knows more about these things than I do," since the inference would carry to the jury that the judge had made such unlawful comment: *Spencer v. Arlington*, 49 Wash. 121.

A new trial is properly granted for permitting, over objection, adverse comment to the jury by counsel on the fact that the plaintiff in a personal injury case had refused to consent to the examination of his physician as to facts learned in a professional capacity: *Kiehlhoefer v. Washington Water Power Co.*, 49 Wash. 646.

IN EQUITY.—In an equity cause a motion for a new trial is unnecessary; hence the failure to file a motion for a new trial in such case within the time provided by law cannot defeat an appeal: *Littlejohn v. Miller*, 5 Wash. 399, 402; *Sadler v. Niesz*, 5 Wash. 182.

A statement of facts need not be prepared for use on the hearing of a motion for a new trial: *Id.*

ON APPEAL.—Held, under former statutes, that the granting or refusing a new trial is not a final decision and no appeal

lies therefrom: *McCormick v. Walla Walla etc. Ry. Co.*, 1 W. T. 512.

An appeal may be taken without making any motion for a new trial in an equity cause: *Littlejohn v. Miller*, *supra*.

Under § 450, Code of 1881, the appellate court may review and reverse any judgment of the lower court, although no motion for a new trial be made: *Johnson v. Maxwell*, 2 Wash. 482; see *Morgan v. Bell*, 3 Wash. 558.

A motion for a new trial is not necessary in order to give validity to an appeal, where no opportunity is given to attack the findings: *Kennedy v. Derrickson*, 5 Wash. 289.

As to necessity of motion for new trial in general, see 1 Remington's Digest, p. 123, §§ 153-163.

The premature entry of a judgment upon the verdict of a jury before notice of a new trial could be interposed is not ground for vacating the judgment, when the motion for a new trial has, nevertheless, been given a full hearing and decided on its merits: *National Bank v. Weymouth*, 11 Wash. 412.

Where the matters alleged as error were involved in the disposition of the case,

and were fully presented to the court below, a motion for a new trial is unnecessary: *Tullis v. Shannon*, 3 Wash. 716.

Under the appeal act of March 22, 1889, it is sufficient, without making a formal assignment of errors, to specify the errors in appellant's motion for a new trial, and cite them in its brief: *Watson v. Grays Harbor B. Co.*, 3 Wash. 283.

Where the transcript fails to show a bill of exceptions, and also that a motion for a new trial was made below, the writ of error will be dismissed: *Clark Co. v. Commissioners*, 1 W. T. 250.

If plaintiff, instead of going to trial, moves for and obtains a judgment on the pleadings, he cannot afterward complain of the judgment, though it be for a nominal sum: *Hadlam v. Ott*, 2 W. T. 165.

Certiorari will not lie to review the action of the lower court in granting a new trial: *State v. Superior Court*, 6 Wash. 201.

Failure to enter judgment until several days after a motion for a new trial is overruled constitutes no ground for error: *Voorhies v. Hennessy*, 7 Wash. 243.

§ 400. (5072.) Specification of Grounds for New Trial.

In no case of motion for a new trial hereafter made in the courts of this state shall it be necessary to specify the grounds thereof, otherwise than in the language of the last preceding section, specifying the grounds upon which a motion for a new trial may be made. [L. '88, p. 30, § 1; 2 H. C., § 401.]

See notes to last section.

See *infra*, § 401, when affidavit may be used.

Cited in 3 Wash. 21.

In granting a new trial, asked on several grounds, it is discretionary to make a general order without stating specific reasons therefor, and not error to refuse a

request to state the specific grounds: *Best v. Seattle*, 50 Wash. 533.

As to specification of errors, see 2 Remington's Digest, p. 2155, § 46.

§ 401. (5074.) When Affidavits may be Used.

The motion for a new trial shall state the grounds or causes for which a new trial is asked, and if made for any of the causes mentioned in the first, second, third, or fourth subdivision of section 399, the facts upon which it is based may be shown by affidavit. [Cd. '81, § 278; 2 H. C., § 403.]

See *supra*, § 400, specification of grounds.

See *supra*, § 399, and notes, grounds for new trial.

See *infra*, § 403, what affidavits must show.

Cited in 2 Wash. 562.

A motion for a new trial because of the insufficiency of the evidence, or that the verdict is contrary to law, must be made upon the written statement required by this section: *Jones v. Wiley*, 1 W. T. 603.

The misconduct of the jury in separating without authority must be shown by affidavit: *Lyberger v. State*, 2 Wash. 552.

Affidavits in support of a motion for a new trial under Laws of 1886 are a part of the record on appeal without a statement

of facts or bill of exceptions being settled: *Anderson v. State*, 2 Wash. 183.

As to what may be shown by affidavits, see 2 Remington's Digest, p. 2155, §§ 49-51; *Marvin v. Yates*, 26 Wash. 50; *Pincus v. Puget Sound Brew. Co.*, 18 Wash. 108; *Reeder v. Traders' Nat. Bank*, 28 Wash. 139; *O'Toole v. Phoenix Ins. Co.*, 39 Wash. 688; *Wilson v. Waldron*, 12 Wash. 149; *Brennan v. Seattle*, 39 Wash. 640; *Dumontier v. Stetson & Post Mill Co.*, 39 Wash. 264.

§ 402. (5075.) Notice and Motion, Practice.

The party moving for a new trial must, within two days after the verdict of a jury, if the action was tried by a jury, or two days after notice in writing of the decision of the court or referee, if the action was tried without a jury, file with the clerk, and serve upon the adverse party, his motion for a new trial, designating the grounds upon which it will be made. If the motion is made upon affidavits, the moving party must, within two days after serving the motion, or such further time as the court in which the action is pending, or the judge thereof may allow, file such affidavits with the clerk, and serve a copy thereof upon the adverse party, who shall have two days to file counter affidavits, or such further time as the court may allow, a copy of which must be served upon the moving party. [Cf. L. '69, p. 68, § 282; Cd. '81, §§ 279, 280; L. '91, p. 102, § 1; 2 H. C., § 404; L. '97, p. 13, § 1.]

See *infra*, § 431, time of entering judgment.

See notes to § 399, *supra*.

Cited in 11 Wash. 413; 17 Wash. 126; 26 Wash. 3; 35 Wash. 67; 40 Wash. 39.

Under § 250, *supra*, authorizing courts to enlarge or extend the time within which by statute any act is to be done or proceeding taken after the time therefor has expired, a court may extend the time in which to file a motion for a new trial after the expiration of the time fixed by statute: See 2 Remington's Digest, p. 2154, § 44; Bailey v. Drake, 12 Wash. 99; Bullock v. White Star S. S. Co., 30 Wash. 448; Kreilheimer v. Nelson, 31 Wash. 406.

Under such circumstances, there is no prejudicial error in the court's entering an order extending the time for filing a motion for a new trial, although the order by its terms is to take effect as of a prior date and thus validate a motion for a new trial which was ineffectual by reason of its not having been filed in time: Bailey v. Drake, 12 Wash. 99. A successor in office of judge may grant a new trial in a case heard before his predecessor: Rank v. Scholl, 19 Wash. 30; Nelson v. Seattle Traction Co., 25 Wash. 602. Successive motions for new trial on the same grounds cannot be considered by trial judge or his successor: See Coyle v. Seattle Electric Co., 31 Wash. 181; Burnham v. Spokane Mer.

Co., 18 Wash. 207. The practice upon entering judgment and the right to move for a new trial is the same in equity as in cases tried before a jury: State ex rel. Payson v. Chapman, 35 Wash. 64.

The statute requiring a judgment to be entered immediately upon return of the verdict does not change the rule, under the former statute, whereby the court had power to extend the time for moving for a new trial after the time therefor had expired: McAllister v. Seattle Brewing & Malting Co., 44 Wash. 179.

As to time for application, see 2 Remington's Digest, p. 2154, § 43; McBroom & Wilson Co. v. Gandy, 18 Wash. 79; Turner v. Bailey, 12 Wash. 634; Boarman v. Hinckley, 17 Wash. 126; Kubillus v. Ewert, 40 Wash. 38.

Notice of a motion for a new trial is a sufficient notice of intention to apply therefor: Boarman v. Hinckley, 17 Wash. 126.

The party filing a motion for a new trial is not entitled to notice of the time of hearing the motion: Burnham v. Spokane Mercantile Co., 18 Wash. 207.

Order for judgment instead of new trial: See Griffith v. Maxwell, 19 Wash. 614; Buffalo Pitts Co. v. Dearing, 37 Wash. 591.

§ 403. (5076.) What Affidavits for Motion must Show.

If the motion be supported by affidavits, and the cause be newly discovered evidence, the affidavits of any witness or witnesses, showing what their testimony will be, shall be produced, or good reasons shown for their non-production. [L. '54, p. 170, § 219; L. '69, p. 68, § 284; Cd. '81, § 282; L. '91, p. 103, § 2; 2 H. C., § 405.]

See *supra*, § 401, when affidavits may be used.

Cited in 39 Wash. 268.

CHAPTER IX.

JUDGMENTS IN GENERAL.

§ 404. (5080.) Judgment, Defined.

A judgment is the final determination of the rights of the parties in the action. [L. '54, p. 171, § 220; Cd. '81, § 283; 2 H. C., § 406.]

See supra, § 278, judgment on pleadings for want of reply.

See infra, § 408, judgment of nonsuit.

See infra, § 411, judgment by default.

See infra, § 413, judgment by confession.

Cited in 25 Wash. 656; 31 Wash. 186.

Judgments generally: See 2 Remington's Digest, pp. 1573-1642.

JUDGMENT — VALIDITY AND EFFECT OF.—A judgment which goes beyond the issues and attempts to settle questions not submitted for a judicial determination, is unwarranted: *American etc. Assn. v. Farmers' Ins. Co.*, 11 Wash. 619. The fact that the trial was not confined to the issues, and that findings were made outside thereof, does not require a reversal, where other findings within the issues support the judgment: *State ex rel. Weidert v. Superior Court*, 36 Wash. 81.

A person may be bound by a decree, though not a technical party to the action, if he be interested in the subject matter of the action and exercise the right of participating in the defense thereto: *Douthitt v. MacCulsky*, 11 Wash. 601; *Shoemaker v. Finlayson*, 22 Wash. 12.

An item of special damage, which, though recoverable, was not alleged in the complaint, cannot be included in the judgment: *Levy v. Sheehan*, 1 Wash. 149.

A judgment against an insane surety upon a forthcoming bond in attachment proceedings is not void, if the surety was not insane at the time the bond was given: *Pollock v. Horn*, 13 Wash. 626.

Questions as to irregularities in the proceedings in which a judgment is rendered against an insane person cannot be raised in a collateral attack: *Id.*; *Park v. Mighell*, 3 Wash. 737; *Belers v. Miller*, 10 Wash. 259.

The fact that the insanity of a judgment debtor had been established prior to the rendition of judgment against him would not exempt his property from the operation of an execution flowing from a legal judgment, which had not been fraudulently or wrongfully obtained: *Pollock v. Horn*, supra.

A decision of the supreme court establishing property rights between parties will be held conclusive when collaterally attacked in a subsequent action: *Morrow v. Moran*, 5 Wash. 692.

Although the pleadings may not entitle defendants to affirmative relief, a decree determining their rights between each other is voidable, and not void, where the court had jurisdiction of the persons and

subject matter: *Jones v. Sander*, 2 Wash. 329.

Where an attack is made upon a judgment in a collateral action, when it appears that the court had jurisdiction of the person and of the subject matter in the original action, it must be presumed, until rebutted, that the court continued to act within its jurisdiction throughout the case; and, although the pleadings as filed would not support the judgment rendered, the presumption is that the court may have considered the pleadings amended to correspond with the proof offered and have entered judgment in pursuance of such amendment: *Baldwin v. Baer*, 10 Wash. 414.

As to presumption in favor of validity of judgment, when attacked collaterally, see 2 Remington's Digest, p. 1610, §§ 143-150; *Christofferson v. Pfennig*, 16 Wash. 491; *Case Threshing Machine Co. v. Sires*, 21 Wash. 322; *McKenna v. Cosgrove*, 41 Wash. 332; *Collett v. N. P. R. Co.*, 23 Wash. 600; *Morrison v. Berlin*, 37 Wash. 600; *Sullivan's Estate, In re*, 40 Wash. 202; *Yamashita, In re*, 30 Wash. 234. As against collateral attack upon the ground that a summons was insufficient to give a court jurisdiction, it will be presumed in aid of a decree, which recites that service of the complaint and notice had been duly made according to law, that another and sufficient summons was issued, where there was ample time for the service of another summons after completion of the publication of the first: *Rogers v. Miller*, 13 Wash. 82. As to grounds of collateral attack, see 2 Remington's Digest, pp. 1611-1613, §§ 151-162; *Dubuque v. Stich*, 16 Wash. 641; *Dolan v. Jones*, 37 Wash. 176; *Baldwin v. Baer*, 10 Wash. 414; *Krutz v. Batts*, 18 Wash. 460; *State v. Washington Dredging etc. Co.*, 43 Wash. 508; *Kizer v. Canfield*, 17 Wash. 417; *Rohrer v. Snyder*, 29 Wash. 199; *State ex rel. Le Brook v. Wheeler*, 43 Wash. 183; *Christofferson v. Pfennig*, 16 Wash. 491; *Nolan v. Arnot*, 36 Wash. 101; *Ballard v. Way*, 34 Wash. 116; *Peyton v. Peyton*, 28 Wash. 278; *Kalb v. German Sav. & Loan Soc.*, 25 Wash. 349; *Noerdlinger v. Huff*, 31 Wash. 360; *Stern v. State Board of Dental Examiners*, 50 Wash. 100; *Noble v. Aune*, 50 Wash. 73; *Bauer v. Widholm*, 49 Wash.

310; *Peterson v. Lara*, 46 Wash. 448; *Silverstone v. Totten*, 50 Wash. 447; *Stevens v. Doochen*, 50 Wash. 145; *Waterman v. Bash*, 46 Wash. 212.

As to what collateral and what direct attack, see 2 Remington's Digest, p. 1613, § 163; *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132; *Sturgis v. Dart*, 23 Wash. 244; *Dane v. Daniel*, 28 Wash. 155; *Kalb v. German Sav. & Loan Soc.*, 25 Wash. 349; *Peyton v. Peyton*, 28 Wash. 278; *Northwestern & P. H. Bank v. Ridpath*, 29 Wash. 687; *Donaldson v. Winningham*, 48 Wash. 374.

CONCLUSIVENESS of judgment of courts, see 2 Remington's Digest, pp. 1616, 1617, §§ 173-176.

Of probate and superior courts: See *Davis v. Seattle Nat. Bank*, 19 Wash. 65; *Nash v. Wakefield*, 30 Wash. 581; *In re Graham*, 7 Wash. 237; *Meeker v. Winyer*, 48 Wash. 27.

Of appellate courts: See *Tibbals v. Mt. Olympus Water Co.*, 16 Wash. 480; *Taake v. Seattle*, 18 Wash. 178; *Smith v. Seattle*, 20 Wash. 613; *State v. Boyce*, 25 Wash. 422; *State ex rel. Holgate v. Superior Court*, 19 Wash. 114; *Miller v. Lake Irr. Co.*, 33 Wash. 132; *Furth v. Snell*, 13 Wash. 660; *Taylor v. Gale*, 24 Wash. 336; *Payette v. Ferrier*, 31 Wash. 43; *Crooker v. Pacific Lounge etc. Co.*, 34 Wash. 191; *Clark v. Eltinge*, 34 Wash. 323; *Parke v. Seattle*, 8 Wash. 78; *Wilkes v. Davis*, 8 Wash. 112; *Richardson v. Carbon Hill Coal Co.*, 18 Wash. 368; *Hughes v. Bravinder*, 14 Wash. 304; *N. P. Lumber etc. Co. v. Kenon*, 5 Wash. 214.

Of federal courts: See *In re MacDonald's Estate*, 29 Wash. 422; *Hennessy v. Tacoma Smelting etc. Co.*, 33 Wash. 423; *Nichols v. Doak*, 48 Wash. 457.

As to conclusiveness of foreign judgments, see 2 Remington's Digest, pp. 1633, 1634, §§ 254-259; *In re Maney*, 20 Wash. 509; *Cunningham v. Spokane Hydraulic Min. Co.*, 20 Wash. 450; *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132; *Trowbridge v. Spinning*, 23 Wash. 48; *Clark v. Eltinge*, 38 Wash. 376; *Whitman v. Mast-Buford etc. Co.*, 11 Wash. 318; *Ritchie v. Carpenter*, 2 Wash. 512.

CONCLUSIVENESS OF ADJUDICATION.—As to nature of action or other proceedings, see 2 Remington's Digest, pp. 1617, 1618, §§ 177-180; *Traders' Nat. Bank of Spokane v. Schorr*, 20 Wash. 1; *Larsen v. Winder*, 20 Wash. 419; *Kellog v. Maddocks*, 1 W. T. 407; *Wadhams v. Page*, 6 Wash. 103; *Bruce v. Foley*, 18 Wash. 96; *Drasdo v. Jobst*, 39 Wash. 425; *Belt v. Washington Water P. Co.*, 24 Wash. 387; *Dolan v. Scott*, 25 Wash. 214; *Wheeler v. Aberdeen*, 45 Wash. 63; *Carmean v. North American T. & T. Co.*, 45 Wash. 446; *Brehm Lumber Co. v. Niblock*, 46 Wash. 180.

Decision must be on merits and final to constitute estoppel: See 2 Remington's Digest, p. 1618, §§ 181-183. As to necessity for, and what constitutes, decision on merits, see *Wilkes v. Davies*, 8 Wash. 112; *Cloud v. Lawrence*, 12 Wash. 163; *Abernethy v. Moss*, 13 Wash. 42; *Dunsmuir v. Port Angeles Gas etc. Co.*, 30 Wash. 586.

As to finality of determination, see *Chezum v. Claypool*, 22 Wash. 498; *Wilson v. Seattle Dry Dock etc. Co.*, 26 Wash. 297; *Peyton v. Peyton*, 28 Wash. 278; *Childs v. Blethen*, 40 Wash. 340; *Bartelt v. Seehorn*, 25 Wash. 261.

As to judgment by default, on motion, and summary proceedings in general, see 2 Remington's Digest, pp. 1619, 1620, §§ 185-194; *Seattle Nat. Bank v. School District No. 40*, 20 Wash. 368; *McGee v. Wineholt*, 23 Wash. 748; *Hadlan v. Ott*, 2 W. T. 165.

Judgment on discontinuance, dismissal, or nonsuit, and effect of: See *Bates v. Drake*, 28 Wash. 447; *Von Sobel v. Stetson & Post Mill Co.*, 32 Wash. 683; *Union Bank v. Nelson*, 32 Wash. 208; *Fidelity & Deposit Co. v. Seattle etc. R. Co.*, 50 Wash. 391; *Smith v. Seattle*, 20 Wash. 613; *Plant v. Carpenter*, 19 Wash. 621; *Brechlin v. Night Hawk Min. Co.*, 49 Wash. 198; *Wilson v. Hubbard*, 39 Wash. 671.

Conclusiveness of judgments in particular classes of actions or proceedings: See 2 Remington's Digest, pp. 1629, 1630, §§ 233-236.

As to actions relating to real property, see *Denny v. Northern Pac. R. Co.*, 19 Wash. 298.

As to ejectment, see *George v. Columbia & Puget S. R. Co.*, 38 Wash. 480; *Kline v. Stein*, 46 Wash. 546.

As to mortgage foreclosure, see *Hanna v. Kasson*, 26 Wash. 568.

As to condemnation proceedings, see *Compton v. Seattle*, 38 Wash. 514.

Where trapdoors are negligently maintained in a sidewalk by the abutting owner, whereby a pedestrian is injured, the city and the owner are not in *pari delicto* or joint wrongdoers as between each other; and upon recovery of judgment against the city in an action for the injuries, and payment of the same, the city has a remedy over against the lot owner for the amount paid on the judgment, which is conclusive on the lot owner if due notice to defend the action was given: *Seattle v. Puget Sound Imp. Co.*, 47 Wash. 22.

A judgment against a city for damages from the negligence of a contractor, who had agreed to save the city harmless therefrom, is conclusive against the contractor where he had notice to defend, as to the amount of damages, the existence of the defect, and want of negligence on the part of plaintiff in the former case: *Seattle v. Saulez*, 47 Wash. 365.

§ 405. (5080a.) Order and Motion, Defined.

Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order. An application for an order is a motion. [L. '97, p. 10, § 1.]

See *infra*, § 1000, orders in special proceedings.

Cited in 23 Wash. 249; 25 Wash. 656; 31 Wash. 186.

See *Spokane & Idaho Lum. Co. v. Stanley*, 25 Wash. 653.

An order of the court regarding the payment of money, not made in an action or proceeding, is void: See *State ex rel. Martin v. Pendergast*, 39 Wash. 132.

§ 406. (5081.) Judgment may be Given for or Against Any of the Parties.

Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves. [L. '54, p. 171, § 221; Cd. '81, § 284; 2 H. C., § 407.]

Judgment affecting less than all: See next section.

Cited in 11 Wash. 563, 564; 49 Wash. 407.

Judgment binds only parties to the action, and those having notice: *Barnett v. Ashmore*, 5 Wash. 163, 166.

PERSONS CONCLUDED BY JUDGMENTS.—As to parties bound in general, see 2 Remington's Digest, p. 1620, §§ 195-198; *Gaffney v. Megrath*, 23 Wash. 476; *Burkman v. Jamieson*, 25 Wash. 606; *Weatherwax Lumber Co. v. Ray*, 38 Wash. 545; *Johnson v. Shuey*, 40 Wash. 22; *Schmidt v. Olympia L. & P. Co.*, 46 Wash. 360; *Plant v. Carpenter*, 19 Wash. 621.

As to successive interests, vendor and vendee, assignor and assignee, see 2 Remington's Digest, p. 1621, §§ 201-203; *Rochford v. Doty*, 37 Wash. 232; *Davis v. Seattle National Bank*, 19 Wash. 65; *Moran Bros. v. Watkins*, 44 Wash. 392; *Seattle v. Northern Pac. R. Co.*, 47 Wash. 552; *Collins v. Gleason*, 47 Wash. 69; *Cuschner v. Longbehn*, 44 Wash. 546; *American Bonding Co. v. Loeb*, 47 Wash. 447; *Harvey v. Sparks*, 45 Wash. 578.

As to joint torts by master and servant, see *Casey v. Northern Pac. R. Co.*, 15 Wash. 450; *Doremus v. Root*, 23 Wash. 710.

As to parties to actions on bills and notes, and warrants, see 2 Remington's Digest, p. 1622, §§ 207-209; *Commercial Bank of Tacoma v. Toklas*, 21 Wash. 36; *Parker v. Galbraith*, 46 Wash. 280; *Hotchkin v. Bussell*, 46 Wash. 7; *Hanna v. Kason*, 26 Wash. 568; *Cullity v. Dorfel*, 18 Wash. 122; *Payson v. Jacobs*, 38 Wash. 203; *Spokane v. Costello*, 33 Wash. 98; *Doremus v. Root*, 23 Wash. 710.

As to municipality and officers, citizens or taxpayers, see 2 Remington's Digest, p. 1623, § 210; *Stallcup v. Tacoma*, 13 Wash. 141; *State ex rel. Porter v. Headlee*, 19 Wash. 477; *Waldron v. Snohomish*, 41 Wash. 566; *Wheeler v. Aberdeen*, 45 Wash. 63.

As to persons not parties or privies, see 2 Remington's Digest, p. 1623, §§ 212, 213;

Bennett v. Supreme Tent, etc., 40 Wash. 431; *Anderson v. Bigelow*, 16 Wash. 198; *Cullity v. Dorfel*, 18 Wash. 122; *Savage v. Sternberg*, 19 Wash. 679; *Sackman v. Thomas*, 24 Wash. 660; *Brier v. Traders' Nat. Bank*, 24 Wash. 695; *Seavey v. Seattle*, 17 Wash. 361; *State ex rel. Wolf v. Moore*, 16 Wash. 350; *State ex rel. Porter v. Headlee*, 18 Wash. 220; *Canada Settlers' L. & T. Co. v. Murray*, 20 Wash. 656.

Witnesses not bound, when not made parties: See *Anderson v. Bigelow*, 16 Wash. 198; *Sackman v. Thomas*, 24 Wash. 660.

BAR AND MATTERS CONCLUDED.—As to scope and extent of estoppel, see 2 Remington's Digest, p. 1624, §§ 214-217.

Judgment as evidence of indebtedness: See *Stern v. Washington Nat. Bank*, 14 Wash. 511; *Lilly v. Eklund*, 37 Wash. 532.

Matters which might have been litigated: See *Smith v. Ormsby*, 20 Wash. 396; *Wiseman v. Eastman*, 21 Wash. 163; *Dolan v. Scott*, 25 Wash. 214; *In re MacDonald's Estate*, 29 Wash. 422; *Stallcup v. Tacoma*, 13 Wash. 141; *State ex rel. Cook v. Fairley*, 45 Wash. 52.

Identity of subject matter, causes of action, or interests in general, see 2 Remington's Digest, p. 1625, § 217; *Wilkes v. Davies*, 8 Wash. 112; *Smalley v. Laugenour*, 30 Wash. 307; *Ryan v. Sumner*, 17 Wash. 228; *State ex rel. Abernethy v. Moss*, 13 Wash. 42; *Fogg v. Hoquiam*, 23 Wash. 340; *Spring Hill Irr. Co. v. Lake Irr. Co.*, 42 Wash. 379; *Carlson v. Curran*, 42 Wash. 647.

As to what constitutes identical and what distinct causes, see 2 Remington's Digest, p. 1625, §§ 218, 219; *Bruce v. Foley*, 18 Wash. 96; *Schmidt v. Olympia Light and Power Co.*, 46 Wash. 360; *Jones v. Seattle*, 23 Wash. 753; *Dunsmuir v. Pt. Angeles etc. P. Co.*, 30 Wash. 586; *Payette v. Ferrier*, 31 Wash. 43; *Carlson v. Curran*, 42 Wash. 647; *Bird v. Winyer*, 44 Wash. 264.

Cause of action extinguished by one satisfaction: See *Dolan v. Scott*, 25 Wash. 214.

As to matters in issue, or within scope of issue, see 2 Remington's Digest, p. 1627, §§ 222-225; *Sayward v. Thayer*, 9 Wash. 22; *Lauman v. Hooper*, 37 Wash. 382; *Roberts v. Shelton S. W. R. Co.*, 21 Wash. 427; *In re Clifford*, 37 Wash. 460; *Vulcan Iron Works v. Kent Lumber Co.*, 39 Wash. 435; *Achey v. Creech*, 21 Wash. 319; *Sweeney v. Waterhouse & Co.*, 43 Wash. 613; *Russell v. Blair*, 18 Wash. 339.

As to matters not in issue, or matters in issue but not decided, see 2 Remington's

Digest, p. 1628, §§ 226, 227; *Long v. Eisenbeis*, 21 Wash. 23; *Marble Sav. Bank v. Williams*, 23 Wis. 766; *Budlong v. Budlong*, 32 Wash. 672; *Payette v. Ferrier*, 20 Wash. 479; *Long v. Eisenbeis*, 21 Wash. 23; *Bingham v. Keylor*, 25 Wash. 156; *Snyder v. Harding*, 38 Wash. 666.

As to matters assumed or immaterial in former decisions, or which could not have been adjudicated, see 2 Remington's Digest, p. 1628, §§ 228, 229; *McGee v. Wineholt*, 23 Wash. 748; *Brier v. Traders' Nat. Bank*, 24 Wash. 696; *Harding v. Atlantic Trust Co.*, 26 Wash. 536; *O'Brien v. Allen*, 42 Wash. 393.

§ 407. (5082.) Judgments Against Several Defendants.

In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others. [L. '54, p. 171, § 222; Cd. '81, § 285; 2 H. C., § 408.]

See supra, § 192, persons severally liable, how sued.

See supra, § 236, proceedings against defendants severally liable.

See infra, § 436, judgments against joint debtors.

See infra, § 415, confession of judgment by joint debtor.

Cited in 49 Wash. 407.

See 2 Remington's Digest, p. 1592, §§ 59, 60, and p. 1615; *Doremus v. Root*, 23 Wash. 710; *Gove v. Moses*, 1 W. T. 7; *Childs v. Blethen*, 40 Wash. 340; *Olson v. Veazie*, 9 Wash. 481; *Collins v. Denny Clay Co.*, 41 Wash. 136; *Allen v. Peterson*, 38 Wash. 599.

If only one of two defendants, sued as partners, is served with process, it is error to render personal judgment against both, but under § 68 of the Code of 1881, judgment may be taken against the one served and the joint property of both: *McCoy v. Bell*, 1 Wash. 504; see supra, § 236.

In an action against joint defendants, where judgment by default has been rendered against one, and judgment against the other on a trial of the action, it is not error to grant a new trial as to defendant who answered and deny it as to the defaulting defendant: *Ex parte Lowman & Hanford Co.*, 2 Wash. 427.

In an action against two corporations for materials furnished them upon request of certain of their officers, a joint judgment cannot be sustained where there is no evidence that the officers had authority to bind defendants jointly: *Pacific Cable Co. v. McNatt*, 2 Wash. 216.

CHAPTER X.

JUDGMENT OF NONSUIT.

§ 408. (5085.) Judgment of Dismissal or Nonsuit, When Granted.

An action may be dismissed, or a judgment of nonsuit entered, in the following cases:—

1. By the plaintiff himself, at any time before the jury retire to consider their verdict, unless setoff be interposed as a defense, or unless the defendant sets up a counterclaim to the specific property or thing which is the subject matter of the action;

2. By either party, upon the written consent of the other;

3. By the court, when the plaintiff fails to appear on trial, and the defendant appears and asks for a dismissal;

4. By the court, when, upon the trial and before the final submission of [the] case, the plaintiff abandons it;

5. By the court, on the refusal or neglect of the plaintiff to make the necessary parties, after having been ordered by the court;

6. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence;

7. By the court, for disobedience of the plaintiff to an order concerning the proceedings in the action;

8. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient cause for the jury. [L. '54, p. 171, § 223; Cd. '81, § 286; 2 H. C., § 409.]

See supra, § 196, bringing in new parties.

See supra, § 189, who are necessary parties.

See supra, § 340, directing verdict.

See notes to § 284, supra.

Cited in 2 Wash. 542; 3 Wash. 141, 638; 4 Wash. 119, 326, 373, 652, 810; 7 Wash. 408; 8 Wash. 636; 15 Wash. 430; 17 Wash. 602; 20 Wash. 126; 23 Wash. 445; 24 Wash. 325; 25 Wash. 263, 666; 33 Wash. 540; 43 Wash. 521; 44 Wash. 405; 46 Wash. 82; 49 Wash. 515.

DISMISSAL and nonsuit in general: See 1 Remington's Digest, pp. 942-949, §§ 1-26. The first words of this section providing that an action may be dismissed, etc., does not render the dismissal discretionary with the court when the plaintiff fails to prove a sufficient case for the jury. In such case the words "may be" are equivalent to "must be": Tolmie v. Dean, 1 W. T. 46.

Technically a motion for a nonsuit is not applicable to an equitable action, but treated as a motion to dismiss it may be entertained: Scoland v. Scoland, 4 Wash. 118, 119; to secure the advantage of such a motion in equity the party must stand upon it: Id.; Cattell v. Ferguson, 3 Wash. 541. There can be no nonsuit in a criminal case as in a civil action, but the proper practice is to ask the court to direct an acquittal: State v. Hyde, 22 Wash. 551.

Plaintiff may, as at common law, dismiss his bill at any time before final decree, upon payment of costs: Waite v. Wingate, 4 Wash. 324. Overruled, see Washington Nat. Bldg. etc. Assn. v. Saunders, 24 Wash. 321. See, also, McKee v. McKee, 32 Wash. 247.

The plaintiff is not entitled to dismiss his action to quiet title, claimed under a certain land contract, alleged to have been fraudulently assigned to defendant, after answer by the defendant setting up title in himself by virtue of the assignment of the contract and conveyance thereunder, and praying that his title be quieted; since the answer is a counterclaim connected with the subject of the action and arises out of the same contract or transaction set out in the complaint: Gray v. Granger, 48 Wash. 442.

Plaintiff's right of dismissal in equitable actions remains as at common law and is not taken away by this and the succeeding section: Somerville v. Johnson, 3 Wash. 140.

Plaintiff's right of dismissal is not cut off by an intimation by the court of its judgment and before findings are made: Id. But see Herrick v. Neisz, 16 Wash. 74.

A party voluntarily dismissing his action and causing judgment to be rendered thereon cannot prosecute an appeal therefrom: Liebmann v. McGraw, 3 Wash. 520; Mahneke v. Tacoma, 1 Wash. 18.

It is error to deny plaintiff's motion for the dismissal of his action and grant defendant's motion therefor after a demurrer to the complaint is sustained: Lowman v. West, 7 Wash. 407.

The rights accorded the plaintiff under subdivision 1 are absolute in a proper case: Id.

As to plaintiff's right to dismiss action, see 1 Remington's Digest, pp. 943-945, §§ 3-11; Washington Nat. Bldg. etc. Assn. v. Saunders, 24 Wash. 321; Dane v. Daniel, 28 Wash. 155; Lowman v. West, 7 Wash. 407; Chehalis County v. Ellingson, 21 Wash. 638; Simpson v. Brown Bros. & Co., 1 W. T. 247; Bellingham Bay etc. Co. v. Strand, 14 Wash. 144; Johnston v. Gerry, 34 Wash. 524.

As to involuntary dismissal and nonsuit, see 1 Remington's Digest, pp. 945-948, §§ 12-22. Dismissal as to part of cause of action: See Hays v. Hill, 23 Wash. 730.

Error as to nature or form of remedy: See Browder v. Phinney, 30 Wash. 74; McKay v. Calderwood, 37 Wash. 194; Brown v. Calloway, 34 Wash. 175; Wilson Coal etc. Co. v. Driver, 9 Wash. 177; Robinson v. Brooks, 31 Wash. 60; Winsor v. Hanson, 40 Wash. 423. Defects and objections as to process and as to pleadings: See 1 Remington's Digest, p. 946, §§ 18, 19; Neff v. Neff, 32 Wash. 82; Johnston v. Gerry, 34 Wash. 524; Murray v. Meade, 5 Wash. 693; Richardson v. Carbon Hill Coal Co., 6 Wash. 52; Wilkeson Coal & Coke Co. v. Driver, 9 Wash. 177; In re Renton's Estate, 10 Wash. 533; Noerdlinger v. Huff, 31 Wash. 360; Johnson v. S. E. Co., 39 Wash. 211.

Discontinuance by omissions or irregularities in proceedings or for want of prosecution: See 1 Remington's Digest, pp. 947, 948, §§ 20, 21; Spokane & Vancouver etc. Co. v. Colfelt, 30 Wash. 628; Bank of Commerce v. Warren, 8 Wash. 477; Lang-

ford v. Murphey, 30 Wash. 499; Hoffmeister v. Renton Coal Co., 40 Wash. 48; Arthur v. Washington Water Power Co., 42 Wash. 431; First Nat. Bank v. Hunt, 40 Wash. 190; Bignold v. Carr, 24 Wash. 413; In re Sullivan's Estate, 40 Wash. 202.

Dismissal for failure to comply with order of court: See 1 Remington's Digest, p. 948, § 22; Washington Bank of Walla Walla v. Horn, 24 Wash. 299; Norris Safe & Lock Co. v. Clark, 34 Wash. 104; Carlson Bros. & Co. v. Van de Vanter, 19 Wash. 32; Johnston v. Gerry, 34 Wash. 524; Wilkeson Coal & Coke Co. v. Driver, 9 Wash. 177.

NONSUIT, WHEN GRANTED: See 1 Remington's Digest, p. 948, § 23. A nonsuit may be entered on the voluntary order of the court, under subdivisions 4, 5 and 7, but not otherwise: McDaniel v. Pressler, 3 Wash. 636, 639. See, also, State ex rel. Hennessy v. Huston, 32 Wash. 154; Kirby v. Pease, 33 Wash. 511.

When plaintiff's case is concluded and there is nothing to submit to the jury, a nonsuit must be granted: Beck v. Ravena M. Co., 5 Wash. 560.

Under this section the plaintiff is entitled to voluntary nonsuit at any time before the jury retires, if there is no set-off or counterclaim interposed: Fisk v. Tacoma Smelting Co., 49 Wash. 514.

It is not beyond the power of a trial court to reverse its ruling denying a motion for a nonsuit, where immediately after the oral announcement extensive arguments followed, and no judgment or formal order was made, the motion having at first been considered as merely formal: Brown v. Northern Pac. R. Co., 44 Wash. 1.

Where the burden of proof is shifted from the plaintiff to the defendant by a prima facie case sufficient to overcome a presumption in favor of the defendant, and is then shifted back to the plaintiff by defendant's counter evidence, plaintiff's prima facie case must, on demurrer to the evidence, be measured by defendant's evidence, and determined as a matter of law in the light of defendant's explanations: Long v. McCabe & Hamilton, 52 Wash. 422.

As to grounds, and right to move, for nonsuit, see 2 Remington's Digest, p. 2751, §§ 56, 57. A judgment of nonsuit will be sustained if any one of the grounds relied on therefor is sufficient, although the lower court may have founded its ruling upon an inadequate reason: Brennan v. Front St. C. Ry. Co., 8 Wash. 353. If the court would not be warranted in granting a nonsuit it would not be warranted in directing a verdict for the defendant: Spokane & I. Lumber Co. v. Loy, 21 Wash. 501; Weir v. Seattle Elec. Co., 41 Wash. 657.

A nonsuit should be granted when the evidence for plaintiff is insufficient to sustain a judgment in his favor: Wolff v. Madden, 6 Wash. 514; but the court will not take a case from the jury when there

is any evidence to support it: Ward v. Moorey, 1 W. T. 104; Welch v. Fransioli, 46 Wash. 590; and upon a motion for a nonsuit where a doubtful question is presented, the safer practice is to let the case go to the jury: Burns v. Commencement Bay L. & I. Co., 4 Wash. 558, 559.

If the evidence introduced in an action tends to establish the allegations of the complaint, its sufficiency should be determined by the jury, and not by the court on a motion for nonsuit: Tibbals v. Mt. Olympus Water Co., 10 Wash. 329.

A motion for nonsuit should be granted where there is no testimony upon which a recovery can be founded: Burns v. Commencement Bay L. & I. Co., supra. See United States v. Kelly, 3 W. T. 421.

Where there is conflicting testimony, but the clear weight of the evidence is with either side, the court is justified in taking the case from the jury: Guley v. N. W. Coal & T. Co., 7 Wash. 491.

When plaintiff has failed to make a case on the proofs adduced by him, defendant is entitled to a nonsuit, although upon cross-examination of plaintiff's witnesses he has asked certain questions, the answers to which may tend to establish a defense: Hoge v. Wilson, 5 Wash. 161.

Where there is a variance between the proof and the complaint, the proof having been received without objection, the court should, upon a motion for a nonsuit, consider the complaint amended to correspond with the facts proven: Murray v. Meade, 5 Wash. 693; State ex rel. Jenkins v. Equitable Indemnity Assn., 18 Wash. 514.

In an equity case, where a motion for a nonsuit is erroneously refused, the error is waived by the subsequent admission of testimony sufficient to make a prima facie case: Cattell v. Ferguson, 3 Wash. 541.

Although the court may err in denying defendant's motion for dismissal of the case at the close of plaintiff's testimony, the error is cured by defendant's thereafter proceeding with the case: Scoland v. Scoland, 4 Wash. 118.

A motion for a nonsuit is waived by proceeding with the trial, and the case will thereafter be reviewed on the entire testimony only: Ryan v. Lambert, 49 Wash. 649.

The withdrawal of a demurrer to a complaint and joining issue by answer does not waive the right to move to dismiss the action for want of sufficient facts to state a cause of action, where the complaint was amended after the demurrer was interposed: Hemrich Bros. Brewing Co. v. Kitsap County, 45 Wash. 454.

After an improper denial of a motion for nonsuit at the close of plaintiff's case, the fact that defendant opens his defense operates as a waiver of the motion only to the extent of allowing plaintiff the benefit of any evidence subsequently introduced: Matson v. Port Townsend S. Ry

Co., 9 Wash. 449; *Morgan v. Carbon Hill Coal Co.*, 6 Wash. 577.

Where, under the evidence, defendant is entitled to an instruction for a verdict in his favor, on a reversal of the judgment on appeal, a dismissal will be directed: *Bernhard v. Reeves*, 6 Wash. 424.

It is error to direct a verdict of nonsuit for insufficiency of the original complaint, where leave has been granted to file an amended one to correspond with the proofs, if the proofs show a cause of action: *Richardson v. Carbon Hill Coal Co.*, 6 Wash. 52. But see *Johnson v. Seattle Electric Co.*, 39 Wash. 211; *Noerdlinger v. Huff*, 31 Wash. 360.

In passing upon a motion for a nonsuit it is not error for the court to comment on the evidence in the jury's presence: *Blue v. McCabe*, 5 Wash. 125; *Patchen v. Park & Lacy M. Co.*, 6 Wash. 486.

Where a nonsuit has been granted, no motion for a new trial is necessary to secure a review on appeal: *Burns v. Commencement Bay L. Co.*, 4 Wash. 558.

The court cannot dismiss an action for defect of parties, when it is not raised by demurrer or answer, except upon the refusal or neglect of the plaintiff to make the necessary parties after ordered to do so: *Harrington v. Miller*, 4 Wash. 808.

The court upon a trial without a jury may grant a nonsuit at the close of plaintiff's evidence, on the ground that a fair preponderance of the proof established facts preventing recovery by plaintiff, although there is evidence tending to sustain plaintiff's claim: *Lambuth v. Stetson & Post Mill Co.*, 14 Wash. 187.

SPECIAL CASES.—A nonsuit entered on the ground of absence of counsel should be set aside when plaintiff's counsel appeared within twenty minutes after the calling of court at the early hour of 8:30 A. M.; and it is an abuse of discretion to refuse to vacate the order, especially when counsel on both sides are willing to waive the technicality and proceed with the trial: *Bank of Commerce v. Warren*, 8 Wash. 477. Where defendant admits a portion of plaintiff's indebtedness to be due, and tenders the amount into court, it is error to nonsuit plaintiff: *Mace v. Gaddis*, 3 W. T. 125.

If complaint on attachment bond fails to allege that damages incurred have not been paid, and no proof is offered on that point, defendants are entitled to a nonsuit: *Church v. Campbell*, 7 Wash. 547.

In an action to charge an undisclosed principal with liability for purchase of certain property, a nonsuit should be granted when the evidence fails to show that the defendant had any relation to the property or parties from which a liability could be implied: *Harper v. Sinclair*, 7 Wash. 372, 374.

Where one of two joint lessees paid all the money on contract of lease, and brings his individual action to recover the money

paid, on breach of contract, ignoring the lease and failing to make his colessee a party, a nonsuit should be granted: *Dietz v. Weinhill*, 6 Wash. 109. The defendant is not entitled to a dismissal for non-joinder, as a necessary party, of one who claimed a lien upon corporate stock in suit, where the adverse party is entitled to a judgment ordering a sale subject to the lien: *Hardin v. White Swan Min. etc. Co.*, 26 Wash. 583. An information in the nature of quo warranto is properly dismissed when the suit is not brought by the officer authorized or charged by law to institute the suit: *State ex rel. Attorney Gen. v. Seattle Gas etc. Co.*, 28 Wash. 488, 38 Pac. 946. In an action against a married woman to foreclose a mechanic's lien for a building erected on her land, under contract with her husband, plaintiff should be nonsuited where the wife is not shown to have had any knowledge of the contract, and the proof is insufficient to show that the husband was her agent: *Cattell v. Ferguson*, supra.

A corporation is entitled to a nonsuit, in an action against it and its general manager jointly to recover the price of goods sold and delivered to a third person, when the evidence fails to connect the corporation with the transaction: *Cosh-Murray Co. v. Adair*, 9 Wash. 686.

A motion for nonsuit on the ground that plaintiff had not shown that the officers of a corporation had authority to indorse and transfer a promissory note is properly denied when the testimony tends to show that the note was cashed at the instance of the maker, a director in the corporation, and for the company's benefit: *Blue v. McCabe*, 5 Wash. 125.

In an action to recover a balance due on account, it is error to nonsuit plaintiff, when it appears from the evidence that he had given an order to a third party for the sum due from defendant, on the supposition that it was a certain amount, but, in fact, as the evidence showed, there was a further amount due him: *Patchen v. Park & Lacy M. Co.*, supra.

In an action against husband and wife to recover real estate commissions, in which a judgment of nonsuit had been rendered in favor of the wife, a verdict for both defendants is harmless error where plaintiff is not deprived of any substantial right, and has failed to except to the verdict when rendered: *Dillon v. Folsom*, 5 Wash. 439.

In an action to recover for labor performed by the plaintiff for defendant, a nonsuit is proper, when the evidence shows that the labor was performed at the request of other parties than the defendant, although the work may have resulted in a benefit to the latter: *Bunker v. Blair*, 14 Wash. 106.

It is error to nonsuit plaintiff in an action for damages for assault and battery, when the evidence shows an infrac-

tion of plaintiff's legal rights, from which damages follow as a legal consequence: *Hannan v. Gross*, 5 Wash. 703.

In an action for personal injuries to a child trespassing on defendant railway company's right of way without defendant's knowledge, unless defendant's negligence is shown to amount to wantonness, a nonsuit should be granted: *Matson v. Port Townsend S. Ry. Co.*, 9 Wash. 449.

Where an action is brought by a widow and minor children to recover damages for the wrongful killing of her husband, and it was claimed that only the personal representatives could recover, it is improper to dismiss the action for want of jurisdiction: *Dahl v. Tibbals*, 5 Wash. 259, 262.

The question of liability of a city for injuries sustained by an individual by reason of a defective street is a question of law, which should be raised by demurrer and not by a motion for nonsuit: *Sutton v. Snohomish*, 11 Wash. 24.

NEGLIGENCE.—In an action for damages by an employee for personal injuries sustained by defendant's negligence, where no negligence is proved by plaintiff, a nonsuit must be ordered: *Weideman v. Tacoma Ry. & M. Co.*, 7 Wash. 517.

In an action for damages for personal injuries inflicted by a corporation upon one of its employees evidence of the employment by defendant of a negligent and unskilled physician to treat plaintiff is presumptive negligence, and will avoid a nonsuit: *Richardson v. Carbon Hill Coal Co.*, supra.

In an action for damages for personal injuries plaintiff should not be nonsuited on the ground of contributory negligence, when the evidence shows that he was guilty of no negligence contributing to his injury: *Ladouceur v. N. P. Ry. Co.*, 4 Wash. 38.

A nonsuit should be granted where it clearly appears that the plaintiff has been guilty of such contributory negligence as precludes his recovery: *N. P. Ry. Co. v. Holmes*, 3 W. T. 202; and where the testimony shows that the injury was caused by a fellow-servant, the defendant may move for a nonsuit without having pleaded such defense in his answer: *Sayward v. Carlson*, 1 Wash. 29.

Defendant is entitled to a nonsuit in an action for personal injuries occasioned by defendant's negligence, if it appears from plaintiff's case that plaintiff is chargeable with contributory negligence: *Krennan v. Front St. C. Ry. Co.*, 8 Wash. 363.

A nonsuit should be granted in an action for negligence where the evidence is not sufficient to establish negligence on the part of defendant; or if shown that there was contributory negligence: *Morgan v. Carbon Hill Coal Co.*, 6 Wash. 577.

In an action for damages for personal injuries consequent upon defendant's negligence, held, that the facts of the particu-

lar case authorized the granting of a nonsuit: *Cooney v. G. N. Ry. Co.*, 9 Wash. 292.

The refusal of the trial court to open a case after a motion for nonsuit so that plaintiff may the next morning have the testimony of a witness made a part of her affirmative evidence, does not show such an abuse of the discretion lodged in it in such matters as to warrant the interference of the appellate court, when it appears that plaintiff had full knowledge as to the nature of the testimony and rested her case without any suggestion of the absence of such witness and of efforts on her part to procure his attendance: *Martin v. Union Mut. Ins. Co.*, 13 Wash. 275.

Where it appears from the evidence introduced by plaintiff in an action for damages for injuries received by reason of the alleged negligence of defendants, that the negligence, if any, was that of an independent contractor, the defendants are entitled to a nonsuit, although they may not have pleaded such fact as a defense: *Easter v. Hall*, 12 Wash. 160.

In an action for damages for breach of contract to float a wreck, in which the only element of damages claimed was the difference between the value of a wrecked vessel and what she would probably have been worth as a vessel afloat, the plaintiff should be nonsuited when the evidence shows that the only contract entered into was that two tugs should use their best efforts, pulling together at high tide, to raise the wreck, for a fixed price for the pull, and that all chances of getting the vessel off were to be taken by plaintiff: *Benjamin v. Puget Sd. Coml. Co.*, 12 Wash. 476.

In an action for damages for the improper construction of a building and the use of defective materials therein, and for loss of rents, the defendant is not entitled to a nonsuit, because the proof shows that payments were made by plaintiffs after the expiration of the time fixed for the completion of the building and after knowledge of a change in the plans of construction, when the proof also tends to show that defective materials had been used without their knowledge: *Brodek v. Far-num*, 11 Wash. 565.

Under this section the court is warranted in dismissing an action upon the failure of the plaintiff to comply with an order directing an amended bill of particulars to be furnished: *Plummer v. Weil*, 15 Wash. 427.

Neither findings of fact nor conclusions of law are required on the part of a trial court when it grants a motion for a nonsuit in a jury case: *Berkley v. Barton*, 15 Wash. 33.

In an action which seeks to charge defendant as assignee of a written lease for a term of years, plaintiff should be nonsuited when there is no proof that the as-

signment was in writing: *Jacobs v. National Bank*, 15 Wash. 358.

A nonsuit is improper, when there is sufficient testimony to sustain a verdict, although the facts testified to may be inad-

missible in evidence and are only properly in the case as a result of the unchallenged examination of witnesses: *Dutcher v. Howard*, 15 Wash. 693.

§ 409. (5086.) All Other Judgments are on the Merits.

In every case other than those mentioned in the last section, the judgment shall be rendered on the merits. [L. '54, p. 171, § 224; Cd. '81, § 287; 2 H. C., § 410.]

See supra, § 404, judgments defined.

§ 410. (5087.) Effect of Judgment of Nonsuit.

When a judgment of nonsuit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause. [L. '69, p. 70, § 290; Cd. '81, § 288; 2 H. C., § 411.]

Cited in 46 Wash. 82.

As to dismissal without prejudice, see 1 Remington's Digest, p. 949, § 24; *Russell v. Blair*, 18 Wash. 339; *Chehalis County v. Ellingson*, 21 Wash. 638; *Bates v. Drake*, 28 Wash. 477; *Dunkle v. Spo-*

kane Falls & N. R. Co., 20 Wash. 254; *Dane v. Daniel*, 28 Wash. 155; *Hubenthal v. Spokane etc. R. Co.*, 43 Wash. 677; *State Medical Examining Board v. Stewart*, 46 Wash. 79; *Budlong v. Budlong*, 48 Wash. 65.

CHAPTER XI.

JUDGMENT BY DEFAULT.

§ 411. (5090.) Judgment for Failure to Answer.

Judgment may be had if the defendant fail to answer to the complaint, as follows:—

1. In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants. The court shall thereupon enter judgment for the amount claimed against the defendant or defendants, or against one or more of the several defendants, in the cases provided for in section 236. Where the defendant, by his answer, in any such action, shall not deny the plaintiff's claim, but shall set up a counterclaim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counterclaim;

2. In other actions the plaintiff may, upon the like proof, apply to the court after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or of the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. Where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if to determine the amount of damages the examination of a long account be necessary, by a reference as above provided. If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to five days' notice of the time and place of application to the court for the relief demanded in the complaint;

3. In [an] action where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of

service by publication, apply for judgment; and the court must thereupon require proof of the demand mentioned in the complaint, and must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to anyone for his use on account of such demand, and may render judgment for the amount which he is entitled to recover, or for such other relief as he may be entitled to. [Cf. L. '54, p. 171, § 225; L. '69, p. 70, § 291; L. '77, p. 59, § 293; Cd. '81, § 289; 2 H. C., § 412.]

See supra, § 192, persons severally liable.

See supra, §§ 220-254, summons and service.

See supra, § 236, judgment against one defendant where others not served.

See supra, § 278, judgment for failure to plead to new matter.

See supra, § 366, assessment by jury of amount of recovery, when.

See supra, §§ 369-377, trial by referee.

See supra, § 406, judgment may be rendered against whom.

See supra, § 407, judgment against several parties.

See infra, § 436, proceedings against defendants not served.

See infra, § 1230, judgment for failure to answer interrogatories.

See infra, § 1858, judgment by default in justice's court.

See notes to next section.

DEFAULT: See 2 Remington's Digest, pp. 1585-1587, §§ 21-34. To entitle a party to a default a motion therefor is necessary separate from that for judgment: *State v. Hunter*, 4 Wash. 651, 652.

Although a formal default is not entered against a defendant before trial, yet a judgment against him will be upheld on appeal where the record shows that the time for answering had expired, and that testimony was given at the trial of amounts due from him to plaintiff: *Proulx v. Stetson & Post M. Co.*, 6 Wash. 478. It is not necessary to enter the default in a separate order: *Warner v. Miner*, 41 Wash. 98.

It is error to render judgment against a party in default before the default is entered: *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165; distinguished in *Proulx v. Stetson* etc., supra; or to render judgment by default for want of appearance, when a demurrer is on file: *Walla Walla etc. Co. v. Budd*, 2 W. T. 336; *Canada Settlers' Loan & Trust Co. v. Murray*, 20 Wash. 656. Or where a motion to stay proceedings has not been disposed of: See *Richardson v. Richardson*, 43 Wash. 634.

A plaintiff is not called upon to reply to an affirmative defense in an answer while his demurrer thereto remains undetermined: *Ewing v. Van Wagenen*, 6 Wash. 39.

Where only one of two defendants is served with process it is error to render personal judgment against both, though they are alleged to be partners: *McCoy v. Bell*, 1 Wash. 504.

Allowing a default before publication of summons for the time required, where there is no evidence of a copy being mailed to defendant, renders the judgment void for want of jurisdiction: *Montgomery v. Manning*, 1 W. T. 434; see *Garrison v. Cheeney*, 1 W. T. 489.

The mere corporal presence of a party or his agent in court, without demurring, an-

swering or giving notice of appearance, will not prevent default being entered against him: *McCoy v. Bell*, supra.

An action is not abandoned by the delay of four years after entry or default, in proceeding to judgment, and judgment then entered without notice to the defendant is not void: *Peirce v. Nat. Bank of Germantown*, 44 Wash. 404.

Where defendants were in default, and the court ordered judgment of default unless an answer should be filed showing a meritorious defense, and answers were filed showing no defense, the answers may be stricken and judgment of default entered: *American Bonding Co. v. Dufur*, 49 Wash. 632.

A special appearance by a nonresident defendant, to move to set aside a judgment and default entered against him, does not waive any jurisdictional rights: *Paxton v. Daniell*, 1 Wash. 19.

On judgment rendered against a nonresident defendant, and attachment of property, objection to the jurisdiction taken before entry of default is waived by motion to open default, and by subsequent filing of an answer: *Sayward v. Carlson*, 1 Wash. 29.

Judgment for failure to answer can be entered, as of course, without proof under subdivision 1 of this section only in case the summons and complaint have been served and proof thereof filed with the clerk, and this requirement is not abolished by the act of February 2, 1888, making it no longer necessary to serve a copy of the complaint on defendant in order to acquire jurisdiction: *Spokane Falls v. Curry*, 2 Wash. 541; but the original note and mortgage upon which an action is brought, without proof of their authenticity, or of payments made thereon, is insufficient to warrant a default under subdivision 3 of this section: *State v. Hunter*, 4 Wash. 651, 652. As to proof of cause of

action, see *Citizens' Nat. Bank of Dayton v. Columbia County*, 23 Wash. 441; *Ferguson v. Hoshi*, 25 Wash. 664; *Titus v. Larson*, 18 Wash. 145.

The refusal to grant a default for failure to answer within the prescribed time will be presumed to have been based upon good and sufficient reasons in the absence of a showing to the contrary in the statement of facts: *Mason v. McLean*, 6 Wash. 31.

Where defendant refuses to plead after overruling his demurrer to the complaint, a court may, under this section, proceed to take evidence upon the allegations of the complaint: *Cross v. Johnson*, 20 Wash. 124.

The judgment of a court of general jurisdiction rendered upon default will be presumed valid, although the record does not affirmatively show that all the steps required by the statute have been complied with, and it will only be held void when it affirmatively appears from the record that the court had no jurisdiction to render it: *Munch v. McLaren*, 9 Wash. 676, 679; *Kalb v. German Sav. & Loan Soc.*, 25 Wash. 349.

It is only void, and not erroneous, judgments that may be collaterally attacked: *Kizer v. Caufield*, 17 Wash. 417. But denial of rights will be presumed prejudicial, unless it affirmatively appears from the record to the contrary: *Collett v. Northern Pac. R. Co.*, 23 Wash. 600, 63 Pac. 225. The ruling of the trial court permitting a reply to be filed on the same day that defendant moved for judgment on the pleadings for want of a reply, will not be disturbed, when there is no showing of abuse of discretion: *Stinson v. Sachs*, 8 Wash. 391.

A judgment by default rendered in chambers at Seattle is valid in a cause pending in the court at Port Townsend, it being in the same territorial judicial district: *Murne v. Schwabacher*, 2 W. T. 130.

A judgment rendered by the superior court without proper service of summons is invalid on the ground of want of jurisdiction: *State v. Superior Court*, 6 Wash. 353, 355. But failure of record to show proper service of process is a mere irregularity if default was duly entered: *Twigg v. James*, 37 Wash. 434; *Sellers v. Pacific Wrecking etc. Co.*, 34 Wash. 111. The recital of due service contained in a default judgment is not conclusive upon a direct attack by appeal from the judgment, on overruling an objection to the jurisdiction and motion to vacate the default: *French v. Ajax Oil etc. Co.*, 44 Wash. 305.

A defendant personally served with summons who suffers judgment by default cannot object to the summons for the first time in the appellate court: *Baker v. Pre-witt*, 3 W. T. 595.

In an action before a justice of the peace under § 1858, *infra*, where defendants fail to appear on the expiration of

one hour from the time set for trial, and plaintiff demands judgment, it is the justice's duty to so enter it, and being entered it cannot be modified or changed: *McCoy v. Bell*, 1 Wash. 504.

JUDGMENT FOR FAILURE TO ANSWER INTERROGATORIES.—Judgment may be given against a defendant for failure to answer interrogatories within the time prescribed by § 1230, *infra*: *Livesley v. O'Brien*, 6 Wash. 553; and under the same section the only judgment authorized is one of dismissal where no default is taken for his failure to reply to an affirmative defense, and no proof is introduced in support of the matters alleged in such defense: *Waite v. Wingate*, 4 Wash. 324.

A judgment by default against the husband for his failure to answer interrogatories, is not binding on the wife as to community property: See *Glass v. Buttner*, 39 Wash. 296.

After default duly entered, a party is not entitled to notice of further proceedings: See *Norris v. Campbell*, 27 Wash. 654.

JUDGMENT ON PLEADINGS: See 2 *Remington's Digest*, p. 2289, §§ 145-150. Where defendant fails to plead, or if he files an answer which does not controvert the material allegations of the complaint which tenders no issue requiring proof, then plaintiff is entitled to judgment. It is not technically a judgment on the pleadings, but a judgment for failure to answer: *Port v. Parfit*, 4 Wash. 369, 373; see *Lake v. Steinbach*, 5 Wash. 659, 663; *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630, 636; *Seattle Cedar Lumber Mfg. Co. v. Ballard*, 50 Wash. 123.

The practice of granting judgment on the pleadings upon an oral motion, at the time the case is set for trial, condemned. The proper theory is set out in *Port v. Parfit*, *supra*, and five days' notice should be given of the time and place of application as prescribed in subdivision 2 of this section: *Seattle Nat. Bank v. Meerwaldt*, *supra*; see *Noyes v. Loughhead*, 9 Wash. 325, 327.

If the answer does not controvert any of the material allegations of the complaint, or contain any new matter constituting a defense or counterclaim, and no reply is made, it is improper to render judgment on the pleadings, under § 278, *supra*, but plaintiff may, after the time for answering has expired, disregard such answer and move for default and judgment: *Lake v. Steinbach*, 5 Wash. 659, 663.

Judgment on the pleadings is not authorized where a reply, though insufficient in law, has actually been filed to the affirmative matter in the answer: *Davis v. Ford*, 15 Wash. 107.

In an action upon a promissory note, plaintiff is not entitled to judgment on the pleadings when the answer admits the execution of the note but alleges a failure of consideration, and also that the defend-

ant's signature was obtained by fraud: *P. T. So. Ry. Co. v. Weir*, 15 Wash. 507. See, also, *Helmer v. Title Guaranty & Surety Co.*, 50 Wash. 411.

Where the record shows that after a motion for judgment on the pleadings had been sustained, evidence was introduced by plaintiff in support of his cause, and upon the same the court based its findings, it will be presumed on appeal that the motion was treated by the court as a demurrer to the answer: *Bethel v. Robinson*, 4 Wash. 446.

If plaintiff, instead of going to trial, as he might have done on the question of the measure of damages, move the lower court for judgment in his favor on the pleadings, and that court award him judgment in a nominal amount, he cannot afterward complain of such judgment: *Hadlan v. Ott*, 2 W. T. 165.

Failure of defendant to plead a former judgment as *res judicata* does not estop the defendant from taking advantage of the defense by motion for judgment on the pleadings, where the plaintiff sets up the former adjudication as affirmative matter in a reply: *Collins v. Gleason*, 47 Wash. 62.

Where an answer denies no material allegations of the complaint it is not error to render judgment on the pleadings: *Hanna v. Savage*, 7 Wash. 414; *King v. Ilwaco etc. Nav. Co.*, 1 Wash. 127.

In an action on a promissory note, plaintiff is entitled to judgment on the pleadings, when the answer admits the execution thereof and negatives the allegation of nonpayment in the complaint merely by a general denial: *National Bank v. Western Iron & Steel Co.*, 14 Wash. 162.

Where defendant has objected to the in-

troduction of evidence on account of a departure in plaintiff's pleadings and has afterward moved for a nonsuit, he has thereby saved his right to urge the error on appeal, although he has failed to move for judgment on the pleadings: *Osten v. Winehill*, 10 Wash. 333; see *Distler v. Dabney*, 3 Wash. 200.

The failure to reply to an allegation in an answer which is equivalent to a mere denial of the corresponding allegation of the complaint is not ground for judgment on the pleadings: *Raymond v. Morrison*, 9 Wash. 156.

The entry of a default against a defendant is waived by allowing him to participate in the subsequent proceedings in the cause, to serve and be served with motions, and by otherwise treating him as a party thereto: *Cornell University v. Denny Hotel Co.*, 15 Wash. 433.

Where a motion for default for failure to plead within the time ordered by the court has been denied, it must be presumed on appeal that sufficient was shown to justify the exercise of the court's discretion in that regard: *Plummer v. Weil*, 15 Wash. 427; following *Mason v. McLean*, 6 Wash. 35.

A motion for default cannot be made after defendant's appearance, on the ground that the appearance presented a frivolous and dilatory motion, where the court did not regard the motion as frivolous but properly sustained the same: *Washington etc. Imp. Co. v. Cannel Coal Co.*, 45 Wash. 462.

This section is not mandatory in the sense that failure to enter judgment immediately will result in loss of jurisdiction: *Peirce v. National Bank of Germantown*, 44 Wash. 404.

§ 412. (5091.) Court may Set Aside Default.

The court may, in its discretion, before final judgment, set aside any default, upon affidavit showing good and sufficient cause, and upon such terms as may be deemed reasonable. [L. '54, p. 171, § 225, subd. 4; L. '69, p. 72, § 292; Cd. '81, § 290; 2 H. C., § 413.]

See *supra*, § 303, release from judgment.

See *supra*, § 307, harmless defects disregarded.

See *infra*, § 464, proceedings to vacate and modify judgments.

See notes to last section.

Cited in 2 Wash. 543; 6 Wash. 35; 39 Wash. 375.

VACATING DEFAULT: See 2 Remington's Digest, pp. 1587-1590, §§ 35-50.

Discretion of court: See *Id.*, p. 1587, § 36; *Spokane v. Curry*, 2 Wash. 541; *Myers v. Landrum*, 4 Wash. 762; *Hull v. Vining*, 17 Wash. 352; *Titus v. Larsen*, 18 Wash. 145; *Everett Produce Co. v. Smith Bros.*, 40 Wash. 566; *McBride v. McGinley*, 31 Wash. 573; *Twigg v. James*, 37 Wash. 434.

If judgment has been rendered against a party not served with process, but in whose behalf an unauthorized attorney has appeared, the judgment will be set aside

as a nullity: *McEachern v. Brackett*, 8 Wash. 652. But want of authority in attorney must be clearly shown: *Turner v. Turner*, 33 Wash. 118.

Affidavit of merits not necessary to set aside void or prematurely entered judgment: See 2 Remington's Digest, p. 1589, § 47; *Walla Walla Print. etc. Co. v. Budd*, 2 W. T. 336; *Hole v. Page*, 20 Wash. 208; *Wheeler v. Moore*, 10 Wash. 309; *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431.

As to excuses for default, see 2 Remington's Digest, pp. 1588, 1589, §§ 40-45; *Hull v. Vining*, 17 Wash. 352; *Titus v. Larsen*,

18 Wash. 145; see *Dalgardno v. Trumbull*, 25 Wash. 362; *Reitmeir v. Sigmund*, 13 Wash. 624; *Warner v. Miner*, 41 Wash. 98; *Jordan v. Hutchinson*, 39 Wash. 373; *Moody v. Reichow*, 38 Wash. 303.

It is not an abuse of discretion to deny a motion to vacate a judgment by default when the only ground alleged therefor is that defendant's counsel was prevented from answering the complaint because of absence from the city: *Sanborn v. Centralia F. Co.*, 5 Wash. 150; nor to set aside a default for failure to file an answer until notice of default, where no legal excuse is shown, although the answer filed presents a meritorious defense: *Haynes v. Schwartz Co.*, 5 Wash. 433; nor to vacate a judgment by default, when the only ground shown is want of attention to the case by counsel and clients; such an order is a final order after judgment and appealable: *Myers v. Landrum*, 4 Wash. 762.

Where judgment has been taken by default for failure to answer, it should be set aside when it appears that defendant has a defense upon the merits, and was misled by plaintiff's attorney as to the time of trial: *Bast v. Hysom*, 6 Wash. 170.

Where judgment is obtained, and execution sale had thereunder, against a defendant, on a default upon a false return of the sheriff that he had been served with summons, the return may be attacked in a proceeding to set aside the judgment and sale: *Johnson v. Gregory & Co.*, 4 Wash. 109; *Northwestern & P. H. Bank v. Ridpath*, 29 Wash. 687.

Although judgment by default, in an action for foreclosure of a mortgage upon realty, may have been erroneously rendered, because a demurrer to the complaint was pending at the time, yet the judgment cannot be attacked on that ground in an action of ejectment brought by the purchaser under execution sale for the purpose of obtaining possession of the premises: *Belles v. Miller*, 10 Wash. 259; see *Belles v. Carroll*, 6 Wash. 131.

Where default has been entered against plaintiff for delay in appearing at the time set for trial, it is an abuse of discretion to refuse to vacate the same, when he comes into court and moves to vacate the same within twenty minutes of the time, and defendant consents thereto: *Bank of Commerce v. Warren*, 8 Wash. 477.

APPEAL.—The remedy of a party against whom judgment by default is claimed to have been irregularly entered in the court below is not by appeal, but by motion in the trial court to set aside such judgment: *Belles v. Carroll*, 6 Wash. 131; but it was held in the territorial court that an appeal will lie from a judgment rendered by default in the district court: *Baker v. Prewett*, 3 W. T. 474; see *Myers v. Landrum*, 4 Wash. 762; and also that a writ of error will lie from a judgment by default: *Montgomery v. Manning*, 1 W. T. 434; cited in *Garrison v. Cheeney*, 1 W. T. 489, 495.

No appeal lies from a judgment by default entered by consent of defendant: *Port v. Parfit*, 4 Wash. 369.

CHAPTER XII.

JUDGMENT BY CONFESSION.

§ 413. (5093.) When Judgment may be Given on Confession.

On the confession of the defendant, with the assent of the plaintiff or his attorney, judgment may be given against the defendant in any action, before or after answer, for any amount or relief not exceeding or different from that demanded in the complaint. [Cf. L. '54, pp. 172, 173, §§ 226-228; L. '69, p. 72, § 293; Cd. '81, § 291; 2 H. C., § 414.]

Cited in 10 Wash. 501.

As to judgments by confession, see 2 Remington's Digest, p. 1584, §§ 14-17.

A debtor may make confession of judgment in a pending action, but the action, when brought, must be in the usual sense a hostile one. In such an action the confession need only be acknowledged, and the statute does not prescribe what it shall contain: *Puget Sound Nat. Bk. v. Levy*, 10 Wash. 499, 503; but where a debtor employs his own attorney to bring suit against him in behalf of a certain creditor, and consents to an entry of judgment therein, so as to work a preference in favor of such creditor, the judgment is one by

confession, and is regulated by § 418, *infra*: Id.

A confession of judgment by the defendant in an attachment suit does not have the effect of waiving the attachment lien: *Schloss v. State Bank*, 4 Wash. 726.

A husband may confess judgment, but the community realty is not affected thereby unless the debt upon which the judgment was given was a community debt: *Andrews v. Andrews*, 3 W. T. 286, 290.

A confession of judgment for the amount of premium notes due an insurance company is not equivalent to a payment of the premium: *Proebstel v. State Ins. Co.*, 14 Wash. 669.

§ 414. (5094.) How Corporations and Minors may Confess Judgment.

When the action is against the state, a county or other public corporation therein, or a private corporation or a minor, the confession shall be made by the person who, at the time, sustains the relation to such state, corporation, county, or minor as would authorize the service of a notice [summons] upon him; or in the case of a minor, if a guardian for the action has been appointed, then by such guardian; in all other cases, the confession shall be made by the defendant in person. [L. '69, p. 72, § 294; Cd. '81, § 292; 2 H. C., § 415.]

On whom service of summons may be made in the cases mentioned in the statute: See *supra*, §§ 226, 227.

A judgment by confession, made by an insolvent corporation in favor of one of its creditors, who has knowledge of its insolvent condition, and which confession is given and accepted for the purpose of making a preference in favor of such creditor over others, is void as against the other creditors: *Compton v. Schwabacher Bros. & Co.*, 15 Wash. 306; *Conover v. Hull*, 10 Wash. 673.

A receiver for an insolvent corporation is not estopped from assailing a confession of judgment by the corporation as fraudulent by reason of the fact that in a former receivership the receiver had treated the judgment as valid, and had been discharged by the court upon a false representation that all the debts of the corporation, except a balance on such judgment, had been paid: *Id.*

§ 415. (5095.) Judgment by Confession Against Persons Jointly Liable.

When the action is upon a contract, and against one or more defendants jointly liable, judgment may be given, on the confession of one or more defendants, against all the defendants thus jointly liable, whether such defendants have been served or not, to be enforced only against their joint property and against the joint and separate property of the defendant making the confession. [L. '69, p. 72, § 295; Cd. '81, § 293; 2 H. C., § 416.]

See note to § 464, *infra*.

Judgment against persons jointly liable: See *supra*, § 407.

Cited in 7 Wash. 539; 12 Wash. 197.

One partner may confess judgment binding against all the partners, in so far as it is enforceable against partnership property

and the separate property of the partner making the confession: *Bank of Shelton v. Willey*, 7 Wash. 535.

§ 416. (5096.) Confession, How Made.

The confession and assent thereto shall be in writing and subscribed by the parties making the same, and acknowledged by each before some officer authorized to take acknowledgments of deeds. [L. '69, p. 72, § 296; L. '77, p. 60, § 298; Cd. '81, § 294; 2 H. C., § 417.]

See § 418, *infra*, as to requisites of statement.

Cited in 10 Wash. 501.

§ 417. (5097.) Judgment by Confession Without Action.

A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. [L. '69, p. 73, § 297; Cd. '81, § 295; 2 H. C., § 418.]

Cited in 10 Wash. 501; 13 Wash. 77.

§ 418. (5098.) Requisites of Statement.

A statement in writing shall be made, signed by the defendant and verified by his oath, to the following effect:—

1. It shall authorize the entry of judgment for a specified sum;

2. If it be for money due or to become due, it shall state concisely the facts out of which the indebtedness arose, and shall show that the sum confessed to be due is justly due or to become due;

3. If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same. [L. '69, p. 73, § 298; Cd. '81, § 296; 2 H. C., § 419.]

Cited in 10 Wash. 500; 10 Wash. 504; 13 Wash. 77.

§ 419. (5099.) Proceedings in Court on Presentation of Statement.

The statement must be presented to the superior court, or a judge thereof, and if the same be found sufficient, the court or judge shall indorse thereon an order that judgment be entered by the clerk, whereupon it may be filed in the office of the clerk, who shall enter a judgment for the amount confessed, with costs. Execution may be issued and enforced thereon in the same manner as upon judgments in other cases. [Cf. L. '69, p. 73, § 299; L. '77, p. 61, § 301; Cd. '81, § 297; 2 H. C., § 420.]

Cited in 10 Wash. 501.

CHAPTER XIII.

ARBITRATION, AND JUDGMENT THEREON.

§ 420. (5102.) Disputes may be Submitted to Arbitration.

All persons desirous to end, by arbitration, any controversy, suit, or quarrel, except such as respect the title to real estate, may submit their difference to the award or umpirage of any person or persons mutually selected. [L. '60, p. 324, § 1; L. '63, p. 81, § 231; Cd. '81, § 264; 2 H. C., § 424.]

See *infra*, § 1485, arbitration of claims against estates.

Cited in 27 Wash. 39.

Arbitration and award: See 1 Remington's Digest, pp. 264-267, §§ 1-16.

Whenever the terms of a contract leave it doubtful whether the settlement of a disputed question is intended to be left to the final decision of arbitrators, the construction is in favor of the right to resort to the courts for redress: *Van Horne v. Watrous*, 10 Wash. 525. An agreement to pay for the value of a wharf which was to be "appraised" is not an agreement to arbitrate in case of a disagreement: *Hart Lumber Co. v. Everett Land Co.*, 20 Wash. 71.

An agreement for arbitration providing that the finding of the arbitrators should be approved by the city council in order to be binding upon the city merely constitutes the council a member of the board of arbitrators and is valid: *Lidgerwood*

Park Waterworks Co. v. Spokane, 19 Wash. 365.

A party who has submitted a matter in dispute to arbitration is not estopped from revoking the submission and repudiating the award, when the bias and prejudice of one of the arbitrators was unknown at the time of submission, and knowledge thereof only developed during the progress of the arbitration, as a consequence of his conduct, taken in connection with the inadequate amount allowed: *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143.

Conditions precedent to action, and effect on pending or subsequent action: See 1 Remington's Digest, pp. 264, 265, §§ 3, 4; *Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31; *Hughes v. Bravinder*, 9 Wash. 595; *Lidgerwood Park Waterworks Co. v. Spokane*, 19 Wash. 365; *Winsor v. German Savings & Loan Society*, 31 Wash. 365.

§ 421. (5103.) Agreement to be in Writing.

Said agreement to arbitrate shall be in writing, signed by the parties, and may be by bond in any sum, conditioned that the parties entering into said submission shall abide the award. [L. '60, p. 324, § 2; Cd. '81, § 265; 2 H. C., § 425.]

An affirmative defense of settlement by arbitration is demurrable where it fails to allege any written agreement for arbitra-

tion, the filing of any award, or any approval of the same by the court: *Owen v. Casey*, 48 Wash. 673.

§ 422. (5104.) How Arbitration Conducted.

The said arbitrators shall be duly sworn to try and determine the cause referred to them, and a just award make out, under the hands and seals of a majority of them, agreeably to the terms of the submission. Said award, together with the written agreement to submit, shall be sealed up by the arbitrators and delivered to the party in whose favor it shall be made, who shall deliver the same, without breaking the seal, to the clerk of the superior court of the county wherein said arbitration is held, who shall enter the same on record in his office. A copy of the award, signed by said arbitrators, or a majority of them, shall also be delivered to the party in whose favor it is rendered, who shall, if the matter be not settled, serve a copy of the same on the adverse party, and if no exceptions be filed against the same within twenty days after such service, judgment shall be entered as upon the verdict of a jury, and execution may issue thereon, and the same proceedings [may be had] upon said award, with like effect as though said award were a verdict in a civil action. [Cf. L. '63, p. 324, § 3; Cd. '81, § 266; L. '91, p. 104, § 1; 2 H. C., § 426.]

Cited in 5 Wash. 207, 208; 5 Wash. 210, 211; 34 Wash. 48.

When an arbitration of the differences between parties has failed for any reason the superior court is clothed with full jurisdiction to proceed to a final determination of the controversy, and an order of such court setting aside the award of the arbitrators is not such a final order as will sustain an appeal: *Tacoma R. & M. Co. v. Cummings*, 5 Wash. 206.

An award made without hearing the parties is void: See 1 Remington's Digest, p. 265, § 8; *Van Hook v. Burns*, 10 Wash. 22; *Brown's Executors v. Farnandis*, 27 Wash. 232; *McDonald v. Lewis*, 18 Wash. 300.

Where an agreement for an arbitration expressly limits the time within which the award is to be made, the power of the arbitrators expires at that time: *Jordan v. Lobe*, 34 Wash. 42.

§ 423. (5105.) Compensation of Arbitrators—Penalty.

The arbitrators chosen under the provisions of this chapter shall each be allowed three dollars per day, to be taxed with other costs of suit, but if either party fail to appear on the day agreed upon for the arbitrators to meet, said party shall be liable for all costs accruing that day, unless his absence was unavoidable, and shall be so established to the satisfaction of said arbitrators. And any arbitrator failing to attend on the day appointed, unless delayed by sickness or unavoidable accident, shall forfeit and pay the sum of five dollars to the school fund of the county, to be recovered by action before a justice of the peace, in the name of the county commissioners of the county. [Cf. L. '60, p. 324, § 4; L. '69, p. 65, § 269; Cd. '81, § 267; 2 H. C., § 427.]

§ 424. (5106.) Exceptions to Award.

The party against whom an award may be made may except in writing thereto for either of the following causes:—

1. That the arbitrators or umpire misbehaved themselves in the case;
2. That they committed an error in fact or law;
3. That the award was procured by corruption or other undue means. [L. '60, p. 324, § 5; Cd. '81, § 268; 2 H. C., § 428.]

Cited in 5 Wash. 207-211; 13 Wash. 355, 356.

If the award substantially complies with the law, it should not be disturbed for

mere technical defects: *Bachelor v. Wallace*, 1 W. T. 107.

When the terms of submission authorize a majority of the three arbitrators to make

a finding, it is sufficient if made by two; although but two signed the findings: *Id.* and when all three appear to have been See, also, *Jordan v. Lobe*, 34 Wash. 42; sworn it will be presumed that all acted, *McDonald v. Lewis*, 18 Wash. 300.

§ 425. (5107.) Proceedings of Court on Such Exceptions.

If upon exceptions filed it shall appear to the said superior court that the arbitrators have committed error in fact or law, the court may refer the cause back to said arbitrators, directing the amendment of said award forthwith, returnable to said court, and on the failure so to correct said proceedings, the court shall be possessed of the case and proceed to its determination. [Cf. L. '60, p. 325, § 6; Cd. '81, § 269; L. '91, p. 105, § 2; 2 H. C., § 429.]

See supra, § 422, and notes, conducting arbitrations.

Cited in 5 Wash. 207-211; 13 Wash. 355, 356.

The only power of the superior court, under this section, upon the hearing of exceptions to an award is to refer the cause

back to the arbitrators for amendment in case of error in fact or law, or to confirm the award, as made; with the merits of the controversy the court has nothing to do: *School Dist. v. Sage*, 13 Wash. 352.

§ 426. (5108.) Powers of Arbitrators.

Arbitrators, or a majority of them, shall have power,—

1. To compel the attendance of witnesses duly notified by either party, and to enforce from either party the production of all such books, papers, and documents as they may deem material to the cause;

2. To administer oaths or affirmations to witnesses;

3. To adjourn their meetings from day to day, or for a longer time, and also from place to place, if they think proper;

4. To decide both the law and the fact that may be involved in the cause submitted to them. [L. '60, p. 325, § 7; Cd. '81, § 270; 2 H. C., § 430.]

Cited in 13 Wash. 355, 356.

Under this section, providing that arbitrators shall have power to decide both the law and the fact involved in the cause submitted to them, and there being no provision made for the preservation of the evidence received by them, the courts cannot sustain an exception to an award on the ground that the arbitrators committed error in fact or in law, unless such error appears upon the face of the award, or in some paper delivered with it: *School Dist. v. Sage*, 13 Wash. 352.

An award by arbitrators, when fairly and honestly made upon due consideration of all the evidence before them, is conclusive and binding upon the parties: *Id.*

As to matters of law, arbitrators are not bound in all cases to follow the strict rules of law governing courts, unless restricted

by the agreement to submit, but may decide in accordance with their views of the equitable rights of the parties: *Id.*

An award will not be set aside on account of error in law, even where arbitrators are required to decide according to the strict rules of law, if the error complained of is not plain, or if the point of law is a doubtful one: *Id.*

An award of an arbitrator pursuant to an agreement of submission providing that the award shall in all things be faithfully "kept and observed" is final, and cannot be reviewed by the courts in the absence of any showing that the arbitrator was guilty of misconduct or corruption: *Skagit County v. Trowbridge*, 25 Wash. 140.

Practice as to awards of arbitrators stated: *Tacoma R. & M. Co. v. Cummings*, 5 Wash. 206, 208-210.

§ 427. (5109.) Rules of Evidence.

The laws in force in this state relating to evidence and the manner of procuring the attendance of witnesses shall govern in arbitrations. [L. '60, p. 325, § 8; Cd. '81, § 271; 2 H. C., § 431.]

§ 428. (5110.) Arbitrators may Punish Contempts.

The law governing proceedings for contempt, in the trial of cases before justices of the peace, so far as the same may be applicable, shall apply to the

proceedings before arbitrators. [L. '60, p. 325, § 9; Cd. '81, § 272; 2 H. C., § 432.]

See *infra*, §§ 1891-1897, contempt before justices of the peace.

§ 429. (5111.) Costs Taxed Against Losing Party.

The costs of witnesses, and other fees in the case, shall be taxed against the losing party; said fees shall be indorsed upon the award, and when said award is affirmed as the judgment of the superior court, execution shall issue therefor as for costs in civil actions. [L. '60, p. 325, § 10; Cd. '81, § 273; 2 H. C., § 436.]

§ 430. (5112.) Award, When Affirmed, has Force of a Judgment.

Such award, when so affirmed, shall be in all respects like any other judgment of the superior court, and a transcript of such judgment, or execution issued thereon, recorded in the county auditor's [clerk's] office in the same manner as other judgments, shall be a lien upon real estate in said county. [L. '60, p. 325, § 11; Cd. '81, § 274; 2 H. C., § 434.]

See *supra*, §§ 404-407, judgments in general.

See notes to § 426, *supra*.

See *infra*, § 445, liens of judgments of superior court.

As to conclusiveness of adjudication, see *dorf Const. Co. v. Western Am. Co.*, 27 1 Remington's Digest, p. 267, § 16; *Skagit Wash. 31; School District v. Sage*, 13 Wash. County v. Trowbridge, 26 Wash. 140; *Zin-* 352.

CHAPTER XIV.

MANNER OF TAKING AND ENTERING JUDGMENTS.

§ 431. (5115.*) Time of Entering Judgment.

When a trial by jury has been had, judgment shall be entered by the clerk immediately in conformity to the verdict, and a transcript of said judgment may be immediately filed in the office of the clerk of the superior court of any other county in the state in the manner provided by law: Provided, however, that if a motion for a new trial shall be filed, execution shall not be issued upon said judgment until said motion shall be determined: And provided, further, that the granting of a motion for a new trial shall immediately operate as the vacation and setting aside of said judgment. [L. '03, p. 285, § 1. Cf. L. '54, p. 173, § 229; Cd. '81, § 301; L. '91, p. 76, § 1; 2 H. C., § 435.]

See *supra*, § 18, nonjudicial days.

See *supra*, § 363, verdict in actions for specific personal property.

See *supra*, § 365, and note, special findings.

See *supra*, § 402, motion for new trial.

See *supra*, §§ 404-407, judgments in general.

See *supra*, § 408, judgment of nonsuit.

See *supra*, § 412, judgment by default.

See *supra*, § 413 et seq., judgment by confession.

See *infra*, § 435, when and what must be entered.

See *infra*, § 464, vacation or modification of judgments.

Cited in 11 Wash. 413; 26 Wash. 228; 35 Wash. 66; 36 Wash. 324; 35 Wash. 537; 37 Wash. 485; 49 Wash. 303, 304.

As to entry, record and docketing of judgments, see 2 Remington's Digest, pp. 1593-1596, §§ 69-82.

A plaintiff cannot take judgment for more than his complaint shows that he is entitled to under the law: *King Co. v. Ferry*, 5 Wash. 536, 557.

The existence of a judgment, though not entered in the court's journal as by statute

contemplated, nor bearing the file-marks of the clerk, may be established by competent proof after the death of the judge rendering it: *Eakin v. McCraith*, 2 W. T. 112.

The clerk of the court being the custodian of its records, according to the statutes, a judgment record offered in evidence, certified by the clerk, is sufficient without any certificate of the judge that the clerk is the custodian of the records: *Bignold v. Carr*, 24 Wash. 413.

As to signature, see 2 Remington's Digest, p. 1595, § 79.

The signature of the judge to the journal entry of the judgment entry offered in evidence is not necessary to make it valid: *Richie v. Carpenter*, 2 Wash. 512, 26 Am. St. Rep. 877; *Ainsworth v. Territory*, 3 W. T. 270. Judgment may properly be signed on day it is rendered and notice of application is not necessary: See *White Crest Canning Co. v. Sims*, 30 Wash. 375; *Brooks v. James*, 16 Wash. 335; *Fisher v. Puget Sound Brick etc. Co.*, 34 Wash. 578. Failure to enter judgment against appellant immediately after the rendition of a verdict, and that it was not signed until after denial of a new trial, are mere irregularities, and harmless error when no prejudice appears: *Schultz v. Simmons Fur. Co.*, 46 Wash. 555. See, also, *Rauh v. Scholl*, 19 Wash. 30; *Harris v. Fidalgo Mill Co.*, 38 Wash. 169.

Failure to enter judgment immediately after return of verdict is not ground for reversal: See *Harris v. Fidalgo Mill Co.*, 38 Wash. 169.

A judgment entered by the clerk immediately upon rendition of the verdict, pursuant to this section, is not void because the fees required by § 497, *infra*, were not collected by the clerk; and failure to collect the fees does not affect the finality of the judgment for the purposes of appeal: *Chilcott v. Globe Nav. Co.*, 49 Wash. 302.

As to premature entry and entry *nunc pro tunc*, see 2 Remington's Digest, p. 1594, §§ 71, 72.

The premature entry of a judgment upon the verdict of a jury before notice of a new trial could be interposed, is not ground for vacating the judgment, when the motion for a new trial has, nevertheless, been given a full hearing and decided on its merits: *Port Townsend Nat. Bank v. Weymouth*, 11 Wash. 412; *Kinkade v. Witherop*, 29 Wash. 10.

Although a judgment may not be entered within the time provided by law, it is not thereby rendered void: *Brown v. Porter*, 7 Wash. 327; *West Phil. etc. Trust Co. v. Olympia*, 19 Wash. 150; *Quareles v. Seattle*, 26 Wash. 226; *State ex rel. Brown v. Brown*, 31 Wash. 397.

The district court has no jurisdiction, even with the consent of parties, to enter as of a past term a decree rendered at chambers in vacation: *P. S. A. Co. v. Pierce Co.*, 1 W. T. 75.

Judgments *nunc pro tunc* are only allowed in furtherance of justice, never to work injustice: *Hays v. Miller*, 1 W. T. 143; *Schulze v. Oregon R. & Nav. Co.*, 41 Wash. 614.

Where the record fails to show that an order made in vacation, and directing a judgment to be entered *nunc pro tunc*, was within the statute, such judgment then directed to be entered cannot be regarded as relating back to a prior date: *Hale v. Finch*, 1 W. T. 17. But see *Barthrop v. Tucker*, 29 Wash. 666.

Failure to decide a case within ninety days after its submission does not render the judgment void: See *Demaris v. Barker*, 33 Wash. 200; *Moylan v. Moylan*, 49 Wash. 341.

Entry of judgment is to be distinguished from rendition thereof: See *Quareles v. Seattle*, 26 Wash. 226; *Sears v. Kilbourne*, 28 Wash. 194; *Barthrop v. Tucker*, 29 Wash. 666; *State ex rel. Brown v. Brown*, 31 Wash. 397.

§ 433. (5117.) Judgment in Case of Setoff.

If a setoff established at the trial exceed the plaintiff's demand so established, judgment for the defendant shall be given for the excess; or if it appear that the defendant is entitled to any [other] affirmative relief, judgment shall be given accordingly. [L. '54, p. 173, § 231; Cd. '81, § 303; 2 H. C., § 437.]

See *supra*, §§ 269-272, judgment in case of setoff.

§ 434. (5118.) Judgment in Actions to Recover Personal Property.

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same. [L. '54, p. 173, § 232; Cd. '81, § 304; 2 H. C., § 438.]

See supra, § 363, verdict in actions for specific personal property.

See infra, § 707, and notes, action of replevin.

See infra, § 573 et seq., adverse claim to property levied on.

Cited in 8 Wash. 636; 10 Wash. 227; 22 Wash. 309.

As to judgment in actions of replevin, see 2 Remington's Digest, pp. 2508, 2509, §§ 44-51; Bancroft-Whitney Co. v. Gowan, 24 Wash. 66; Dow v. Dempsey, 21 Wash. 86; Hall v. Law Guarantee & T. Soc., 22 Wash. 305; Eidson v. Woolery, 10 Wash. 225; Kehoe v. McConaghy, 29 Wash. 175; Harvey v. Ivory, 35 Wash. 397.

No authority can be found in this section for entering any other judgment than one for the return of the property or, in case

return cannot be had, for its value, and under its provision such judgment can only be rendered against plaintiff or defendant in the action, and there is no authority for entering judgment against sureties in the bond given to secure possession: Eidson v. Woolery, 10 Wash. 225, 227.

In an action of replevin judgment in favor of plaintiff should be for possession of the property in controversy, or in case delivery cannot be had, for the value thereof, with damages for the detention: National Bank v. Meerwaldt, 8 Wash. 630.

§ 435. (5119.) Where and What must be Entered.

All judgments shall be entered by the clerk, subject to the direction of the court, in the journal, and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action. [L. '69, p. 75, § 307; Cd. '81, § 305; 2 H. C., § 439.]

See supra, § 431, and notes, when judgment shall be entered.

Cited in 26 Wash. 228; 31 Wash. 402.

The existence of a judgment, though not entered in the court's journal as contemplated by statute, nor having the file-mark of the clerk, may be established by competent proof after the death of the judge rendering it: Eakin v. McCraith, 2 W. T. 112.

A clerical error of the county clerk in recording a judgment by filling up a blank for the date six days later than the filing date is immaterial, as the date of the judgment was the date of its filing: Warner v. Miner, 41 Wash. 98.

An order does not become final until entered: See State ex rel. Brown v. Brown, 31 Wash. 397.

It is not necessary for the validity of a decree or judgment that it be served upon any party to a cause after it has been filed: See Western Security Co. v. Lafleur, 17 Wash. 406; Fisher v. Puget Sound Brick Co., 34 Wash. 578.

An indorsement of "O. K." will be considered an assent as to form only where exceptions were taken: See Humphries v. Sorenson, 33 Wash. 563.

§ 436. (5120.) Summons. After Judgment, to Joint Debtor not Originally Served.

When a judgment is recorded [entered] against one or more of several persons jointly indebted upon an obligation by proceeding as provided in section 236, such defendants who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons. [L. '77, p. 64, § 318; Cd. '81, § 314; 2 H. C., § 440.]

Section 13, p. 411 of Laws 1893, being § 236 of this code, is inserted instead of § 177 of 2 Hill's Code, the latter being considered repealed by the former law.

See supra, § 192, persons severally liable, how sued.

See supra, § 236, proceedings against defendants severally liable.

See supra, § 407, judgments against several defendants.

See supra, § 415, confession of judgment by joint debtors.

§ 437. (5121.) What Such Summons must Contain.

The summons as provided in the last section must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner and returnable within the same

time as the original summons. It is not necessary to file a new complaint. [L. '77, p. 64, § 319; Cd. '81, § 315; 2 H. C., § 441.]

See supra, § 245, manner of making service of summons.
See references under last section.

§ 438. (5122.) Must be Supported by Affidavit.

The summons must be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon. [L. '77, p. 65, § 320; Cd. '81, § 316; 2 H. C., § 442.]

§ 439. (5123.) Defenses in Such Case.

Upon the service of such summons and affidavit, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently to the taking of the judgment, or he may deny his liability on the obligation upon which the judgment was rendered, except a discharge from such liability by the statute of limitations. [L. '77, p. 65, § 321; Cd. '81, § 317; 2 H. C., § 443.]

§ 440. (5124.) What Constitute Pleadings in Such Case.

If the defendant in his answer deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was rendered, a copy of the original complaint and judgment, the summons with the affidavit annexed, and the answer constitute such written allegations. [L. '77, p. 65, § 322; Cd. '81, § 318; 2 H. C., § 444.]

§ 441. (5125.) Trial and Entry in Such Cases.

The issue formed may be tried as in other cases, but when the defendant denies in his answer any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must not exceed the amount remaining unsatisfied on such original judgment, with interest thereon. [L. '77, p. 65, § 323; Cd. '81, § 319; 2 H. C., § 445.]

See supra, § 361, and notes, receiving verdict and discharging jury.

Where plaintiff obtained a verdict for a certain sum, "with legal interest," and the court gave judgment for interest from date sixty days after the making of the con-

tract, the judgment is erroneous: *Western M. & L. Co. v. Blanchard*, 1 Wash. 230, 235; *Meeker v. Gardella*, 1 Wash. 139.

§ 442. (5126.) Judgment-roll—What Constitutes.

Immediately after entering the judgment, the clerk shall attach the following papers in the case, which shall constitute the judgment-roll:—

1. If the complaint has not been answered by any defendant, and no pleading has been filed by an intervener, he shall attach together, in the order of their filing, issuing, and entry, the complaint, summons, and proof of service, and a copy of the entry of judgment;

2. In all other cases he shall attach together in like manner the summons and proof of service, the pleadings, bill of exceptions, all orders relating to change of parties, together with a copy of the entry of judgment, and all other journal entries or orders in any way involving the merits and necessarily af-

fecting the judgment. [Cf. L. '54, p. 173, § 233; Cd. '81, § 306; L. '91, p. 77, § 3; 2 H. C., § 446.]

§ 443. (5127.) How Judgment-roll Indorsed and Preserved.

In all cases, the clerk shall attach upon the outside of the judgment-roll a blank sheet of paper, upon which he shall indorse the name of the court, the title of the action, for whom judgment was given, and the amount or nature thereof and the date of its entry. [L. '91, p. 77, § 4; 2 H. C., § 447.]

CHAPTER XV.

JUDGMENT LIENS.

§ 444. (5131.) Execution Docket.

Every clerk shall keep in his office a well-bound book, to be called the execution docket, which shall be a public record, and open during the usual business hours to all persons desirous of inspecting it. [L. '54, p. 173, § 234; Cd. '81, § 307; 2 H. C., § 448.]

See supra, § 75, books to be kept by clerk.

§ 445. (5132.) Judgment Lien.

The real estate of any judgment debtor and such as he may acquire, shall be held and bound to satisfy any judgment of the district or circuit court of the United States, if rendered in this state, or of the superior or supreme court, or any judgment of a justice of the peace for the period of five years from the day on which said judgment was rendered, and such judgments shall be a lien thereupon to commence as follows: Judgments of the superior court of the county in which real estate of the judgment debtor is situated, from the date of the entry thereof; judgments of the district or circuit courts of the United States, if rendered in this state; judgments of the supreme court; judgments of the superior court of any county other than the county in which said judgment was rendered, and judgments of a justice of the peace, from the time of the filing and indexing of a duly certified transcript or abstract of such judgments, as provided by this chapter, with the county clerk of the county in which said real estate is situated. [Cf. L. '54, p. 175, § 240; L. '57, p. 11, § 15; L. '60, p. 51, § 234; L. '69, p. 78, § 317; Cd. '81, § 321; 2 H. C., § 460; L. '93, p. 65, § 1; see also 2 H. C., §§ 449, 450, 455, 456, 457, 460, and L. '93, p. 67, § 9.]

See supra, § 75, what books clerk shall keep.

See infra, § 446, clerk's record index.

See infra, § 453, entry of abstract or transcript of judgment.

See infra, § 454, satisfaction of judgment.

See infra, § 457, interest on judgments.

See infra, § 458, appeals from judgments.

See infra, §§ 459, 460, revival of judgments.

See infra, § 469, existing liens not disturbed by modification of judgments.

See infra, § 476, who entitled to costs.

See infra, § 495, retaxation of costs.

See infra, § 510, execution to enforce judgment.

See infra, § 2187, judgment liens in criminal cases.

See infra, § 8789, certified copies of final judgments, auditor to record, when.

Cited in 20 Wash. 52; 21 Wash. 319; 32 Wash. 88; 33 Wash. 570; 45 Wash. 4, 22 Wash. 240; 23 Wash. 546; 26 Wash. 8; 50 Wash. 506.
75; 28 Wash. 196; 29 Wash. 255, 665; As to the lien of judgments, see 2 Remington's Digest, pp. 1630-1633, §§ 237-251.

Under § 449, 2 Hill's Code, the filing in the county auditor's office of a transcript of a judgment, instead of the abstract thereof required to be entered by the clerk in the execution docket, is all that is necessary to create a lien upon the judgment debtor's land in the county; and the requirement that the names of the parties shall be set forth at length is merely a requirement that the names shall be stated as shown by the judgment entry: *Lamey v. Coffman*, 11 Wash. 301; and the fact that the amount of costs is not shown in the transcript will not defeat the lien of the principal judgment itself: *Id.* See, also, *Murray v. Briggs*, 29 Wash. 245; *Fuller & Co. v. Hull*, 19 Wash. 400.

The obtaining of a general judgment lien held not to cut off the subsequent selection of a homestead at any time before sale to satisfy the judgment: *McMillan v. Mau*, 1 Wash. 26; *Philbrick v. Andrews*, 8 Wash. 7.

Judgment liens are voidable where a judgment debtor in failing circumstances confesses judgment in favor of certain creditors, who have knowledge of his condition, after the intention to make an assignment had been fully formed in his mind, and follows the confession with an assignment for the benefit of creditors: *Hyman v. Barmon*, 6 Wash. 516.

In an action to foreclose a mortgage on certain real estate, to which one of the defendants interposes the defense that he has a paramount interest by reason of a judgment lien, against a leasehold interest in the land, evidence is admissible to show that the actual interest of the judgment interest in the lands is less than it is made to appear by the county records: *Book v. Willey*, 8 Wash. 267.

The judgment lien provided by § 460, 2 Hill's Code, as attaching to all the real estate of the judgment debtor in any county after the filing of a transcript thereof in

the office of the county auditor, will not attach to lands conveyed by the judgment debtor to his wife, prior to the rendition of judgment, although the judgment was for a community debt; and the subsequent conveyance of such lands, for value prior to any proceedings taken by the judgment creditor attacking the transfer from husband to wife, is sufficient to pass the land free from all claims of the judgment creditor: *Sawtelle v. Weymouth*, 14 Wash. 21. See, also, *Preston-Parton Mill Co. v. Dexter Horton & Co.*, 22 Wash. 236.

As to commencement of lien, see 2 Remington's Digest, p. 1631, § 241; *Hays v. Miller*, 1 W. T. 143; *Shumway v. Orchard*, 12 Wash. 104; *Fuller & Co. v. Hall*, 19 Wash. 400; *Quareles v. Seattle*, 26 Wash. 226; *State ex rel. Brown v. Brown*, 31 Wash. 397; *Whitworth v. McKee*, 32 Wash. 83.

As to property affected and extent of lien, see 2 Remington's Digest, p. 1631, §§ 243, 244; *Traders' Nat. Bank of Spokane v. Schorr*, 20 Wash. 1; *Book v. Willey*, 8 Wash. 267; *Dawson v. McCarty*, 21 Wash. 314; *Phoenix Min. etc. Co. v. Scott*, 20 Wash. 48; *Woodhurst v. Cramer*, 29 Wash. 40.

Absence from the state by the judgment debtor does not extend the lien of the judgment, which under this section expires five years after the date of the rendition of the judgment: *Hemen v. Rinehart*, 45 Wash. 1.

As to priorities between judgments or between judgments and conveyances, see 2 Remington's Digest, p. 1632, §§ 246, 247; *Mayer v. Morgan*, 26 Wash. 71; *Goetzinger v. Rosenfeld*, 16 Wash. 392; *Dawson v. McCarty*, 21 Wash. 314; *Dow v. Ballard*, 28 Wash. 87; *Boyer v. Robinson*, 26 Wash. 118; *Hall v. Law Guar. etc. Soc.*, 22 Wash. 306. See, also, *Young v. Davis*, 50 Wash. 504.

§ 446. (5133.) Clerk's Record Index.

It shall be the duty of the county clerk to keep a proper record index, both direct and inverse, of any and all judgments, abstracts or transcripts of judgments in his office, and all renewals thereof, and such index shall refer to each party against whom the judgment is rendered or whose property is affected thereby, [which index] together with the records of said judgments, shall be open to public inspection during regular office hours. [Cf. 2 H. C., § 452; L. '93, p. 66, § 6.]

See references to § 445, *supra*.

§ 447. (5133a.) Assignment or Satisfaction, Filing—Notice.

Any assignment or satisfaction of judgment, or any certified transcript of such assignment or satisfaction, may be recorded in any county auditor's office, or county clerk's office, in which the judgment is of record, and from the time of filing for record shall be notice of such assignment or satisfaction. [L. '97, p. 10, § 1.]

Cited in 34 Wash. 514. Lewis v. Third St. & Suburban R. Co., 26 Wash. 28; Sturgiss v. Dart, 23 Wash. 244.
 Operation and effect of assignment of judgment and rights of assignee: See

§ 448. (5134.) Entries in Execution Docket.

He shall leave space on the same page, if practicable, with each case, in which he shall enter, in the order in which they occur, all the proceedings subsequent to the judgment in said case until its final satisfaction, including the time when and to what county the execution is issued, and when returned, and the return or the substance thereof. When the execution is levied on personal property which is returned unsold, the entry shall be: "Levied (noting the date) on property not sold." When any sheriff shall furnish the clerk with a copy of any levy upon real estate on any judgment the minutes of which are entered in his execution docket, the entry shall be: "Levied upon real estate," noting the date, and shall refer to the page upon the book of levies where the same is entered, as is hereinafter provided. When any execution issued to any other county is returned levied upon real estate in such county, the entry in the docket shall be: "Levied on real estate of —, in — county," noting the date, county, and defendant whose estate is levied upon, and when the money is made, or any part thereof, the amount and time when made shall be entered; also, when a writ of error has been taken, or the judgment is appealed, modified, discharged, or in any manner satisfied, the facts in respect thereto shall be entered. The parties interested may also assign or discharge such judgment on such execution docket. When the judgment is fully satisfied in any way, the clerk shall write the word "satisfied," in large letters across the face of the entry of such judgment. [L. '54, p. 174, § 237; Cd. '81, § 310; 2 H. C., § 451.]

See next section.

See supra, § 75, duties of clerks.

See supra, § 444, execution docket.

See infra, § 454, entry of satisfaction.

§ 449. (5135.) Book of Levies.

The clerk shall also keep in his office a well-bound book, to be called a book of levies, which shall be a public record, and open during the usual business hours to all persons desirous of inspecting the same, in which he shall enter all levies upon real estate in his county, when delivered to him by the sheriff, as provided by law. An alphabetical index shall be prefixed to the book of levies, containing the names of all persons upon whose real estate such levies have been made, and when such levies are discharged in any manner, an entry thereof shall be made in the margin of the book of levies where the levy is recorded. [L. '54, p. 174, § 239; Cd. '81, § 313; 2 H. C., § 454.]

§ 450. (5136.) Transcripts from Justices' Courts.

Any judgment of any justice of the peace of any county in this state, shall become a lien upon any real estate of the judgment debtor, and such as he may acquire in that county wherein said judgment was rendered by the filing of a duly certified transcript from the docket of said justice in the county clerk's office of said county wherein said judgment was rendered, and upon such filing said judgment shall become to all intents and purposes a judgment of said superior court of said county, said judgment of said justice of the peace shall become a lien upon the real estate of the judgment debtor and such as he

may acquire in any county other than that in which the same was rendered by the filing in the office of the county clerk of that county a duly certified abstract of the record of said judgment, from the office of the county clerk of that county in which the certified transcript of the said judgment of said justice of the peace was originally filed. [L. '93, p. 65, § 2.]

See references to § 445, *supra*.

See *infra*, § 1878, transcript to other justices in other counties, etc.

Cited in 23 Wash. 545; 31 Wash. 363. See *Grant v. Cole*, 23 Wash. 542.

§ 451. (5137.) Abstract of Judgment, Contents of.

An abstract of a judgment as provided for in this chapter shall contain:—

1. The name of the party or parties in whose favor the judgment was rendered;

2. The name of the party or parties against whom the judgment was rendered;

3. The date of the rendition of the judgment;

4. The amount for which the judgment was rendered, and in the following manner, viz.: Principal, \$——; interest, \$——; costs, \$——; total, \$——. [L. '93, p. 66, § 3.]

See references to § 445, *supra*.

Cited in 23 Wash. 545.

§ 452. (5138.) Transcript of Justice's Docket.

A transcript of a judgment of a justice of the peace provided for by this chapter shall contain an exact copy of the judgment from the justice's docket. [L. '93, p. 66, § 4.]

See references to § 445, *supra*.

See *infra*, § 1770, justice's docket, contents of.

§ 453. (5139.) Entry of Abstract or Transcript of Judgment.

It shall be the duty of the county clerk to enter in his execution docket any duly certified abstract or transcript of any judgment of any of the courts mentioned in this chapter, and he shall index the same in the same manner as judgments originally rendered in the superior court of the county of which he is clerk. [L. '93, p. 66, § 5.]

See references to § 445, *supra*.

Cited in 23 Wash. 545.

§ 454. (5140.) Satisfaction of Judgments.

When any judgment shall be paid and satisfied, the satisfaction shall be noted upon the records thereof in the execution docket as satisfied, giving the date of such satisfaction, and when the same shall be signed by the judgment creditor or his attorney the lien thereof against said real estate shall be satisfied and discharged. [L. '93, p. 66, § 7.]

See references to § 445, *supra*.

See *supra*, § 448, as to satisfaction of judgments.

See *infra*, § 459, revival of judgments.

See *infra*, § 889, satisfaction of judgments against the state.

See *infra*, §§ 978, 979, protection to sureties and codefendants in satisfying judgments.

Cited in 23 Wash. 545.

As to payment, satisfaction and discharge of judgments, see 2 Remington's Digest, p. 1637, §§ 268 271.

On an application by defendants to the district court for an order citing plaintiff to show cause why the judgment against the defendant should not be satisfied and

discharged of record, an order made by the court that the judgment be modified and reformed by striking out and disallowing the attorney's fee included therein was erroneous for the reason that it was not within the scope of the original order to show cause, and a bare exception to such final order was, under the circumstances, sufficient: *Hawks v. Votaw*, 1 Wash. 70.

As to mode and sufficiency of payment, see *Brown v. Kern*, 21 Wash. 211; *Standard Furniture Co. v. Van Alstine*, 31 Wash. 499.

Evidence as to payment: See *Edmunds v. Black*, 15 Wash. 73; *Gaffney v. Megrath*, 23 Wash. 476.

Operation and effect of satisfaction: See *Murray v. Meade*, 5 Wash. 632; *Hanna v. Savage*, 21 Wash. 555.

§ 455. Satisfaction of Judgments of Federal Court—Penalty for Failure.

When the amount due on any judgment is paid off or satisfied in full, the plaintiff, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the judgment, or by the execution of an instrument in writing referring to the judgment, acknowledged and filed in the office of the auditor or recorder in every county where the judgment is a lien. If he fail to do so within sixty days after having been requested in writing so to do, he shall forfeit to the defendant the sum of fifty dollars. [L. '90, p. 98, § 3; 2 H. C., § 458.]

"Any judgment": This section can apply only to judgments of the United States courts. The title of the act is "An act relating to the filing and recording of transcripts of judgments rendered in this state by the district or circuit courts of the United States."

§ 456. (5141.) Existing Liens Continued.

All judgments which are liens upon real estate by reason of their having been filed in any county auditor's office, shall continue to be liens thereupon in the manner now provided by law. [L. '93, p. 67, § 8.]

See references to § 445, *supra*.
See notes to last section.

§ 457. (5142.*) Interest on Judgments.

Judgments hereafter rendered founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in such contracts, not in any case, however, to exceed ten per cent per annum: Provided, That said interest rate is set forth in the judgment; and all other judgments shall bear interest at the rate of six per centum per annum from date of entry thereof. [L. '99, p. 129, § 6. Cf. 2 H. C., § 459; L. '95, p. 350, § 4.]

See *infra*, § 6250 et seq., legal rates of interest.

Cited in 23 Wash. 417.

Judgment on a promissory note, payable on demand, with "interest at three per cent per month," cannot bear a higher than the

legal rate: *Roder v. Brown*, 1 W. T. 112. A judgment, given in a condemnation suit, draws interest at the legal rate: See *State ex rel. Donofrio v. Humes*, 34 Wash. 347.

§ 458. (5143.) Appeal does not Suspend Lien.

An appeal to the supreme court or stay of execution shall not affect any existing lien; and in all cases of an appeal the date of final judgment in the supreme court shall be the time from which said five years shall commence to run. Personal property shall only be held from the time it is actually levied upon. [Cf. L. '54, p. 175, §§ 240, 241; L. '60, p. 79, § 319; Cd. '81, § 322; 2 H. C., § 461.]

Cited in 4 Wash. 762; 28 Wash. 196; 32 Wash. 88.

CHAPTER XVI.

REVIVAL OF JUDGMENTS.

§ 459. (5148.) Judgment Lien Expires When.

After the expiration of six years from the rendition of any judgment it shall cease to be a lien or charge against the estate or person of the judgment debtor. [L. '97, p. 52, § 1.]

This and the next two sections are void as to existing contracts: See note to § 462, *infra*.

For former laws see: L. '54, pp. 175, 176, §§ 242, 243; L. '69, p. 79, §§ 318, 320; Cd. '81, § 323; 2 H. C., § 462.

See *supra*, § 157, and notes, limitation of actions.

See *supra*, § 445, duration of judgment liens.

See *infra*, § 510, when execution may issue.

Cited in 19 Wash. 207, 219; 21 Wash. 400; 23 Wash. 411; 24 Wash. 48, 485; 38 Wash. 627, 631; 39 Wash. 175, 219, 588; 44 Wash. 159, 516.

As to duration of lien, see 2 Remington's Digest, p. 1633, § 251; Brier v. Traders'

Nat. Bank, 24 Wash. 695; Hardin v. Day, 29 Wash. 664; Packwood v. Briggs, 25 Wash. 530; Hewitt v. Root, 31 Wash. 312; Dalgardno v. Barthrop, 40 Wash. 191.

§ 460. (5149.) Proceedings for Extension Denied.

No suit, action, or other proceedings shall ever be had on any judgment rendered in the state of Washington by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment. [L. '97, p. 52, § 2.]

See note to § 462, *infra*.

Cited in 37 Wash. 270; 39 Wash. 219; 50 Wash. 488, 489.

§ 461. (5150.) Exceptions.

When the lien of any judgment, as specified in section 459, has run six years, or its duration will be less than one year by reason of this act, then the lien of such judgment shall continue for one year from and after the taking effect of this act. [L. '97, p. 52, § 3.]

"This act" took effect June 9, 1897.

Cited in 21 Wash. 400; 37 Wash. 270.

§ 462. When Judgments may be Revived—Procedure.

If any judgment shall remain unsatisfied in whole or in part, at the end of five years after the date of its rendition, the lien thereof may be revived and continued, as in this section provided:

(1) The judgment creditor, his assignee, or the party to whom said judgment is due and payable, shall file a motion with the clerk of the court where judgment is entered, to revive and continue the lien of the same, with leave to issue an execution. The motion shall state the names of the parties to the judgment, the date of its entry, the amount claimed to be due thereon, or the particular property, of which the possession was thereby adjudged to such party, remaining undelivered. The motion shall be subscribed and verified in the same manner as an original complaint.

(2) At any time after filing such motion, the party may cause notice to be served on the judgment debtor in like manner and with like effect as a sum-

mons; said notice shall be attached to a copy of said motion, by the clerk of the court, and be served by the sheriff or other officer as an original summons. It shall cite the judgment debtor to appear and show cause why the said motion should not be allowed. The time in which the judgment debtor shall be required to appear, shall be the same as is prescribed for answer to a complaint, and the law applicable to service of a summons, shall apply to the service of such notice. In case the judgment debtor be dead, the notice may be served upon his legal representatives.

(3) The judgment debtor, or in case of his death, his representatives, may file an answer or demurrer to such motion within the time allowed by law to answer a complaint, alleging any defense to such motion which may exist. If no answer be filed within the time prescribed, the motion shall be allowed as of course. The moving party may demur or reply to the answer. The pleadings shall be subscribed and verified, and the proceedings concluded as in original actions.

(4) The word "representatives," in this section shall be deemed to include any or all of the persons in whose possession property of the judgment debtor may be which is liable to be taken and sold or delivered in satisfaction of the execution, and not otherwise.

(5) The order shall specify the amount due upon such unsatisfied judgment for which execution is to issue, or the particular property, possession of which is to be delivered; it shall be entered in the journal and docketed as a judgment, and a final record shall be made of the proceedings in the same manner as a judgment. [Cd. '81, § 323; 2 H. C., § 462.]

This and the next section were repealed by L. '97, p. 53, § 4, but are retained, as the repeal did not affect any existing contract obligations or judgments recovered thereon.

The proceedings authorized by this chapter to revive a judgment are not the commencement of an action; nor do the provisions of § 157, supra, limiting to six years the time in which an action may be commenced on a judgment or decree, apply to judgments rendered by the courts of this state: *Burns v. Conner*, 1 Wash. 6.

As to time for revival and limitations, see 2 Remington's Digest, p. 1636, §§ 265-267; *Denio v. Benham*, 24 Wash. 485; *Sears v. Kilbourne*, 28 Wash. 194; *Barthrop v. Tucker*, 29 Wash. 666; *Hayton v. Beason*, 31 Wash. 317; *Tacoma Nat. Bank v. Sprague*, 33 Wash. 285; *State ex rel. Quiney v. Collins*, 31 Wash. 564.

The appearance of a defendant to contest the revival of a judgment, void for want of service of process, does not waive service of process in the original action; and he cannot be required to answer the complaint upon entry of a decree setting aside the judgment: *Waterman v. Bash*, 46 Wash. 212.

In a proceeding to revive a judgment, the jurisdiction of the court may be attacked by answer and the same is a direct attack on the judgment: *Waterman v. Bash*, 46 Wash. 212.

This section does not prohibit actions on domestic judgments, which under § 157, supra, may be commenced within six years:

Lilly-Brackett Co. v. Sonnemann, 50 Wash. 487.

The legislature has power to reduce the time within which a proceeding may be commenced to revive an existing judgment, provided the right is not thereby arbitrarily and summarily cut off; since the same pertains only to the remedy and does not affect vested rights: *Gaffney v. Jones*, 44 Wash. 518.

A judgment upon a contract prior to the enactment of this section may be revived by a direct action at law brought thereon: *Meikle v. Cloquet*, 44 Wash. 513.

The act of 1897, which includes the three preceding sections, together with a repeal of this and the following section, is unconstitutional, so far as judgments on pre-existing contracts are concerned: See 2 Remington's Digest, pp. 1635, 1636, §§ 264-267; *Bettman v. Cowley*, 19 Wash. 207; *Palmer v. Laberee*, 23 Wash. 409; *Denio v. Benham*, 24 Wash. 485; *Raught v. Lewis*, 24 Wash. 47; *Williams v. Packard*, 39 Wash. 217; *Fischer v. Kittinger*, 39 Wash. 174; *Howard v. Ross*, 38 Wash. 627.

But is not void as to existing judgments founded in tort: See *Gaffney v. Jones*, 39 Wash. 587.

As to operation and effect of revival, see *Palmer v. Laberee*, 23 Wash. 409; *Brier v. Traders' Nat. Bank*, 24 Wash. 695.

§ 463. Proof for Revival—No Revival After Six Years.

Such motion shall not be granted unless it be established by oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied. The order of the court granting such leave shall operate as a revival of the judgment for the amount found due at the time of such revival, and the same shall be and continue a lien upon real estate of the judgment debtor for a period of five years from and after the date of such order, in like manner with the original judgment: Provided, that a transcript thereof shall, within twenty days, be filed in the office of the county auditor of the county where the lands lie of such judgment debtor, or said lien shall be suspended till such transcript be filed. Revived judgments shall bear the same interest and be in all respects similar to original judgments as to lien and enforcement of collection: Provided, however, that no judgment shall be revived or continued unless proceedings for such revival or continuance shall be commenced within six years after the date of its rendition: Provided further, that this act shall not apply to any judgment now in existence until one year from the time this act takes effect. [L. '91, p. 165, § 1; 2 H. C., § 463.]

See notes to last section.

CHAPTER XVII.

VACATION AND MODIFICATION OF JUDGMENTS.

§ 464. (5153.) Causes for Vacation or Modification of Judgments.

The superior court in which a judgment has been rendered, or by which or the judge of which a final order has been made, shall have power, after the term [time] at which such judgment or order was made, to vacate or modify such judgment or order:—

1. By granting a new trial for the cause, within the time and in the manner, and for any of the causes prescribed by the sections relating to new trials;
2. By a new trial granted in proceedings against defendant, served by publication only as prescribed in section 235;
3. For mistakes, neglect, or omission of the clerk, or irregularity in obtaining the judgment or order;
4. For fraud practiced by the successful party in obtaining the judgment or order;
5. For erroneous proceedings against a minor [or] person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;
6. For the death of one of the parties before the judgment in the action;
7. For unavoidable casualty or misfortune preventing the party from prosecuting or defending;
8. For error in a judgment shown by a minor, within twelve months after arriving at full age. [L. '75, p. 20, § 1; Cd. '81, § 436; 2 H. C., § 1393.]

See *supra*, § 235, relief in cases where personal service not had.

See *supra*, § 303, relief from judgments, etc.

See *supra*, § 398 et seq., new trials.

Cited in 5 Wash. 302; 7 Wash. 482; 8 Wash. 594; 10 Wash. 271, 311, 646, 675; 13 Wash. 675; 17 Wash. 357, 566; 21 Wash. 161, 433, 482, 639, 675; 22 Wash. 251, 499; 23 Wash. 247; 24 Wash. 98; 25 Wash. 470, 573, 655, 659, 670; 28 Wash. 128, 301; 31 Wash. 59; 32 Wash. 160, 174; 34 Wash. 307; 35 Wash. 115; 37 Wash. 437; 39 Wash. 680, 681; 43 Wash. 511; 45 Wash. 264; 48 Wash. 430; 50 Wash. 477; 52 Wash. 39.

See 2 Remington's Digest, pp. 1598-1607, §§ 94-133.

The provisions of this chapter are not applicable to criminal cases: *Thompson v. Territory*, 1 W. T. 547.

A motion to vacate and set aside a judgment is directed to the discretion of the trial court, and its action in passing thereon will not be reversed on appeal, unless the showing made therefor leaves no room for the exercise of discretion of the lower court: *Livesley v. O'Brien*, 6 Wash. 553. Upon the vacation of a judgment entered for want of prosecution, it is discretionary for the trial court to make the same conditional upon the payment of an attorney's fee in excess of the statutory fee for the trial of a cause without a jury: *Redding v. Puget Sound etc. Works*, 44 Wash. 200.

While the party seeking to have a judgment set aside must proceed with diligence, within the year allowed by § 467, the question of diligence, as well as the sufficiency of the showing, is addressed to the discretion of the lower court, and its action in granting a petition therefor will only be set aside when it appears that there is an abuse of such discretion: See 2 Remington's Digest, p. 1599, § 99; *Bozzie v. Vaglio*, 10 Wash. 270; *McDougal v. Walling*, 21 Wash. 478; *McCord v. McCord*, 24 Wash. 529; *Clein v. Wandschneider*, 14 Wash. 257; *State ex rel. Rucker v. Superior Court*, 18 Wash. 227; *Wilson v. Seattle Dry Dock etc. Co.*, 26 Wash. 297. See, also, *Roberts v. Shelton Southwestern R. R. Co.*, 21 Wash. 427; *Morrison v. Morrison*, 25 Wash. 467; *Williams v. Breen*, 25 Wash. 666; *Morrison v. Steenstra*, 45 Wash. 175.

A defect in the record, not materially affecting the merits, is not sufficient cause for setting aside a judgment: *Nesqually Mill Co. v. Taylor*, 1 W. T. 1.

Where substantial rights have been denied defendant an affidavit of merits is not required of him to have the judgment vacated: *Walla Walla P. & P. Co. v. Budd*, 2 W. T. 336, 339; *Hole v. Page*, 20 Wash. 208; *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431. See, also, *Titus v. Larsen*, 18 Wash. 145. The presumption of jurisdiction from the recital in a tax foreclosure judgment of due service of summons is not overcome by defects in the record: *Bock v. Sanders*, 46 Wash. 62.

An independent action or proceeding will not lie for the purpose of setting aside a judgment in a former suit between the same parties, when the action is based upon the error of the court in setting aside a verdict in such suit: *Davis v. Fields*, 9 Wash. 78.

But otherwise as to clerical errors: See *Long v. Eisenbeis*, 18 Wash. 423.

A motion to vacate a judgment under this section cannot be made for error of law: *Warren v. Hershberg*, 52 Wash. 38.

If a judgment erroneous, but not void, has been entered against a party, he

should either appeal or apply to the court in the manner and within the time prescribed by law to have it set aside. After the expiration of the time prescribed, the district judge has no power to vacate or modify the judgment: *Hawks v. Votaw*, 1 Wash. 70.

After the time fixed by law or the well-established practice, a judgment which is neither void on its face nor affected by fraud in its procurement, nor want of jurisdiction, stands for absolute verity; and neither the court which rendered nor the appellate court which has affirmed it has jurisdiction to vacate, modify or otherwise affect it: *Wolferman v. Bell*, 8 Wash. 140.

As to time for application, see 2 Remington's Digest, p. 1605, §§ 121, 122; *Denton v. Merchants' Nat. Bank*, 18 Wash. 387; *Boston Nat. Bank of Seattle v. Hammond*, 21 Wash. 158; *Scott v. Hanford*, 37 Wash. 5; *Twigg v. James*, 37 Wash. 434.

An action for the vacation of a judgment against a minor is barred if not brought within a year after the arrival of such minor at the age of majority: *Hill v. Lowman*, 15 Wash. 503. As to limitations on and laches in actions for vacation of judgment, see 2 Remington's Digest, p. 1609, § 142; *Long v. Eisenbeis*, 18 Wash. 423; *West Phila. Title & Trust Co. v. Olympia*, 19 Wash. 150; *Boston Nat. Bank of Seattle v. Hammond*, 21 Wash. 158; *Peyton v. Peyton*, 28 Wash. 278.

After the close of the next term of the district court, subsequent to the one in which the judgment was rendered, the court has no power to grant relief from such judgment: *Hancock v. Stewart*, 1 W. T. 323.

A judgment regularly entered will not be opened although entered by mistake, unless it appears from the motion therefor that it is wrongful or oppressive: *Northern Pac. R. Co. v. Black*, 3 Wash. 327; *Davis v. Fields*, supra; *Western Security Co. v. Lafuer*, 17 Wash. 406. See, also, *Land Mortgage Bank v. Nicholson*, 24 Wash. 258; *Chehalis County v. Ellingson*, 21 Wash. 638.

It is no ground for vacating a judgment that it was irregularly entered as a judgment at law in a suit in equity: *Tacoma L. & M. Co. v. Wolff*, 7 Wash. 478.

For defects in process, see 2 Remington's Digest, p. 1600, § 102; *Snider v. Bedere*, 39 Wash. 130; *Sellers v. Pacific Wrecking etc. Co.*, 34 Wash. 111; *Dane v. Daniel*, 28 Wash. 155.

If it is sought to secure the vacation of a judgment on the ground that it was rendered without proper service on defendant, and was based upon a promissory note which defendant never executed, the proceeding is governed by the provisions of this chapter and not by § 303, supra: *Wheeler v. Moore*, 10 Wash. 309.

Vacation on the ground of fraud: See 2 Remington's Digest, p. 1602, §§ 113-115; *Snohomish Land Co. v. Blood*, 40 Wash. 626; *McDougall v. Walling*, 21 Wash. 478; *Fried-*

man v. Manley, 21 Wash. 675; Morrison v. Steenstra, 45 Wash. 175; see, also, Hochkin v. Bussell, 46 Wash. 7.

A judgment will not be vacated or modified on the ground of fraud when the only basis for such allegation is the fact that plaintiff sought for and obtained a decree of foreclosure covering all the land described in the mortgage, although a certain portion of the land had been released by the mortgagee: State v. Superior Court, 8 Wash. 591.

Where a proceeding is instituted in the lower court, for the purpose of vacating and modifying a judgment of the supreme court on appeal, the question of the jurisdiction of the lower court is involved to the extent that the supreme court is authorized, by writ of prohibition, to review and prohibit such proceeding, when it would be an unwarranted interference with such judgment: State v. Superior Court, 8 Wash. 591.

A decree which vests one-half of the community property in the children of a testator is not affected by the setting aside of a subsequent unauthorized and illegal decree rendered in the same cause upon intervention proceedings: Mason v. McLean, 6 Wash. 31.

It is not error for a court, while refusing to vacate a judgment in a proceeding therefor, to modify the judgment as to the amount of costs taxed therein: Tacoma L. & M. Co. v. Wolff, supra; Shearer v. Buckley, 31 Wash. 370.

Vacation for error of law, etc.: See 2 Remington's Digest, p. 1600, §§ 106, 107; Kuhn v. Mason, 24 Wash. 94; In re Barker's Estate, 33 Wash. 79; Snohomish Land Co. v. Blood, 40 Wash. 626.

Error of law committed by the court in including attorney fees in a judgment rendered against a partnership, upon the confession of judgment by one of the partners upon a promissory note of the firm, cannot be corrected by petition to vacate the judgment, when no fraud has been practiced upon the court, but must be reached by appeal: Dickson v. Matheson, 12 Wash. 196.

A motion to vacate a judgment for irregularities or fraud under this section cannot be made more than two years after entry of the judgment without a showing of unavoidable casualty or misfortune preventing the party from defending and diligence in making his motion: Warren v. Hershberg, 52 Wash. 38.

As to irregularities in proceedings before judgment, see State ex rel. Grady v. Lockhart, 18 Wash. 531; Lamona v. Cowley, 31 Wash. 297.

An omission from the records of the district court cannot be supplied by the order of the judge in vacation, unless authorized by statute, and it must appear on the face of the records that he acted within the statute: Hale v. Finch, 1 W. T. 517.

An amendment to § 109 of the Code of 1881 (§ 303 supra), taking away the five months' limitation on the modification of judgments rendered, is operative upon a judgment rendered ten months prior to the passage of the amendment, and as other provisions of the code allow the vacation and modification of judgments within one year after the rendition, it is competent for the legislature to extend or change the time within which it could be attacked: Marston v. Humes, 3 Wash. 267.

A court of general jurisdiction can, irrespective of statute, clear its record of judgments void for want of jurisdiction: Sturgiss v. Dart, 23 Wash. 234.

Judgment may be vacated because of unauthorized appearance of attorney: See Ashcraft v. Powers, 22 Wash. 440.

A judgment will not be vacated on grounds already passed on: See Friedman v. Manley, 21 Wash. 675; Roberts v. Shelton Southwestern R. Co., 21 Wash. 427; Winstone v. Winstone, 40 Wash. 272.

As to inherent power and duty of court to modify a judgment entry to make it conform to the judgment actually entered, see O'Bryan v. American Inv. & Imp. Co., 50 Wash. 371.

§ 465. (5154.) **Petition for New Trial.**

When the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term [time] when the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as in other cases, not later than after the discovery, on which notice shall be served and returned, and the defendant held to appear as in an original action. The facts stated in the petition [complaint] shall be considered as denied without answer. The case shall be tried as other cases by ordinary proceedings, but no motion shall be filed more than one year after the final judgment was rendered. [L. '75, p. 21, § 2; Cd. '81, § 437.]

"After the discovery": The act of 1875 provided as follows: "not later than the second term after the discovery," etc., but "terms" are now abolished.

See supra, § 399, and notes, new trial.

Cited in 25 Wash. 470; 25 Wash. 573.

§ 466. (5155.) Petition to Vacate, etc., to be by Motion, When.

The proceedings to vacate or modify a judgment or order for mistakes or omissions of the clerk, or irregularity in obtaining the judgment or order, shall be by motion served on the adverse party, or on his attorney in the action, and within one year. [Cf. L. '75, p. 21, § 3; Cd. '81, § 438; L. '91, p. 44, § 1; 2 H. C., § 1394.]

See notes to next section.

Cited in 3 Wash. 720; 13 Wash. 675; 23 Wash. 251; 25 Wash. 470, 573, 659; 44 Wash. 295.

Under this section, a petition for the vacation of an order of court cannot be entertained, when the application is not made within one year from date of the order: *Green v. Williams*, 13 Wash. 674; *Denton v.*

Merchants' Nat. Bank, 18 Wash. 387; *Boston Nat. Bank of Seattle v. Hammond*, 21 Wash. 158; *Twigg v. James*, 37 Wash. 434.

A judgment which has been irregularly obtained may be vacated and set aside by the court on motion therefor, although a remedy by petition is afforded by the next section: *Griffith v. Maxwell*, 25 Wash. 658.

§ 467. (5156.) Petition to be Verified, When.

The proceedings to obtain the benefit of subdivisions two, three, four, five, six, and seven of section 464 shall be by petition verified by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and if the party is a defendant, the facts constituting a defense to the action; and such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto be a minor or person of unsound mind, and then within one year from the removal of such disability. [Cf. L. '75, p. 21, § 4; Cd. '81, § 439; L. '91, p. 45, § 2; 2 H. C., § 1395.]

See supra, §§ 464, 465, and notes, causes and petition for vacating judgment.

Cited in 7 Wash. 482; 10 Wash. 272; 17 Wash. 601; 21 Wash. 161; 23 Wash. 247; 24 Wash. 100; 25 Wash. 270, 573, 655, 659; 28 Wash. 301; 31 Wash. 59; 34 Wash. 307; 37 Wash. 437; 39 Wash. 680; 43 Wash. 25; 45 Wash. 22; 50 Wash. 477.

Application and proceedings: See 2 Remington's Digest, pp. 1603-1607, §§ 118-133.

It is not an abuse of discretion for the trial court to deny a motion to vacate a judgment when the affidavits in support thereof show only a want of attention to the case by the counsel and client: *Myers v. Landrum*, 4 Wash. 762.

The vacation of a judgment for the causes stated in the last preceding section must be

sought exclusively by petition: *Whidby Land and Develop. Co. v. Nye*, 5 Wash. 301; *Williams v. Breen*, 25 Wash. 666.

Form and requisites of application: See *Kuhn v. Mason*, 24 Wash. 94; *State ex rel. Hennessy v. Huston*, 32 Wash. 54; *Nolan v. Arnot*, 36 Wash. 101; *Hoefer v. Sawtelle*, 43 Wash. 23.

An action by a guardian ad litem for relief from a void judgment against an insane ward is not barred, under this section, until "within one year from the removal of the disability," and hence not while the ward is hopelessly insane: *Curry v. Wilson*, 45 Wash. 19.

§ 468. (5157.) Proceedings.

In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service and mode of return, and the pleadings shall be governed by the same principles, and issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that the facts stated in the petition shall be deemed denied without answer, and defendant shall introduce no new cause, and the cause of the petition shall alone be tried. [Cf. L. '75, p. 22, § 5; Cd. '81, § 440; L. '91, p. 45, § 3; 2 H. C., § 1396.]

Cited in 7 Wash. 482; 21 Wash. 639; 23 Wash. 247; 25 Wash. 470, 573, 655; 31 Wash. 59; 32 Wash. 178, 437; 34 Wash. 307; 43 Wash. 512.

As to nature and form of proceedings and requisites of application, see 2 Remington's Digest, p. 1603, §§ 118, 119; *Roberts v. Shelton Southwestern R. Co.*, 21

Wash. 427; *Sturgiss v. Dart*, 23 Wash. 244; *Williams v. Breen*, 25 Wash. 666; *Spokane & Idaho Lum. Co. v. Stanley*, 25 Wash. 653.

The proper proceeding suggested to vacate judgments in *Whidby L. & B. Co. v. Nye*, 5 Wash. 301.

A court of equity will sustain a demurrer to a complaint to vacate a judgment at law, unless facts justifying such action appear in the complaint: *Wingard v. Jameison*, 2 W. T. 402.

In proceedings for vacating a judgment no affidavit of merits is necessary, the petitioner being required to state facts upon oath; nor is it necessary to tender an answer until after it is determined that the grounds alleged are sustained: *Wheeler v. Moore*, 10 Wash. 309.

A complaint in an action to vacate a judgment of foreclosure is insufficient, when there is no showing that it was not an equitable one, or that the judgment would be different if the cause were retried: *Hill v. Lowman*, 15 Wash. 503.

Where a judgment has been vacated because of the irregularity of the plaintiff in obtaining it, it operates to avoid an execution sale made under it, as between the parties, and cancels the purchase by the execution plaintiff of the property sold: *Benney v. Clein*, 15 Wash. 581.

Since the court has inherent power to modify a judgment entry to make it conform to the judgment actually entered, independent of any statute, it is not material under what statute the party seeks relief: *O'Bryan v. American Inv. etc. Imp. Co.*, 50 Wash. 371.

Prohibition will not lie to prevent the threatened erroneous vacation of a judgment, where the same would be a final disposition of the case, since there is an adequate remedy by appeal: *State ex rel. Twigg v. Superior Court*, 34 Wash. 643.

Where judgment on the pleadings is granted, the remedy is by appeal and not by motion to vacate the judgment for irregularity: *Ellis v. Moon*, 40 Wash. 114.

The power to set aside a void judgment is inherent in the court: *Dane v. Daniel*, 28 Wash. 155; and may be exercised by the successor of a judge or by a judge pro tem. who tried the case: *Shepard v. Gove*, 26 Wash. 452; *State ex rel. Rucker v. Superior Court*, 18 Wash. 227; *Fisher v. Puget Sound Brick etc. Co.*, 34 Wash. 578.

As to parties and notice on application for vacation, see 2 *Remington's Digest*, p. 1606, §§ 124, 125; *Kuhn v. Mason*, 24 Wash. 94; *Morrison v. Morrison*, 25 Wash. 466; *Collins v. Kinneer*, 37 Wash. 453; *Dane v. Daniel*, 28 Wash. 155; *Spokane & Idaho Lumber Co. v. Stanley*, 25 Wash. 653; *Dwyer v. Nolan*, 40 Wash. 459; *Sturgiss v. Dart*, 23 Wash. 244.

A general appearance in support of a motion to set aside a void judgment does not validate the judgment or waive the question of jurisdiction: *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431.

Vacation of a judgment cannot be objected to for want of notice, where the record shows service of notice of motion and an appearance by the party to contest the motion: *Stark Brothers v. Royce*, 44 Wash. 287.

Operation and effect of vacation: See 2 *Remington's Digest*, p. 1607, §§ 131-133.

The denial of a petition to vacate a judgment is final, and res adjudicata as against any subsequent independent procedure seeking the same relief: *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207; *Wilson v. Seattle Dry Dock etc. Co.*, 26 Wash. 297; *Chezum v. Claypool*, 22 Wash. 498; *McCord v. McCord*, 24 Wash. 529; *In re Lamona's Estate*, 29 Wash. 394. See, also, *Sturgiss v. Dart*, 23 Wash. 244.

Where a motion to vacate a judgment is denied on the ground that the motion was improper and the rights of the parties could not be adjudicated in such a proceeding, it is res adjudicata upon that question, although not made on the merits; and the court cannot grant a second motion to vacate based on the same grounds: *Pierce County v. Bunch*, 49 Wash. 599.

§ 469. (5158.) Valid Defense.

The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered; or if the plaintiff seeks its vacation, that there is a valid cause of action; and when judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment. [L. '75, p. 22, § 6; Cd. '81, § 441; 2 H. C., § 1397.]

Cited in 11 Wash. 388; 25 Wash. 671; 43 Wash. 25.

The provisions of this section relating to the preservation of judgment liens applies as well to judgment liens upon personalty as upon realty: *Smith v. DeLanty*, 11 Wash. 386, 388.

The fact that a judgment has in form been set aside and vacated and a new one

entered will not destroy the lien of the former judgment, when the new judgment is a slight modification of the original judgment in the matter of amount: *Smith v. DeLanty*, supra.

This section does not contemplate a trial upon the merits before vacating but merely that there is substantial evidence in sup-

port of a defense: *Williams v. Breen*, 25 Wash. 666.

As to affidavit of merits on application, see *Hoefer v. Sawtelle*, 43 Wash. 23.

In an independent action in equity to vacate a judgment, alleged to be void for

want of jurisdictional process, it is necessary for the plaintiff to allege that he has or had a meritorious defense, or that the judgment was inequitable, the plaintiff not being a nonresident: *Brandt v. Little*, 47 Wash. 194.

§ 470. (5159.) Grounds to Vacate must First be Tried.

The court may first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the defense or cause of action. [L. '75, p. 22, § 7; Cd. '81, § 442; 2 H. C., § 1398.]

Cited in 10 Wash. 311.

§ 471. (5160.) Injunction.

The party seeking to vacate or modify a judgment or order may obtain an injunction suspending proceedings on the whole or part thereof, which injunction may be granted by the court or the judge, upon its being rendered probable, by affidavit or petition sworn to, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified. [L. '75, p. 22, § 8; Cd. '81, § 443; 2 H. C., § 1399.]

§ 472. (5161.) Construction.

The provisions of this chapter shall not be so construed as to affect the power of the court to vacate or modify judgments or orders as elsewhere in this code provided; nor shall any judgment of acquittal in a criminal action be vacated under the provisions of this chapter. [L. '91, p. 45, § 4; 2 H. C., § 1400.]

See supra, § 303, relief from judgments, etc.

A defendant in a criminal action cannot be tried after an acquittal on the merits: Const., Art. I, § 9.

Cited in 10 Wash. 36; 25 Wash. 655.

§ 473. (5162.) Judgment upon Denial of Application.

In all cases in which an application under this chapter to vacate or modify a judgment or order for the recovery of money is denied, if proceedings on the judgment or order shall have been suspended, judgment shall be rendered against the plaintiff [in this proceeding] for the amount of the former judgment or order, interest, and costs, together with damages at the discretion of the court, not exceeding ten per cent on the amount of the judgment or order. [Cf. L. '75, p. 22, § 9; Cd. '81, § 444; L. '91, p. 45, § 5; 2 H. C., § 1401.]

CHAPTER XVIII.

COSTS AND DISBURSEMENTS.

§ 474. (5165.) Compensation of Attorneys—Costs.

The measure and mode of compensation of attorneys and counselors shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which allowances are termed costs. [L. '54, p. 201, § 367; Cd. '81, § 505; 2 H. C., § 823.]

See notes to next section.

See notes to § 725, infra.

See supra, § 136, lien of attorneys.

See *infra*, § 476, costs to prevailing party.

See *infra*, § 481, costs as attorney's fee—amount taxable.

See *infra*, § 1116, and notes, attorneys' fees on foreclosure of mortgages.

See *infra*, § 1141, attorneys' fees on foreclosure of mechanics' liens.

Cited in 9 Wash. 465; 26 Wash. 136; 34 Wash. 138; 35 Wash. 294; 42 Wash. 596; 52 Wash. 164.

Costs in general: See 1 Remington's Digest, pp. 669-689, §§ 1-101. Attorneys' fees: See *Id.*, p. 677, § 40.

The statute allows parties to make their own agreement as to attorneys' fees, but in the absence of any agreement, § 481, *infra*,

regulates the matter: *Potwin v. Blasher*, 9 Wash. 460, 465.

A judgment for \$125 attorney's fee against a plaintiff on dismissal of a suit in ejectment on the ground that he knew at the time of instituting suit that certain of defendants were infant children for whom a guardian ad litem must be appointed is erroneous: *Mason v. McLean*, 6 Wash. 31.

§ 475. (5166.) Amount, How Fixed.

In all cases of foreclosure of mortgages and in all other cases in which attorneys' fees are allowed, the amount thereof shall be fixed by the court at such sum as the court shall deem reasonable, any stipulations in the note, mortgage or other instrument to the contrary notwithstanding; but in no case shall said fee be fixed above contract price stated in said note or contract. [Cf. L. '85, p. 176, § 1; L. '88, p. 9, § 1; L. '91, p. 83, § 1; 2 H. C., § 803; L. '95, p. 81, § 1.]

See *infra*, § 481, and notes, statutory attorney's fee.

See notes to last section and to § 1116, *infra*.

See *infra*, § 1141, attorney's fee on foreclosure of mechanics' liens.

Cited in 7 Wash. 323; 11 Wash. 110; 15 Wash. 207, 29; 18 Wash. 463, 508, 556; 19 Wash. 84, 192, 612, 630.

Stipulation and amount of attorneys' fees: See 2 Remington's Digest, p. 1969, § 243; *Scholey v. Demattos*, 18 Wash. 504; *Dennis v. Moses*, 18 Wash. 538; *Gordon v. Decker*, 19 Wash. 188; *Vermont Loan & T. Co. v. Greer*, 19 Wash. 611; *McDougall v. Walling*, 19 Wash. 80.

The supreme court may allow attorney's fees in that court in foreclosure of a lien although the cause be remanded to the lower court for further proceedings: *Seattle & W. W. Ry. Co. v. Ah Kow*, 2 W. T. 36.

On foreclosure of mechanic's lien, the supreme court will not allow additional attorneys' fees: See *Lavanway v. Cannon*, 37 Wash. 593; *Sweatt v. Hunt*, 42 Wash. 96.

A condition in a note providing for the payment of attorney's fees in case of suit to enforce collection does not affect its negotiability: *Second Nat. Bank v. Anglin*, 6 Wash. 403.

Where the complaint in foreclosure alleges that \$250 is a reasonable attorney's fee, and the answer denies that any sum greater than \$100 is a reasonable fee, in the absence of testimony \$100 is all the court is warranted in allowing: *Dexter Horton & Co. v. Long*, 2 Wash. 435.

The reasonableness of an attorney's fee when denied must be proven as any other fact: *Id.*, 440.

In the foreclosure of a mortgage providing for \$250 as attorney's fees to be taxed as part of the costs in case of settlement after suit, the action will not be dismissed until said sum be paid, although all other

sums and costs were paid into court: *Hoyt v. Smith*, 4 Wash. 640.

Under this section, in giving judgment upon a promissory note, the plaintiff is entitled to judgment for attorney's fee in the amount specially contracted to be paid by the terms of the note, even if the same might otherwise be deemed excessive in amount: *Exchange Nat. Bank v. Wolverton*, 11 Wash. 108; affirmed in *Pocin v. Furth*, 15 Wash. 201, 207.

The action of the court in allowing the attorney's fee provided in a note and mortgage as payable in case of foreclosure is warranted, although there is no other proof of the value of services in such proceedings than the agreement contained in the instruments sued upon, which had been introduced in evidence: *Ames v. Bigelow*, 15 Wash. 532.

Where a note and mortgage provide in absolute terms for the payment of an attorney's fee, in case of suit, the mortgagee is entitled to a lien therefor upon the property, notwithstanding the mortgage may also provide that such attorney's fees might be retained out of the moneys made upon the foreclosure sale: *Watson v. Sawyer*, 12 Wash. 35.

Where a number of lien claimants have united in one suit for the foreclosure of their respective liens, an attorney's fee of \$20 in each case is not excessive: *Garneau v. Port B. M. Co.*, 8 Wash. 467.

An attorney's fee of \$2,000 for enforcing a lien of \$21,000, held excessive, and that the same should be reduced to \$1,000 at least. It is not the policy of the law to allow large or exorbitant attorney's fees:

Huttig v. Denny Hotel Co., 6 Wash. 122, 127.

If the attorney's fees in the foreclosure of a logger's lien is left to the discretion of the court, a judgment therefor will not be disturbed, although no testimony as to its reasonable value was offered: Proulx v. Stetson & P. M. Co., 6 Wash. 478.

In order to recover costs and attorney's fees in a suit to foreclose a mortgage on real estate, where the mortgagor dies pending suit, it is not necessary to present the claim to the administrator of the mortgagor's estate within one year: Reed v. Miller, 1 Wash. 426. See Scammon v. Ward, 1 Wash. 179.

Where a mortgage provides for an attorney's fee of twenty per cent of the entire amount due, which sum is claimed by the plaintiff upon foreclosure, the court cannot upon rendering a decree award the plaintiff a less sum: Haywood v. Miller, 14 Wash. 660.

The finding of \$60 as an attorney's fee in a foreclosure suit, without proof, is error: Cowie v. Ahrenstedt, 1 Wash. 416.

Where a written contract between attorney and client in respect to litigation with insurance companies over a certain loss by fire provided that the client should pay \$500 as full payment of services, whether the case was lost or won, upon its final determination, and should pay an additional \$500, making in all \$1,000, in case judgment was obtained against the companies, "these respective sums in either event, to be full compensation for all services growing out of or rendered in the insurance matter," the attorney is not entitled to further compensation for litigating the matter in the supreme court, the contract, by its terms, covering all the work in all the courts: Niagara Fire Ins. Co. v. Hart, 13 Wash. 651.

Where a wife settles with her husband her action for divorce, her attorneys cannot intervene in the suit and obtain judgment for their fees and costs advanced: Hillman v. Hillman, 42 Wash. 595.

§ 476. (5167.) Prevailing Party Entitled to Costs and Disbursements.

In any action in the superior court of Washington, the prevailing party shall be entitled to his costs and disbursements; but the plaintiff shall in no case be entitled to costs taxed as attorneys' fees in actions within the jurisdiction of a justice of the peace, when commenced in the superior court. [Cf. L. '54, p. 201, §§ 368, 369; Cd. '81, §§ 506, 507; L. '83, p. 42, § 1; L. '90, p. 337, § 1; 2 H. C., § 824.]

See supra, § 429, costs in arbitration.

See supra, § 474, costs and attorney's fees.

See infra, § 1178, costs in action upon liens on logs.

See infra, § 1275, costs in actions to restore lost records.

Cited in 4 Wash. 14; 7 Wash. 96; 39 Wash. 345.

Parties entitled: See 1 Remington's Digest, pp. 474, 475, §§ 19-23; Koyukuk Min. Co. v. Van de Vanter, 30 Wash. 385; Hillman v. Hillman, 42 Wash. 595; Grays Harbor Boom Co. v. McAmant, 21 Wash. 465.

For cases in which it was held proper for plaintiff to recover costs in both trial and appellate courts, see Bell v. Waudby, 4 Wash. 743, 748, 7 Wash. 203. See Vermont Loan & T. Co. v. Greer, 19 Wash. 611.

The costs of granting a writ of prohibition against a superior court, to prevent its trying a case for want of jurisdiction, should be taxed against the plaintiff in the lower court as the real party in interest: State v. Superior Court, 5 Wash. 518; State ex rel. Middlebrook v. Reid, 17 Wash. 267.

An assignee is entitled to recover his costs in an action to recover the proceeds of goods converted, as an incident of his judgment: Mansfield v. First Nat. Bank, 6 Wash. 603.

In a particular case in condemnation proceedings, held, that plaintiff was entitled to his costs and disbursements, including

\$15 attorney's fees: Owsley v. O. P. & N. Co., 1 Wash. 491.

Where the husband dismisses his action for divorce the court may properly render judgment against him for costs and reasonable expenses incurred by the wife in preparation of defense, including counsel fees: Thorndike v. Thorndike, 1 W. T. 175.

In an action upon a foreign judgment, a verdict for the aggregate amount of the judgment, costs and interest is not erroneous. The costs of the proceeding in the foreign jurisdiction were a part of the judgment: Ritchie v. Carpenter, 2 Wash. 512.

Upon the reversal of an order of the lower court denying plaintiff's motion to dismiss his action, there having been no appearance or resistance by defendant at any stage of the case, it is inequitable to impose costs on defendant: Somerville v. Johnson, 3 Wash. 140.

Where an action is dismissed because the statute upon which it is founded has been repealed during its pendency neither party is entitled to a judgment for costs, and these sections do not apply to such case: Thurston Co. v. Seammell, 7 Wash. 94.

Under the Law of 1854, § 369, where plaintiff sues in the district court for more

than one hundred dollars and recovers judgment for less than one hundred dollars, costs should be taxed against him: *Bagley v. Carpenter*, 2 W. T. 19, 22; overruling *Ebey v. Engle*, 1 W. T. 72.

In prohibition restraining action on the part of the superior court, the costs should be taxed against the party in the original

action at whose instance the court was proceeding unlawfully: *State v. Superior Court*, 15 Wash. 500.

An application for a writ of certiorari is an "action," within the meaning of the statute relating to the taxation of costs: *State ex rel. Spokane Terminal Co. v. Superior Court*, 40 Wash. 453.

§ 477. (5168.) Limitations.

In an action for an assault and battery, or for false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recover less than ten dollars, he shall be entitled to no more costs or disbursements than the damage recovered. [L. '54, p. 202, § 370; L. '69, p. 123, § 460; Cd. '81, § 508; 2 H. C., § 825.]

Cited in 4 Wash. 12, 16.

This section, which was § 508 of the Code of 1881, being a special enactment relating to costs in particular cases, is not repealed by the act of March 27, 1890 (§ 476, *supra*), which was a general enactment relating to costs: *Meade v. French*, 4 Wash. 11.

The provisions of this section cannot be construed so as to give additional costs to the defendant in case of recovery by plaintiff of less than ten dollars damages: *Id.*, 16. For reasons for this enactment, see *Id.*, 15.

§ 478. (5169.) Limited to One of Several Actions.

When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action against several parties, who might have been joined as defendants in the same action, no costs or disbursements shall be allowed to the plaintiff in more than one of such actions, which may be at his election, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within this state. [L. '54, p. 202, § 371; Cd. '81, § 509; 2 H. C., § 826.]

Where a widow brought suit against a county in her own name for the wrongful death of her husband, and upon submitting to a voluntary nonsuit, judgment for \$264 costs was entered against her, it is an abuse of discretion, upon the commencement of a suit by her as administratrix for the benefit of the widow and children, to stay proceedings as to the widow's claim until

the costs of the former action were paid, where it appears that she is without means, has three small children to support, that she and the children had been ill, dependent upon charity, and inmates of the county poor farm, and no additional costs would accrue to the county by reason of the inclusion of the widow's claim: *Archibald v. Lincoln County*, 50 Wash. 55.

§ 479. (5170.) Costs to Defendant, When.

In all cases where costs and disbursements are not allowed to the plaintiff, the defendant shall be entitled to have judgment in his favor for the same. [L. '54, p. 202, § 372; Cd. '81, § 510; 2 H. C., § 827.]

Cited in 7 Wash. 96.

This section does not apply to cases where neither party is entitled to costs: *Thurston Co. v. Scammel*, 7 Wash. 94, 96.

The plaintiff in an equitable action, on payment of costs, may dismiss his bill at any time before final decree: *Waite v. Wingate*, 4 Wash. 324.

When an action is dismissed because the statute upon which it is founded has been repealed during its pendency neither party is entitled to judgment for costs, and these sections do not apply to such a case: *Thurston Co. v. Scammel*, *supra*.

§ 480. (5171.) Costs to Defendants Defending Separately.

In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to

recover judgment against all, the court may award costs to such defendants as recover judgments in their favor, or either of them. [L. '54, p. 202, § 373; Cd. '81, § 511; 2 H. C., § 828.]

See *infra*, §§ 579, 580, levy of execution on joint property.

Cited in 30 Wash. 391.

In an action to reform a deed without prior demand on defendant for correction, the costs upon a decree of reformation should be assessed against the plaintiff: *Seward v. Spurgeon*, 9 Wash. 74.

And the same rule is applicable to a claim secured by lien: See *Frazer v. Rutherford*, 26 Wash. 658.

Successful defendants are entitled to attorneys' and witnesses' fees where several

actions for the foreclosure of liens concerning separate and distinct persons and property, in which separate judgments are required, are consolidated: *Grays Harbor Boom Co. v. McAmmant*, 21 Wash. 465.

As to costs to persons defending separately, see *Koyukuk Min. Co. v. Van de Vanter*, 30 Wash. 385; *Wittler-Corbin Machinery Co. v. Martin*, 47 Wash. 123; *Springer v. Ayer*, 50 Wash. 642.

§ 481. (5172.) Costs as Attorney Fee—Amount Taxable.

When allowed to either party, costs, to be called the attorney fee, shall be as follows:—

1. In all actions settled before issue is joined, five dollars;
2. In all actions where judgment is rendered without a jury, ten dollars;
3. In all actions where judgment is rendered after impaneling a jury, fifteen dollars;
4. In all actions removed to the supreme court and settled before argument, ten dollars;
5. In all actions where judgment is rendered in the supreme court after argument, fifteen dollars. [L. '54, p. 202, § 374; L. '69, p. 124, § 464; Cd. '81, § 512; 2 H. C., § 829.]

In *State ex rel. Spokane Terminal Co. v. Superior Court*, 40 Wash. 453, it was held that subdivision 5, omitted from Ballinger's Code, was not superseded by Laws 1893, p. 132, § 29 (§ 1744, *infra*), but whether subdivision 4 is superseded was not expressly decided.

See *supra*, §§ 474, 475, compensation of attorneys.

See *infra*, § 1744, costs allowed prevailing party in supreme court.

Cited in 26 Wash. 136; 34 Wash. 434; 40 Wash. 453, 454.

Where there is an agreement in a contract covering attorney's fees, the statutory attorney fee is improperly included in a cost bill: *Potwin v. Blasher*, 9 Wash. 460, 465.

The effect of the limitation of five per cent for attorney's fees in a mortgage expressed the reasonable maximum agreed upon, and an allowance by the court in excess thereof is to that extent excessive; and this is true although the note recites that the maker would pay "such sum as the court may adjudge reasonable as attorney's fees": *Id.* See notes to § 474.

The right to the statutory attorney fee of fifteen dollars in cases tried before a jury is not lost by reason of the fact that after a trial is begun, the cause is disposed of by the court upon motion for a nonsuit or by directing a verdict: *Kimble v. Kimble*, 14 Wash. 369.

In an action at law the court can impose no costs by way of attorney's fee excepting such as are expressly provided by statute:

Larson v. Winder, 14 Wash. 647; *Spencer v. Commercial Co.*, 36 Wash. 374.

In an action to set aside a deed, in which a tender of moneys paid on the purchase price has not been kept good, the plaintiff is not entitled to judgment for costs upon a finding in his favor, and a decree entitling him to reconveyance on repayment of the moneys received from defendant: *Fares v. Gleason*, 14 Wash. 657.

And before action, a defendant need not include the cost of filing a lien notice: See *Young v. Borzone*, 26 Wash. 4.

Where an attorney fee is provided by statute in certain forms of action, it is erroneous to allow in addition thereto the statutory fee of \$10 allowed as costs to the prevailing party: *Montesano v. Blair*, 12 Wash. 188; *Bolster v. Stocks*, 13 Wash. 460.

Only the statutory attorney's fee can be allowed in an action foreclosing a lien for alimony under a decree awarding divorce and alimony: *Trumble v. Trumble*, 26 Wash. 133.

In an action by a resident taxpayer to restrain the payment of warrants, it is error to allow an attorney's fee of \$500 upon giv-

ing judgment for the plaintiff: *Criswell v. Directors School Dist. No. 24*, 34 Wash. 420.

In a common-law action for the wrongful suing out of an attachment, an allowance of

\$75 as an attorney's fees is error, only the statutory fee being recoverable: *McGill v. Fuller & Co.*, 45 Wash. 615.

§ 482. (5173.*) Disbursements, etc.—Cost Bill.

The prevailing party, in addition to allowance for costs, as provided in the last section, shall also be allowed for all necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the necessary expenses of taking depositions, by commission or otherwise, and the compensation of referees. The disbursements shall be stated in detail and verified by affidavit, and shall be served on the opposite party or his attorney, and filed with the clerk of the court, within ten days after the judgment; Provided, the clerk of the court shall keep a record of all witnesses in attendance upon any civil action, for whom fees are to be claimed, with the number of days in attendance and their mileage, and no fees or mileage for any witness shall be taxed in the cost bill unless they shall have reported their attendance at the close of each day's session to the clerk in attendance at such trial. [L. '05, p. 32, § 1. Cf. L. '54, p. 202, § 375; L. '69, p. 124, § 465; L. '77, p. 109, § 517; Cd. '81, § 513; 2 H. C., § 830.]

See *supra*, § 237, service by private parties.

See *supra*, § 317, jury fee taxed as part of costs.

See *infra*, § 497, schedule of fees of clerks of court, officers, and witnesses.

See *infra*, § 4090, bill of fees to be made on demand.

Cited in 24 Wash. 412.

Taxation of costs: See 1 Remington's Digest, pp. 679, 680, §§ 50-57. Items taxable: *Id.*, pp. 676-679, §§ 33-49.

Where costs depend upon facts not ascertained from the record, the cost bill should itemize the charge so that the opposing party may know what is claimed: *Potwin v. Blasher*, 9 Wash. 460.

Costs on execution, being accruing costs which the sheriff adds as they are made, have no place in a cost bill: *Id.*

As to costs on appeal for briefs, transcript, etc., see 1 Remington's Digest, p. 684, §§ 76-81; *Nelson v. McLellan*, 34 Wash. 181; *Clarke v. Eltinge*, 39 Wash. 696; *Commercial Nat. Bank v. Johnson*, 17 Wash. 264; *Deering v. Holcomb*, 26 Wash. 588; *Stowe v. La Conner Trad. & Transp. Co.*, 39 Wash. 28.

It is proper to tax as costs the advance jury fee paid by the prevailing party prior to a stipulation to waive a jury trial: *Lilly v. Lilly, Bogardus & Co.*, 39 Wash. 337.

Stenographers' fees for attendance and transcribing testimony cannot be taxed: See *Bringold v. Spokane*, 19 Wash. 333.

Cost of copies of documents admitted in evidence may be included in cost bill: See *New Whatcom v. Bellingham Bay etc. Co.*, 16 Wash. 137; *McCleary v. Willis*, 35 Wash. 676; *Hamilton v. Witner*, 50 Wash. 689.

It is error to tax as costs fees paid a private citizen for preparing copies of complaint and summons, and for service thereof

on defendant: *Creighton v. Cole*, 10 Wash. 472; a rule of the superior court allowing such costs is invalid: *Id.*

A witness who attends a trial and testifies upon request, without process, is entitled to compensation: *Christensen v. Union Trunk Line*, 6 Wash. 75.

A witness from outside the state is entitled to mileage within the borders of the state: *Carlson Bros. & Co. v. Van de Vanter*, 19 Wash. 32; *State v. Lorenz*, 22 Wash. 289.

Fees of witnesses present, though not sworn, may be taxed: *Ivall v. Willis*, 17 Wash. 645; *McCleary v. Willis*, 35 Wash. 676.

The clerk is not authorized to tax fees approving appeal and supersedeas bond: *Soules v. McLean*, 7 Wash. 451.

A sheriff is not entitled to commissions, under § 497, *infra*, upon the sale of mortgaged property on foreclosure, where plaintiff bids in the property for the amount of the mortgage debt, and no moneys pass through his hands: *State v. Prince*, 9 Wash. 107.

As to recovery of costs incurred in defending against an injunction, wrongfully sued out, see *Anderson v. Provident Life & T. Co.*, 26 Wash. 192.

As to service and filing of cost bill, see 1 Remington's Digest, p. 679, § 50; *Matheson v. Ward*, 24 Wash. 407; *Kane v. Kane*, 35 Wash. 517; *Clarke v. Eltinge*, 39 Wash. 696; *Moritz v. Herskovitz*, 46 Wash. 192.

§ 483. (5174.) Fees of Referees.

The fees of referees shall be five dollars to each for every day necessarily spent in the business of the reference, and twenty cents per folio for writing testimony; but the parties may agree in writing upon any rate of compensation, and thereupon such rate shall be allowed. [Cf. L. '54, p. 202, § 376; L. '77, p. 109, § 518; Cd. '81, § 514; 2 H. C., § 831.]

See supra, § 423, fees of arbitrators.

See infra, § 500, "folio" defined.

Cited in 3 Wash. 741.

A referee cannot increase his fees to more than twenty cents per folio for writing the

testimony, although he employs a stenographer for that purpose: *Park v. Mighell*, 3 Wash. 737.

§ 484. (5175.) Costs on Postponement of Trial.

When an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed as the condition of granting the postponement. [L. '54, p. 203, § 377; Cd. '81, § 515; 2 H. C., § 832.]

See supra, § 322, motion for continuance.

Cited in 9 Wash. 225.

More than ten dollars in addition to witness fees cannot be imposed as a condition for postponement of a trial: *Tacoma Nat. Bank v. Peet*, 9 Wash. 222.

Dismissal for nonpayment of continuance fee: *Soder v. Adams Hardware Co.*, 38 Wash. 607.

§ 485. (5176.) Costs Where Tender is Made.

When, in an action for the recovery of money, the defendant alleges in his answer that, before the commencement of the action, he tendered to the plaintiff the full amount to which he is entitled, in such money as by agreement ought to be tendered, and thereupon brings into court, for the plaintiff, the amount tendered, and the allegation be found true, the plaintiff shall not recover costs, but shall pay them to the defendant. [Cf. L. '54, p. 203, § 378; Cd. '81, § 516; 2 H. C., § 833.]

Cited in 51 Wash. 665.

Effect of tender or deposit: See 1 Remington's Digest, p. 673, § 11; *Fares v. Gleason*, 14 Wash. 657; *Young v. Borzone*, 26 Wash. 4.

Where money is paid into court, in the nature of a tender, and is received by the plaintiff, his act terminates his right to further litigation; and neither he nor his attorney will afterward be permitted to

return a part of the money, or even the whole of it, and prosecute an appeal: *Lyons v. Bain*, 1 W. T. 482.

A tender of money paid into court by a defendant in an action to foreclose a lien may, in the discretion of the court, be made liable for the payment of costs taxed in favor of the plaintiff: *Kruegel v. Kitchen*, 33 Wash. 214.

§ 486. (5177.) Deposit with Clerk by Defendant of Tender, Effect of.

If the defendant, in any action pending, shall at any time deposit with the clerk of the court, for the plaintiff, the amount which he admits to be due, together with all costs that have accrued, and notify the plaintiff thereof, and such plaintiff shall refuse to accept the same in discharge of the action, and shall not afterwards recover a larger amount than that deposited with the clerk, exclusive of interest and cost, he shall pay all costs that may accrue from the time such money was so deposited. [L. '54, p. 203, § 379; Cd. '81, § 517; 2 H. C., § 834.]

Cited in 4 Wash. 671.

In an action by a vendor to recover purchase money, obtained by fraud in the sale of lands, the amount tendered and deposited in court by an intervener, claiming as successor in interest of the

defendant, and which was not accepted, cannot be awarded to the plaintiff, upon judgment against the defendant, but belongs to the intervener: *Lazier v. Cady*, 44 Wash. 339.

§ 487. (5178.) Costs in Appeals from Justice's Court.

In all civil actions tried before a justice of the peace, in which an appeal shall be taken to the superior court, and the party appellant shall not recover a more favorable judgment in the superior court than before the justice of the peace, such appellant shall pay all costs. [L. '54, p. 203, § 380; Cd. '81, § 518; 2 H. C., § 835.]

The expression "a more favorable judgment," in the above section, does not mean a few dollars or cents larger or smaller than the judgment recovered in the justice's court, but one substantially more favorable, which is to be determined by the court, in view of the circumstances of

each particular case: *Baxter v. Scoland*, 2 W. T. 86.

Where plaintiff claims more than \$100 and recovers less than that sum in such action, defendant is entitled to costs: *Bagley v. Carpenter*, 2 W. T. 19; overruling in part *Ebey v. Engle*, 1 W. T. 72.

§ 488. (5179.) Costs Against Guardian of Infant Plaintiff.

When costs are adjudged against an infant plaintiff, the guardian or person by whom he appeared in the action shall be responsible therefor, and payment may be enforced by execution. [L. '54, p. 203, § 381; Cd. '81, § 519; 2 H. C., § 836.]

§ 489. (5180.) Costs in Cases of Executors, etc.

In [an] action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by or against a person prosecuting [or defending] in his own right, but such costs shall be chargeable only upon or collected of the estate of the party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally for mismanagement or bad faith in such action or defense. [L. '54, p. 203, § 382; Cd. '81, § 520; 2 H. C., § 837.]

See *supra*, § 180, executors, etc., as parties to actions.

§ 490. (5181.) Assignee Liable for Costs, When.

When the cause of action, after the commencement of the action, by assignment, or in any other manner, becomes the property of a person not a party thereto, and the prosecution or defense is thereafter continued, such person shall be liable to the costs in the same manner as if he were a party. and payment thereof may be enforced by execution. [Cf. L. '54, p. 203, § 383; L. '69, p. 125, § 473; Cd. '81, § 521; 2 H. C., § 838.]

§ 491. (5182.) Costs Against State or County.

In all actions prosecuted in the name and for the use of the state, or in the name and for the use of any county, the state or county shall be liable for costs in the same case and to the same extent as private parties. [L. '54, p. 203, § 384; Cd. '81, § 522; 2 H. C., § 839.]

See *infra*, § 508, county to pay costs, when.

See *infra*, § 2228 et seq., costs and cost bills in criminal actions.

Cited in 40 Wash. 10.

As to liabilities of the state and the county for costs in criminal actions, see 1 Remington's Digest, p. 687, §§ 93, 94; *State v. Rutledge*, 40 Wash. 9.

State: See *State ex rel. Thurston County v. Grimes*, 7 Wash. 445.

As to county: See *Stowe v. State*, 2 Wash. 124; *State ex rel. Langhorne v. Superior*

Court, 32 Wash. 80; *State ex rel. News Pub. Co. v. Milligan*, 4 Wash. 29; *Presby v. Klickitat County*, 5 Wash. 329.

The costs in an action against the state to confirm the sale of school lands made under the territorial laws should be assessed against the plaintiff, although judgment may be in his favor; but the state is liable for the costs of an unsuccessful ap-

peal from such judgment: *Romine v. State*, 7 Wash. 215.

A court has no power to charge a county with the expense of stenographer's fees in

taking testimony in a civil suit: *State v. Superior Court*, 4 Wash. 30.

In criminal cases where the appellant is successful, costs are taxable against the state: See *State v. Rutledge*, 40 Wash. 9.

§ 492. (5183.) Costs in Revisory Proceedings.

When the decision of a court of inferior jurisdiction, in an action or special proceeding, is brought before the supreme court or a superior court for review, such proceedings shall, for purpose of costs, be deemed an action at issue upon a question of law from the time the same is brought into the supreme court or superior court, and costs thereon may be awarded and collected in such manner as the court shall direct, according to the nature of the case. [L. '54, p. 204, § 385; Cd. '81, § 523; 2 H. C., § 840.]

See *infra*, § 1744, costs on appeal.

Upon a writ of certiorari, where the lower tribunal has no jurisdiction to adjudge costs, the superior court would be without jurisdiction to enter judgment for the costs incurred before such lower tribunal: *Bringgold v. Spokane*, 19 Wash. 333.

Upon reversing a judgment in disbarment proceedings for costs in a substantial amount, the defendant is entitled to his costs on appeal, to be taxed against the state, and not against the relators: *State ex rel. Dill v. Martin*, 45 Wash. 76.

As to costs upon dismissal of appeal, see 1 *Remington's Digest*, p. 681, § 63; *Henry v. Great Northern R. Co.*, 16 Wash. 417; *Bash v. Eisenbeis*, 16 Wash. 700; *Lemey v. Coffman*, 11 Wash. 301; *McKenzie v. Royal Dairy*, 35 Wash. 390; *Seattle, In re*, 40 Wash. 450; *Ramsdell v. Ramsdell*, 47 Wash. 444.

Upon affirmance, modification or reversal of judgment of lower court: See 1 *Remington's Digest*, p. 682, §§ 64-67.

On affirmance: See *Wiley v. Morrow*, 1 W. T. 474; *Herford v. Doud*, 3 Wash. 430; *In re Holburte's Estate*, 38 Wash. 199; *Spencer v. Commercial Co.*, 36 Wash. 374; *Hart v. Seattle*, 42 Wash. 113; *Cushing v. Spokane*, 45 Wash. 193; *Schmidt v. Olympia L. & P. Co.*, 46 Wash. 360; *Westlake Avenue, In re*, 40 Wash. 144; *Trumbull v. Jefferson County*, 37 Wash. 604; *Wheeler Co. v. Pates*, 43 Wash. 247.

As to costs on cessation of controversy, see 1 *Remington's Digest*, p. 683, § 71; *State ex rel. Daniels v. Prosser*, 16 Wash. 608; *Hartson v. Dale*, 9 Wash. 379; *Miller v. Seattle*, 41 Wash. 599; *Seattle, In re*, 40 Wash. 450.

§ 493. (5184.) Costs in Discretion of Court.

In all actions and proceedings other than those mentioned in this chapter, where no provision is made for the recovery of costs, they may be allowed or not; and if allowed, may be apportioned between the parties, in the discretion of the court. [L. '54, p. 204, § 387; Cd. '81, § 525; 2 H. C., § 842.]

The court may apportion the costs when some of the causes of action are of an equitable nature: *Churchill v. Stephenson*, 14 Wash. 620.

Or may order costs paid out of a tender deposited in court: See *Kruegel v. Kitchen*, 33 Wash. 214.

In an action to re-establish a lost corner it is error to tax the costs to the successful party, but the same should be equitably apportioned by an equal division between the parties: *Strunz v. Hood*, 44 Wash. 99.

§ 494. (5185.) Retaxation of Costs.

Any party aggrieved by the taxation of costs by the clerk of the court may, upon application, have the same retaxed by the court in which the action or proceeding is had. [L. '54, p. 204, § 388; Cd. '81, § 526; 2 H. C., § 843.]

Cited in 35 Wash. 137.

As to retaxation, see 1 *Remington's Digest*, p. 680, §§ 56-58.

The amount of costs need not be stated in the judgment; they are taxed by the clerk from his records and papers on file in the case and the party complaining must

move the lower court for a retaxation: *Huntington v. Blakeney*, 1 W. T. 111; *Newburg v. Farmer*, 1 W. T. 182; and they cannot be retaxed in the appellate court unless there was a motion therefor denied in the court below: *Burrichter v. Cline*, 3 Wash. 135; *Miskel v. Stone*, 1 W. T. 229, 230;

Jenkins v. Powe, 19 Wash. 113; Bringgold v. Spokane, 19 Wash. 333.

Questions affecting the taxation of costs will not be reviewed by the appellate court where no error in the matter is assigned: Kratz v. Dawson, 3 W. T. 100.

A motion in the supreme court to retax costs will not be entertained where six months has elapsed after issuance of execution and prior to the question being raised, and the motion indefinite as to the items objected to: B. B. & B. C. Ry. Co. v. Strand, 5 Wash. 807; Port Townsend v. Lewis, 34 Wash. 413.

A witness who attends a trial and testifies upon request, without process, is entitled to compensation: Christensen v. Union Trunk Line, 6 Wash. 75.

Where the only error committed by a magistrate in a criminal trial was in taxing costs under a law which had been repealed,

the superior court should, in reviewing said action in certiorari, retax the costs and affirm the judgment: State v. White, 8 Wash. 230.

It is error, while refusing to vacate a judgment in a proceeding therefor, to modify the judgment as to the amount of costs taxed therein: Tacoma L. etc. Co. v. Wolff, 7 Wash. 478.

Presumption that costs were properly taxed: See Newberg v. Farmer, 1 W. T. 182; Shearer v. Buckley, 31 Wash. 370; Port Townsend v. Lewis, 34 Wash. 413; McCleary v. Willis, 35 Wash. 676.

Payment and remedies for collection: See 1 Remington's Digest, pp. 686, 687, §§ 85-91; Schweder v. Hemrich, 29 Wash. 124; Plumley v. Simpson, 31 Wash. 147; Arthur v. Washington Water Power Co., 42 Wash. 431.

§ 495. (5186.) Security for Costs, When Required.

When a plaintiff in an action resides out of the county, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action shall be stayed until a bond, executed by two or more persons, be filed with the clerk, conditioned that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of two hundred dollars. A new or additional bond may be ordered by the court or judge, upon proof that the original bond is insufficient security, and proceedings in the action stayed until such new or additional bond be executed and filed. The plaintiff may deposit with the clerk the sum of two hundred dollars in lieu of a bond. [L. '54, p. 204, § 389; Cd. '81, § 527; 2 H. C., § 844.]

Cited in 8 Wash. 310; 16 Wash. 337; 17 Wash. 565; 28 Wash. 168; 34 Wash. 156; 39 Wash. 259; 48 Wash. 427.

As to security for payment of costs, see 1 Remington's Digest, p. 675, §§ 24-32.

Under this section the defendant may require security for costs of a nonresident plaintiff, but this right must be exercised promptly, and before answer, or after answer if the fact of nonresidence remains unknown to him and application is made within a reasonable time after knowledge of such fact; a failure to make application seasonably operates as a waiver of the right: Swift v. Stine, 3 W. T. 518.

Where a nonresident plaintiff institutes an action against several defendants, he cannot be compelled to give a separate bond for costs to each defendant appearing and claiming same: Robinson v. Haller, 8 Wash. 309.

A nonresident plaintiff may withdraw his deposit of costs on dismissing his action: See Dane v. Daniel, 28 Wash. 155.

Security for costs cannot be required of a nonresident defendant asking for affirmative relief: See State ex rel. Hanna v. Superior Court, 17 Wash. 564.

Residence in the county in which an action is brought is not a requisite for a surety upon a cost bond: Brooks v. James, 16 Wash. 335.

This section applies to insufficiency in the amount of the bond as well as to the sufficiency of the sureties: Morris v. Warwick, 48 Wash. 426.

Effect of failure to give security: See Carlson Bros. & Co. v. Van de Vanter, 19 Wash. 32; Johnston v. Gerry, 34 Wash. 524; Morris v. Warwick, 48 Wash. 426.

As to summary remedies against surety, see Trumbull v. Jefferson County, 37 Wash. 604.

A cost bond filed pursuant to the order of the federal court is not void because of the fact that the action was dismissed for want of jurisdiction over the subject matter of the action, as the federal court has jurisdiction to render a judgment for costs in such a case; and power to require security for costs is incident to the court's power to render judgment for costs: Carrau v. United States Fidelity & Guaranty Co., 47 Wash. 656.

§ 496. Judgment Against Surety on Cost Bond.

Whenever any bond or undertaking for the payment of any costs to any party shall be filed in any action or other legal proceeding in any court in this state and judgment should be rendered for any such costs against the principal on any such bonds or against the party primarily liable therefor in whose behalf any such bond or undertaking has been filed, such judgment for costs shall be rendered against the principal on such bond or the party primarily liable therefor and at the same time also against his surety or sureties on any or all such bonds or undertakings filed in any such action or other legal proceeding. [L. '09, p. 633, § 1.]

§ 497 (1609,* 1610.*) Schedule of Fees of Officers, Witnesses, etc.

The several officers herein named shall collect the fees herein prescribed for their official services:

CLERK OF THE SUPREME COURT.

Upon filing his first paper or record and making an appearance in the supreme court, the appellant shall pay to the clerk of said court a docket fee of \$5.00.

Upon making his appearance in the supreme court, the respondent in any appealed case shall pay to the clerk a fee of \$2.00.

The applicant or petitioner in any special proceeding in the supreme court, upon making his appearance, shall pay to the clerk thereof a fee of \$3.00.

The respondent in a special proceeding, and each respondent appearing separately therein, at the time of his appearance, shall pay to the clerk a fee of \$1.00.

The foregoing fees shall be all the fees connected with the appeal or special proceeding: Provided, that no fees shall be required to be advanced by the state, or any municipal corporation, or any public officer prosecuting or defending on behalf of such state or municipal corporation.

For filing application, entering admission and issuing certificate to an attorney upon admission to practice, \$20.00.

For all services for which no fee is hereinbefore prescribed, the clerk of the supreme court shall receive the same fees as are prescribed for clerks of the superior courts for like services.

CLERKS OF THE SUPERIOR COURT.

The plaintiff, or other party instituting any civil action or proceeding shall pay, when the case is entered in the court or when the first paper on his part is filed therein, a fee of \$4.00.

The defendant or other adverse party or any one or more of several defendants or other adverse parties, or interveners, appearing separately from the others, shall pay when his or their appearance is entered in the case, or when his or their first appearance is filed therein, a fee of \$2.00.

When no issue of fact is joined in the case and no judgment other than a dismissal or discontinuance, without trial of an issue of fact is rendered, no further fee need be paid.

Where, after an issue of fact has been joined, the cause is dismissed or discontinued without trial of such issue, the party causing such dismissal or discontinuance to be entered shall pay, at the time of the entry thereof, a further fee of \$1.00.

If a judgment other than a dismissal or discontinuance is rendered, the party obtaining the same shall pay, at the time of the entry thereof, a further fee as follows:

1. Where the judgment is rendered without the taking of proof of any fact pleaded:

(a) If no adverse party has appeared in the case, \$2.00.

(b) Or if an adverse party has appeared, \$3.00.

2. Where the judgment is rendered upon proof taken, but without the assessment of damages by a jury, and in a case other than the foreclosure of a lien or mortgage or partition of real estate:

(a) If no adverse party has appeared in the case, \$3.00.

(b) If an adverse party has appeared, \$5.00.

3. Where the judgment is rendered upon an assessment of damages by a jury, no adverse party having appeared in the case, \$5.00.

4. Where the judgment is rendered after an appearance by an adverse party, and a trial by jury, or by the court or a judge, referee or commissioner, in a cause other than the foreclosure of a lien or mortgage, or partition of real estate, \$6.00.

5. Where the judgment is rendered in an action for the foreclosure of a lien or mortgage or partition of real estate:

(a) If no adverse party has appeared in the case, \$6.00.

(b) If an adverse party has appeared, \$8.00.

6. For making a transcript on appeal to the supreme court, or for transcribing the records in any action for any other purpose, 10 cents per folio.

7. For comparing a transcript on appeal, or transcript of the record in any action where the party has prepared it himself, 5 cents per folio.

The appellant in appeals from judgments of a justice of the peace, shall at the time of docketing his appeal, pay a docket fee of \$1.00.

The adverse party in appeals from judgment of a justice of the peace at the time of his appearance in the superior court shall pay a fee of \$2.00.

Other fees shall be charged as are charged in actions originally begun in the superior court.

For filing an abstract of a judgment entered in the supreme court or of any other superior court of the state or of any United States court held in this state, or a transcript of a judgment of a justice court, a fee of \$1.00.

For taking an affidavit with or without seal, 50 cents.

For certificate with or without seal, 50 cents.

For entering a declaration to become a citizen of the United States, \$1.50.

For entering the final admission of an alien to citizenship and for a certified copy thereof under seal, \$3.00.

For filing all instruments required by law to be filed in his office, where no other fee is provided, 10 cents.

For filing and recording marriage certificates, the same to be collected as provided by law, \$1.00.

For approving bond, including justification thereon, in other than civil actions and probate proceedings, 50 cents.

In probate proceedings the party instituting such proceedings shall pay, at the time of the filing of the first paper therein, a fee of \$5.00.

Upon the filing of a petition for the sale of real estate, there shall be paid at the time of filing such petition a fee of \$3.00.

Upon the filing of a final account in the settlement of the decedent's estate, there shall be paid a fee of five dollars.

For issuing commission to take deposition, there shall be paid a fee of \$1.00.

For filing any petition to contest a will admitted to probate, or to prove a will which has been rejected and for all other services in connection with such petition, subsequent to its filing and up to final settlement of the issues raised by such petition, to be paid at the time of filing such petition, a fee of \$25.00.

SHERIFF'S FEES.

For service of each summons and complaint, and return thereon, on each defendant, besides mileage, 60 cents.

For making a return of not found in the county upon a summons, besides mileage actually traveled, 30 cents.

For levying each writ of attachment or writ of execution upon real or personal property, besides mileage, 60 cents.

For serving writ of possession or restitution without aid of the county, besides mileage, \$1.50.

For serving writ of possession or restitution with aid of the county, besides mileage, \$2.00.

For service and return of subpoena, upon each person served, besides mileage, 25 cents.

For summoning each juror, in a justice of the peace court, besides mileage, 25 cents.

For serving an arrest warrant in a civil action or proceeding, besides mileage, 80 cents.

For serving or executing any other writ or process in a civil action or proceeding, besides mileage, 60 cents.

For taking and approving any bond, in a civil action or proceeding, required by law to be taken or approved by him, except indemnity bonds, 50 cents.

For posting each notice, besides mileage, 25 cents.

For each mile actually and necessarily traveled by him in going to or returning from any place of service, 10 cents.

For making a deed to lands sold upon execution or order of sale, or other decree of court, to be paid by the purchaser, \$3.00.

For making copy of any complaint, notice, writ or process, necessary to complete service, per folio, 10 cents:

Provided, that he shall not be required to make any certified copies for a fee of less than \$1.00.

WITNESS FEES.

Witnesses shall receive for each day's attendance in all courts of this state, besides mileage at ten cents per mile each way, \$2.00. [L. '07, p. 88, § 1. See pp. 88-94. Cf. L. '54, pp. 368-376; L. '61, pp. 34-42; L. '63, pp. 391-399; L. '66, pp. 94-99; Cd. '81, § 2086; 1 H. C., § 3017; L. '93, pp. 421, 425, §§ 1, 2; L. '03, pp. 290-298.]

See supra, § 474 et seq., costs and disbursements in civil cases.

See infra, § 1215, compelling attendance of witnesses.

See infra, § 1864, schedule of fees of justices of the peace.

See infra, § 3936, schedule of fees of county auditor.

See infra, § 4016, schedule of fees of coroners.

See infra, §§ 4066, 4073, collection and disposition of fees.

See infra, § 4078, schedule of fees to be posted in office.

See infra, § 4080, penalty for taking illegal fees.

See *infra*, §§ 4086-4088, no fees for official oaths and pension papers.

See *infra*, § 4089, fees for like services in special cases.

See *infra*, § 6530, schedule of fees of constable.

See *infra*, § 8302, schedule of fees of notary public.

See *infra*, § 8999, schedule of fees of secretary of state.

Cited in 8 Wash. 489, 537; 31 Wash. 121; 42 Wash. 659.

Former laws cited in 7 Wash. 446, 450; 8 Wash. 233, 537; 9 Wash. 108, 109, 110, 694; 17 Wash. 488; 25 Wash. 280; 29 Wash. 60; 31 Wash. 121, 565; 39 Wash. 184.

Under this section prior to amendment a sheriff was not entitled to commissions on sale of mortgaged premises under decree of foreclosure when the property was bid in by plaintiff for amount of mortgage debt, and no moneys passed through sheriff's hands: *State v. Prince*, 9 Wash. 107; *State v. O'Loughlin*, 9 Wash. 529; *State v. Pugh*, 9 Wash. 694.

The failure of witnesses to make proof of their attendance and mileage before the clerk is not a ground of objection to the taxation of such costs in civil cases, as § 498, *infra*, requiring such proof applies to criminal cases: *Kimble v. Kimble*, 14 Wash. 369.

A sheriff is not entitled to a commission upon the sale of mortgaged premises under a decree of foreclosure, where the property was bid in by the plaintiff for the amount of the mortgage debt, although the officer and the purchaser may have intended that a portion of the sum bid should be in payment of a commission demanded by the officer: *Sodeberg v. King Co.*, 15 Wash. 194; following *State v. Prince*, 9 Wash. 108.

Where the sheriff, upon making a foreclosure sale, has been paid by the bidder, who was the plaintiff in the action, a certain sum as commission, such sum constitutes a surplus in the hands of the sheriff, which it is his duty to pay over to the judgment debtor: *Id.*

Assumpsit will lie against a county for the recovery of sums charged by the sheriff as commissions upon foreclosure sales and by him mistakenly paid into the treasury, when such sums constitute a surplus in his hands to which the judgment debtor is entitled: *Id.*

Want of privity between the parties is

no obstacle to an action for money had and received: *Id.*

A payment by the sheriff into the county treasury of a surplus arising from a foreclosure sale, made without the knowledge or consent of the judgment debtor, cannot be considered as a voluntary payment by the latter: *Id.*

The provisions of this section requiring a party instituting any action or proceeding to pay a fee of four dollars when the cause is entered in the court, etc., has no application to the filing and entry of a transcript of a justice of the peace in the execution docket of the county clerk: *State v. Gordon*, 8 Wash. 488.

And a garnishment proceeding being auxiliary to the principal action does not fall within the provision requiring the plaintiff to pay the clerk's fee of four dollars for instituting an action: *Kelly v. Ryan*, 8 Wash. 536.

As the federal constitution gives Congress power to establish a uniform rule of naturalization, the act of June 29, 1906, fixing the fees to be charged by all clerks of courts exercising jurisdiction in naturalization cases, applies to state courts where the state constitution confers such jurisdiction; and the fee authorized by a state statute cannot be collected: *State ex rel. Newman v. Libby*, 47 Wash. 481.

Laws of 1903, page 290 [repealed by this section], prescribing a scale of fees, based upon the valuation of the estate, to be paid to the clerk of the court upon filing the first papers in probate, imposes a charge in the nature of a property tax upon estates, which is void because not uniform or levied in proportion to value, where the fees exacted are paid into the general fund of the county and have no relation to the services rendered in the administration of the estate: *State ex rel. Nettleton v. Case*, 39 Wash. 177.

Failure to collect clerk's fees does not affect the finality of the judgment for the purposes of an appeal: *Chilcott v. Globe Nav. Co.*, 49 Wash. 302.

§ 498. (1609a.) Witnesses and Jurors in Criminal Cases.

No fees shall be allowed to witnesses in criminal causes unless they shall have reported their attendance at the close of each day's session to the clerk in attendance thereon. No allowance of mileage shall be made to a juror or witness who has not verified his claim of mileage under oath before the clerk of the court on which he is in attendance. [L. '95, p. 15, §§ 1, 2.]

Cited in 14 Wash. 373.

§ 499. Salaried Officers not to Receive Fees.

No state, county, municipal or other public officer within the state of Washington, who receives from the state, or from any county or municipi-

pality therein, a fixed and stated salary as compensation for services rendered as such public officer, shall be allowed or paid any per diem for attending or testifying on behalf of the state of Washington, or any county or municipality therein, at any trial or other judicial proceeding, in any state, county or municipal court within this state; nor shall such officer, in any case, be allowed nor paid any per diem for attending or testifying in any state or municipal court of this state, in regard to matters and information that have come to his knowledge in connection with and as a result of the performance of his duties as a public officer as aforesaid: Provided, this act shall not apply when any deduction shall be made from the regular salary of such officer by reason of his being in attendance upon the superior court, but in such cases regular witness fees shall be paid; and further, that if a public officer be subpoenaed and required to appear or testify in judicial proceedings in a county other than that in which he resides, then said public officer shall be entitled to receive per diem and mileage as provided by statute in other cases; and, provided further, that this act shall not apply to police officers when called as witnesses in the superior courts during hours when they are off duty as such officers. [L. '01, p. 212, § 1; L. '03, p. 10, § 1.]

§ 500. (1612.) "Folio" Defined, and Matters Concerning.

The term "folio," when used as a measure for computing fees or compensation, shall be construed to mean one hundred words, counting every two figures necessarily used as a word. Any portion of a folio, when in the whole draft or paper there should not be a complete folio, and when there shall be an excess over the last folio exceeding a quarter, it shall be computed as a folio. The filing of a paper shall be construed to include the certificate of the same. [L. '69, p. 373, § 5; Cd. '81, § 2093; 1 H. C., § 3022.]

§ 501. (1613.) Mileage in Certain Cases.

When any sheriff, constable, or coroner serves more than one process in the same cause, or on the same person, not requiring more than one journey from his office, he shall receive mileage only for the most distant service. [L. '69, p. 373, § 16; Cd. '81, § 2094; 1 H. C., § 3023.]

§ 502. (1614.) Witness Fee not Allowed to Attorney.

No attorney in any case shall be allowed any fees as a witness in such case. [L. '69, p. 374, § 17; Cd. '81, § 2095; 1 H. C., § 3024.]

§ 503. (1615a.) Mileage to be Computed from Courthouse, When.

Mileage of officers who are required to reside at the county seat shall be computed from the courthouse of the county, and every portion of a mile shall be computed as one mile. [L. '69, p. 374, § 19; Cd. '81, § 2097; 1 H. C., § 3026.]

Compare amendment of 1886, p. 156, § 1, void for defective title.

§ 504. (1619.) Costs of Publication to be Paid in Advance.

When, by law, any publication is required to be made by an officer of any suit, process, notice, order, or other papers, the costs of such publication shall, if demanded, be tendered by the party procuring such publication before such officer shall be compelled to make publication thereof. [L. '69, p. 373, § 14; Cd. '81, § 2092; 1 H. C., § 3021.]

§ 505. (1620.) Fees Payable in Advance, When.

All fees are invariably due in advance where demanded by the officer required to perform any official act, and no officer shall be required to perform any official act unless his fees are paid when he demands the same: Provided, this section shall not apply when the officer performs any official act for his county or the state. [L. '69, p. 374, § 21; Cd. '81, § 2099; 1 H. C., § 3028.]

Cited in 1 Wash. 96.

Under § 4003, *infra*, and this section, it is no defense for the sheriff against an action for damages for failure to levy an execu-

tion to allege that his fees were not tendered him, where he has made no demand therefor in advance of service: *Haas v. Gaddis*, 1 Wash. 90.

§ 506. (1621.) Officers not to Serve Until Fees are Paid—Liability Afterwards.

The officers mentioned in this act shall not, in any case except for the state or county, perform any official services unless the fees prescribed for such service are paid in advance, and on such payment the officer must perform the services required. For every failure or refusal to perform official duty when the fees are tendered, the officer is liable on his official bond. [L. '90, p. 315, § 39; 1 H. C., § 3009.]

See notes to § 4075.

Cited in 8 Wash. 260.

§ 507. (1622.) Fees of Witness are to be Paid in Advance, When.

Witnesses in civil cases shall be entitled to receive upon demand their fees for one day's attendance, together with mileage going to the place where they are required to attend, if such demand is made to the officer or person serving the subpoena at the time of service. [L. '69, p. 374, § 22; Cd. '81, § 2100; 1 H. C., § 3029.]

See *infra*, § 1215, tender of fees.

Fees of witnesses outside of state: See *Carlson Bros. & Co. v. Van de Vanter*, 19 Wash. 32; *State v. Lorenz*, 22 Wash. 289.

§ 508. (1624.) County to Pay Costs, When and When not.

Each county shall be liable to pay the per diem and mileage, or other compensation in lieu thereof, to jurors of the county attending the district court; the fees of the sheriff for maintaining prisoners charged with crimes, and his costs in conveying them to and from the district court, as well as their board while there; the per diem and mileage, or such other compensation as is allowed in lieu thereof, of the sheriff of the county, when in criminal cases he is required to attend or travel to the superior court out of the limits of his own county; the costs in criminal cases taken from the county to the district court: Provided, that none shall be so paid by the treasurer unless the particular items shall be approved by the judge and certified by the clerk under the seal of the court: And provided further, that for the time or travel which may be paid by the parties or United States, no payment from the county fund shall be allowed, and no officer, juror, or witness shall receive from the county double pay as a per diem for the same time, or as traveling expenses or mileage for the same travel, in how many different capacities or in however many different causes they may be summoned, noti-

fied, or called upon to testify or attend in. [Cf. L. '57, p. 22, § 10; L. '63, p. 425, § 10; L. '69, p. 420, § 9; Cd. '81, § 2103; 1 H. C., § 3050.]

See *supra*, § 491, costs against state or county.

This and the next following section are for the most part incompatible with the organization of the courts under the state constitution. There being a doubt as to what portions thereof survive, they are given as they appeared in the code of 1881.

§ 509. (1625.) Expenses in Lieu of Mileage.

Whenever a juror, witness, or officer is required to attend a court, or travel on official business out of the limits of his own county, and entitled to mileage, in lieu thereof he may at his option receive his actual and necessary traveling expenses by the usually traveled route in going to and returning from the place where the court is held, or where the business is discharged. [Cf. L. '63, p. 424, §§ 6, 8; L. '69, p. 419, § 7; Cd. '81, § 2109; 1 H. C., § 3049.]

This is only a part of Bal. Code, § 1625; see § 4085, *infra*.

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CHAPTER I. EXECUTIONS.

§ 510. (5192.) Execution to Enforce Judgment.

The party in whose favor judgment has been given or may hereafter be given or entered in any court of record in this state or the territory of Washington may have an execution issued at any time for the collection or enforcement of the same: Providing, that if a period of five years shall have elapsed without an execution being issued on such judgment, then execution shall not issue thereafter until such judgment shall be revived in the manner provided for by law. [Cf. L. '54, p. 175, § 242; L. '69, p. 79, § 320; Cd. '81, § 325; L. '88, p. 94, § 1; 2 H. C., § 464.]

Superseded and modified by §§ 445, 458, *supra*: *Whitworth v. McKee*, 32 Wash. 83.

See *supra*, § 445, duration of judgment lien.

See *supra*, § 459, revival of judgments.

See *infra*, § 513, form and contents of writ.

Cited in 12 Wash. 518; 23 Wash. 546; 32 Wash. 90.

Time of issuance: See 1 Remington's Digest, p. 1175, § 19; *Hewitt v. Root*, 31 Wash. 312; *Dalgardno v. Barthrop*, 40 Wash. 191; *Whitworth v. McKee*, 32 Wash. 83.

An order of sale is, in effect, merely an execution and may be issued at any time before the limitation provided in this section expires: *Hamilton v. Carter*, 12 Wash. 510, 518.

Nature and essentials of execution in general: See 1 Remington's Digest, p. 1172, §§ 1-3; *Murray v. Meade*, 5 Wash. 693; *Marks v. Pence*, 31 Wash. 426; *State ex rel. Jefferson County v. Hatch*, 36 Wash. 164; *Grant v. Cole*, 23 Wash. 542.

ALIAS WRITS.—Where a judgment was satisfied by an execution and the money was held by the sheriff under a stipulation to abide the result of another action, the creditor is not entitled to an alias execution for the purpose of recovering interest on the sum the sheriff had been holding: *Adams v. National Bank of Commerce*, 30 Wash. 20.

Quashing, vacating and relief against execution: See 1 Remington's Digest, p. 1177, §§ 30-33; *Tacoma Nat. Bank v. Sprague*, 33 Wash. 285; *Sturgiss v. Dart*, 23 Wash. 244; *Otis Bros. & Co. v. Nash*, 26 Wash. 39; *Hewitt v. Root*, 31 Wash. 312; *Phelan v. Smith*, 22 Wash. 397; *Grant v. Cole*, 23 Wash. 542; *Noerdlinger v. Huff*, 31 Wash. 360.

§ 511. (5193.) Four Kinds of Executions.

There shall be four kinds of execution: One against the property of the judgment debtor; another against his person; the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same; and the fourth, commanding the enforcement of or obedience to any special order of the court. And in all cases there shall be an order to collect the costs. [L. '54, p. 176, § 245; Cd. '81, § 327; 2 H. C., § 465.]

See *infra*, § 513, form and contents of writ.

See *infra*, § 516, execution against the person.

See *infra*, § 518, property subject to execution.

Cited in 22 Wash. 309.

§ 512. (5194.) Enforcement in Particular Cases.

When a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this chapter. When it requires the performance of any other act, a certified copy of the judgment may be served on the party against whom it is given, or the person or officer who is required thereby, or by law, to obey the same, and a writ shall be issued commanding

him to obey or enforce the same. If he refuses, he may be punished by the court as for a contempt. [L. '54, p. 176, § 244; Cd. '81, § 326; 2 H. C., § 466.]

See *infra*, § 578 et seq., service of writ.

§ 513. (5195.) Form and Contents of Writ.

The writ of execution shall be issued in the name of the state of Washington, sealed with the seal of the court, and subscribed by the clerk, and shall be directed to the sheriff of the county in which the property is situated, or coroner when the sheriff is a party or interested, and shall intelligibly refer to the judgment, stating the court, the county where judgment was rendered, the names of the parties, the amount of the judgment if it be for money, and the amount actually due thereon, and shall require substantially as follows:—

1. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of the debtor, and if sufficient personal property cannot be found, out of his real property upon which the judgment is a lien;

2. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment, with interest, out of such property;

3. If it be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor, and commit him to the jail of the county until he shall pay the judgment, with interest, or be discharged according to law;

4. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any charges, damages, or rents and profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, shall be specified therein. If a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of his real property. When it is to enforce obedience to any special order, it shall particularly command what is required to be done or to be omitted. When the nature of the case shall require it, the execution may embrace one or more of the requirements above mentioned. And in all cases the execution shall require the collection of all interest, costs, and increased costs thereon. [Cf. L. '54, p. 176, § 246; L. '69, p. 81, § 324; Cd. '81, § 328; 2 H. C., § 467.]

See *infra*, § 516, execution against the person.

See *infra*, § 578 et seq., service of writ.

See *infra*, § 611, kinds of executions.

Process must run in the name of the state of Washington: Const., Art. IV, § 27.

Cited in 12 Wash. 517; 24 Wash. 707; 26 Wash. 75; 46 Wash. 406.

As to issuance, form and requisites of writ, see 1 Remington's Digest, p. 1175, §§ 16-22.

As to cure of defects in form of writ by confirmation of sale, see *Pederson v. Lease*, 48 Wash. 253.

§ 514. (5196.) To What County Execution may Issue.

The party in whose favor judgment has been rendered, entered, or given in any court of record in this state for the recovery of money, or against the property of a judgment debtor, may have execution issued thereon for

the collection or enforcement of such judgment to the sheriff of any county in this state: Provided, that when a judgment requires the delivery of real or personal property execution shall be issued to the sheriff of the county where the property, or some part thereof, is situated. [Cf. L. '54, p. 177, § 247; Cd. '81, § 329; L. '88, p. 95, § 2; 2 H. C., § 468.]

An execution cannot be issued by the superior court of one county upon a transcript of a judgment entered in another county, and a sale on such an execution is void: *Humphries v. Sorenson*, 33 Wash. 563; *Murray v. Briggs*, 29 Wash. 245.

§ 515. (5197.) Sheriff's Duty on Receiving Execution.

The sheriff shall indorse upon the writ of execution the time when he received the same, and such execution shall be returnable within sixty days after its date to the clerk who issued the same. And no sheriff shall retain any moneys collected on execution more than twenty days before paying the same to the clerk of the court who issues the writ, under penalty of twenty per cent on the amount collected, to be paid by the sheriff, the one-half to the party to whom the judgment is payable, and the other half to the county commissioners of the county wherein the action was brought, for the use of the school fund of said county. And the clerk shall, immediately after the receipt of any moneys collected on any judgment, notify the party to whom the same is payable, and pay over the amount to the said party on demand. On failure to so notify and pay over, without reasonable cause shown for delay, the clerk shall forfeit and pay the same penalty to the same parties as is above prescribed for the sheriff. [Cf. L. '54, p. 177, § 248; L. '69, p. 83, § 226; Cd. '81, § 330; 2 H. C., § 469.]

See *infra*, § 578 et seq., service of writ.

See *infra*, § 590, return and entry for confirmation.

Cited in 3 Wash. 704; 12 Wash. 517; 21 Wash. 275; 26 Wash. 76.

Proceeds, return, payment, satisfaction and discharge: See 1 Remington's Digest, pp. 1187, 1188, §§ 78-88.

Money collected by the sheriff on execution sale, and paid in to the clerk of the court, is in the clerk's custody to be paid by him to the proper party: *State v. Superior Court*, 3 Wash. 702.

Where an execution sale has been had on a judgment by default, obtained under a false return of summons of the sheriff, the return may be assailed in a proceeding to

set aside the judgment: *Johnson v. Gregory*, 4 Wash. 109.

The law requires the sheriff to pay to the clerk of the court the moneys collected on execution; and he cannot receive moneys on an execution in one case and pay it out in satisfaction of a judgment in another: *Hamilton v. Carter*, 12 Wash. 510, 517.

As to time for making return, its form and requisites, see *State ex rel. Commercial Inv. Co. v. Hartman*, 26 Wash. 524; *Whitworth v. McKee*, 32 Wash. 83.

As to payment, satisfaction and discharge, see *Adams v. Bank*, 30 Wash. 20; *Murray v. Meade*, 5 Wash. 693.

§ 516. (5198.) Execution Against the Person.

If the action be one in which the defendant may be arrested as provided by law, an execution against the person of the judgment debtor may be issued to any county in the state: Provided, that the sheriff shall not arrest the defendant if he shall deliver to him the property subject to levy, sufficient to satisfy said judgment. [L. '54, p. 177, § 249; Cd. '81, § 331; 2 H. C., § 470.]

See Const., Art. I, § 17, absconding debtor.

See *infra*, § 748, arrest and bail.

See *supra*, §§ 511, 513, form of execution against the person.

As to execution against the person, see 1 Remington's Digest, p. 1191, §§ 107-110.

ARREST OF DEBTOR.—There shall be

no imprisonment for debt, except in cases of absconding debtor: See Const., Art. I, § 17.

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§ 517. (5199.) Imprisonment of Defendant upon Execution.

A person arrested on execution shall be imprisoned within the jail, or the liberties thereof, and kept at his own expense until satisfaction of the execution or his legal discharge; but the plaintiff shall be liable to the sheriff, in the first instance, for such expense as in other cases of arrest in the same manner and to the same extent as therein prescribed. [L. '54, p. 177, § 250; Cd. '81, § 332; 2 H. C., § 471.]

§ 518. (5200.) What Property Subject to Execution.

All property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution. [L. '54, p. 177, § 251; Cd. '81, § 333; 2 H. C., § 479.]

See *infra*, § 528 et seq., provisions relating to exemptions.

Cited in 15 Wash. 489; 31 Wash. 457.

Property subject to execution: See 1 Remington's Digest, p. 1173, §§ 4-15.

The provisions of this section include equitable as well as legal interests: Calhoun v. Leary, 6 Wash. 17.

Under this section a set of abstract books are subject to sale on execution: Wash. Bank v. Fidelity etc. Co., 15 Wash. 487; see Booth & Hanford etc. Co. v. Phelps, 8 Wash. 549.

As to interests in public lands: Phoenix Min. Co. v. Scott, 20 Wash. 48; Reilley v. Anderson, 33 Wash. 58.

As to crops, see Tipton v. Martzell, 21 Wash. 273.

Corporate stock: See Hardin v. White Swan Min. & Mill. Co., 26 Wash. 583; Daniel v. Gold Hill Min. Co., 28 Wash. 411.

Mortgaged or encumbered property: See Sayward v. Nunan, 6 Wash. 87; Voorhies v. Hennessy, 7 Wash. 243. As to an estate in expectancy, see Mears v. Lamona, 17 Wash. 148.

Property in custody of agent or depository: See Sires v. Newton, 1 W. T. 356; Wash. Nat. Bank v. Moyer, 22 Wash. 622.

Materials of contractor: See Potvin v. Wickersham, 15 Wash. 646.

Property in custody of the law: See Eidson v. Woolery, 10 Wash. 225; Conover v. Hull, 10 Wash. 673.

Joint or several property: See Graden v. Turner, 15 Wash. 516; Skavdale v. Moyer, 21 Wash. 10.

§ 519. (5201.) Execution in Name of Assignee, Executor, etc.

In all cases in which a judgment has been recovered in any of the courts of this state, which shall have been assigned to any person, execution may issue in the name of the assignee, upon the assignment being recorded in the execution docket by the clerk of the court in which the judgment is recovered; and in all cases in which a judgment has been recovered in any such court, and the person in whose name execution might have issued dies, execution may issue in the name of the executor, administrator, or legal representative of such deceased person upon the letters testamentary or of administration, or other sufficient proof, being filed in said cause and minuted upon said execution docket by the clerk of the court in which said judgment is entered, and upon an order of said court, or the judge thereof, which may be made on an ex parte application, and the provisions of this section shall extend to all judgments heretofore recovered, as well as to those hereafter to be recovered, and to cases of persons now deceased, as well as to those who may hereafter die. [L. '69, p. 84, § 330; Cd. '81, § 334; L. '86, p. 75, § 1; 2 H. C., § 472.]

§ 520. (5202.) Franchises Liable to Sale Under Execution or Foreclosure.

All franchises of every kind and nature heretofore or hereafter granted, shall be subject to sale upon execution, and upon order of sale issued upon foreclosure of mortgage, in the same manner as any other personal property

may be sold upon execution or upon order of sale under foreclosure of mortgage, except as hereinafter provided. [L. '97, p. 96, § 1.]

Cited in 21 Wash. 54; 22 Wash. 490.

A "news contract" which passes under the name of "franchises" in the newspaper trade is not a franchise within the meaning of this section: *Lawrence v. Times Printing Co.*, 22 Wash. 482.

An execution sale of "franchises" under a foreclosure of a mortgage on a newspaper,

its plant, franchises, circulation and goodwill, describes no property as a franchise with sufficient particularity to be identified, and hence passes no title to any rights which existed under a contract between the mortgagor and the Associated Press for news service: *Lawrence v. Times Printing Co.*, 22 Wash. 482.

§ 521. (5203.) Manner of Levy and Sale of Franchises.

The levy of such execution or order of sale shall be made by filing in the office of the auditor of the county in which the franchise was granted, a copy of the same, together with a notice in writing that under such execution or order of sale the officer levying the same has levied upon the franchise to be sold, specifying the time and place of sale, the name of the owner of the franchise, the amount of the claim or judgment for the satisfaction of which the franchise is to be sold, and the name of the plaintiff in the action in which the decree of foreclosure or judgment is entered; and by serving a copy of such execution or order of sale and notice, upon the judgment debtor, or his attorney of record, if any, in the action in which judgment was rendered, twenty days prior to date of sale. Notice may be served upon a defendant in the same manner that summons is served in civil actions. The sale of any franchise under execution or order of sale upon foreclosure must be made at the front door of the courthouse in the county in which the franchise was granted, not less than twenty days after the levy of the execution or order of sale and the giving of the notice as in this act provided. [L. '97, pp. 96, 97, §§ 2, 3.]

CHAPTER II.

THE STAY OF EXECUTIONS.

§ 522. (5204.) Stay, in What Cases Allowed.

Stay of execution shall be allowed on judgments rendered in the supreme court and superior courts as follows:—

In the supreme court,—

1. On all sums under five hundred dollars, thirty days;
2. On all sums over five and under fifteen hundred dollars, sixty days;
3. On all sums over fifteen hundred dollars, ninety days.

On judgments rendered in the superior court,—

1. On all sums under three hundred dollars, two months;
2. On all sums over three hundred and under one thousand dollars, five months;
3. On all sums over one thousand dollars, six months. [Cf. L. '54, p. 377, § 1; L. '60, p. 328, § 1; Cd. '81, § 335; 2 H. C., § 473.]

See *infra*, § 728, release of errors on stay of proceedings.

See *infra*, § 737, injunction to stay proceedings—damages.

§ 523. (5205.) Bond Required for Stay.

Before any execution shall be stayed under the provisions of this chapter, the defendant shall give bond to the opposite party in double the amount of the judgment and costs, with surety, to the satisfaction of the clerk, condi-

tioned to pay said judgment, interest, costs, and increased costs at the expiration of the period of said stay. [L. '54, p. 378, § 2; Cd. '81, § 336; 2 H. C., § 474.]

See *infra*, § 1722, stay bond on appeal.

Cited in 50 Wash. 40, 41.

To prevent injustice or surprise in case of a false return of a sheriff the court on a proper showing may stay proceedings: Washington Mill Co. v. Kinneer, 1 W. T. 99.

§ 524. (5206.) Judgment may be Entered Against Sureties.

If the judgment is not satisfied at any time after the expiration of the period for which execution has been stayed, the plaintiff may, upon motion supported by an affidavit that such judgment, or any part thereof, is unpaid, and stating how much still remains due thereon, have judgment against the sureties upon said bond for the balance remaining due, and have an execution therefor, upon which no stay shall be allowed. [L. '54, p. 378, § 3; Cd. '81, § 337; 2 H. C., § 475.]

Cited in 50 Wash. 41.

§ 525. (5207.) Qualification and Justification of Sureties.

The sureties upon a bond for stay of execution shall possess the same qualifications and justify in the same manner as bail upon arrest in civil actions. [L. '54, p. 378, § 4; Cd. '81, § 338; 2 H. C., § 476.]

See *infra*, § 748 et seq., arrest and bail.

§ 526. (5208.) Stay for Part of Period.

When execution has not been stayed, and execution issues before the time has elapsed for which it might have been stayed, as is herein provided, the defendant may have stay for the balance of the time upon giving the proper bond and surety, which bond and surety shall be approved by and justified before the sheriff. [L. '54, p. 378, § 5; Cd. '81, § 339; 2 H. C., § 477.]

§ 527. (5209.) Bond Lodged with Clerk.

Bonds required by this chapter shall, when taken, be lodged with the clerk of the court where the judgment was rendered and placed on file in his office. [L. '54, p. 378, § 6; Cd. '81, § 340; 2 H. C., § 478.]

CHAPTER III.

HOMESTEADS AND EXEMPTIONS.

§ 528. (5214.) Homestead, of What Consists.

The homestead consists of the dwelling-house, in which the claimant resides, and the land on which the same is situated, selected as in this chapter provided. [L. '95, p. 109, § 1.]

See Const., Art. XIX, § 1.

See notes to § 5918.

See *supra*, § 445, and notes, judgment lien.

See *infra*, §§ 535, 536, abandonment of homestead.

See *infra*, § 552, value of homestead.

See *infra*, § 558, selection of homestead.

See *infra*, §§ 585, 1465, probate homestead.

See *infra*, §§ 1102, 1103, exemptions in assignments for benefit of creditors.

For former laws on this subject see: L. '54, p. 178; L. '61, pp. 42, 52; L. '69, p. 85; Cd. '81, §§ 341-348; 2 H. C., §§ 480-490.

Cited in 16 Wash. 377; 17 Wash. 435; 25 Wash. 5; 30 Wash. 40, 54, 313; 32 Wash. 83, 98; 41 Wash. 460, 461, 464, 465; 46 Wash. 577; 48 Wash. 377.

As to nature, acquisition, and extent of homestead: See 1 Remington's Digest, p. 1371, §§ 1-13.

There was no way pointed out by the Code of 1881 by which a homestead could be identified or claimed: *Parsons v. Pearson*, 9 Wash. 48, 50; but under the provisions of § 346 of Laws 1877, the homestead claimant was required to cause the word "homestead" to be entered on the margin of the record; this provision, however, was repealed by the Code of 1881: *Philbrick v. Andrews*, 8 Wash. 7.

As to necessity of occupancy, see *Philbrick v. Andrews*, 8 Wash. 7; *Anderson v. Stadlmann*, 17 Wash. 433; *In re Feas' Estate*, 30 Wash. 51; *Lewis v. Mauerman*, 35 Wash. 136.

The mere occupancy by the judgment debtor and his family of certain lands as a homestead is a sufficient selection thereof under the provisions of § 481 of 2 Hill's Code: *Philbrick v. Andrews*, supra; and the obtaining of a general judgment lien does not cut off a subsequent selection thereof at any time before sale, to satisfy the judgment: *McMillan v. Mau*, 1 Wash. 26; *Wiss v. Stewart*, 16 Wash. 376; *In re Feas' Estate*, 30 Wash. 51; *Ross v. Howard*, 25 Wash. 1; *Anderson v. Stadlmann*, 17 Wash. 433.

As to levy of attachment or execution, see 1 Remington's Digest, p. 1376, § 341.

Under former laws the sale of a homestead under execution worth less than \$1,000 was void, and the title was not disturbed: *Asher v. Sekofsky*, 10 Wash. 379, 382; *Philbrick v. Andrews*, 8 Wash. 7.

A sheriff's deed based upon an execution sale of a lot of land is void, under the homestead law, where it appears that the lot was the only real property of the execution defendant in the state, and that they occupied it as a family residence, and that it was worth less than \$1,000; that they claimed it as exempt, and took every means to prevent the sale by notifying the sheriff, warning purchasers, and protesting against confirmation: *Asher v. Sekofsky*, 10 Wash. 379.

A sale of homestead under general execution is absolutely void: See *Whitworth v. McKee*, 32 Wash. 83.

Mortgage or other encumbrance as waiver of right: See 1 Remington's Digest, p. 1376, § 31.

Article XIX of the Constitution, providing that the legislature shall by law protect a certain portion of the homestead from forced sale, does not apply when the homestead has been voluntarily encumbered: *Oregon Mortgage Co. v. Hesner*, 14 Wash. 515; affirmed in *Stone v. So Relle*, 14 Wash. 704. See, also, *Wiss v. Stewart*, 16 Wash. 376; *Ross v. Howard*, 25 Wash. 1.

Estoppel to claim homestead: See *Traders' Nat. Bank of Spokane v. Schorr*, 20 Wash. 1.

§ 529. Exemption of Homestead—Time for Selection.

There shall be also exempt from execution and attachment to every householder, being the head of a family, a homestead not exceeding in value the sum of one thousand dollars, while occupied as such by the owner thereof, or his or her family. Said homestead may consist of a house and lot or lots in any city, or of a farm consisting of any number of acres, so that the value of the same shall not exceed the aforesaid sum of one thousand dollars. Such homestead may be selected at any time before sale. [Cd. '81, § 342; 2 H. C., § 481.]

This section, except the last sentence, seems to be superseded

See infra, § 552, homestead of the value of \$2,000 exempt.

See notes to preceding section.

The provision in this section as to the time for selection was not superseded by subsequent laws: *Wiss v. Stewart*, 16

Wash. 376; *In re Feas' Estate*, 30 Wash. 51; *Ross v. Howard*, 25 Wash. 1; *Anderson v. Stadlmann*, 17 Wash. 433.

§ 530. (5215.) From What may be Selected.

If the claimant be married the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property. When the claimant is not married, but is the head of a family within the meaning of section 553 the homestead may be selected from any of his or her property. [L. '95, p. 109, § 2.]

Section 1404 of 1 Hill's Code was rendered obsolete by this section and §§ 531 and 553 infra.

As to rights of surviving husband, wife, children or heirs, see 1 Remington's Digest, p. 1374, §§ 21-27.

The surviving wife is entitled to the homestead, even though it was the separate property of the husband: *Anderson v. Stadlmann*, 17 Wash. 433.

But not where the husband has deeded his property to another: *In re Eyer's Estate*, 7 Wash. 291. See *Boggan v. Ried*, 1 Wash. 515.

The interest of a surviving husband in community realty claimed as a homestead

during the life of the community is not exempt from the lien of a mortgage executed by him purporting to cover the whole of the realty: *Wortman v. Vorhies*, 14 Wash. 152.

After the death of the wife the husband may select a homestead from the community property: See *In re Feas' Estate*, 30 Wash. 51.

But a minor child cannot as against the other heirs of the community: See *Stewin v. Thrift*, 30 Wash. 36.

§ 531. (5216.) When Selected from Wife's Separate Estate.

The homestead cannot be selected from the separate property of the wife without her consent, shown by her making the declaration of homestead. [L. '95, p. 109, § 3.]

See notes to last section.

See *supra*, note to § 528.

§ 532. (5217.) Exempt from Forced Sale.

The homestead is exempt from execution or forced sale, except as in this chapter provided. [L. '95, p. 109, § 4.]

See *supra*, note to § 528.

The exception "as in this chapter provided" is stated in § 537, *infra*.

See 1 Remington's Digest, p. 1376, § 34; *National Bank v. Schorr*, 20 Wash. 1; *Philbrick v. Andrews*, 8 Wash. 7; *Traders' Whitworth v. McKee*, 32 Wash. 83.

§ 533. (5218.*) When Homestead Subject to Execution.

The homestead is subject to execution or forced sale in satisfaction of judgments obtained: 1. On debts secured by mechanic's, laborer's, materialmen's or vendor's liens upon the premises. 2. On debts secured by mortgages on the premises executed and acknowledged by the husband and wife or by any unmarried claimant. [L. '95, p. 110, § 5; L. '09, p. 71, § 1.]

See notes to § 528.

As to liabilities enforceable against homestead, see 1 Remington's Digest, p. 1373, §§ 14-18.

A mechanic's lien may be claimed for the erection of a dwelling-house, although the premises are at the time intended to be claimed as a homestead: *Parsons v. Pearson*, 9 Wash. 48.

A mortgagee, proceeding at law to enforce a deficiency judgment, by a sale of the

homestead, is estopped from claiming an equitable lien on the homestead by reason of its purchase with the proceeds of waste committed upon the mortgaged premises: *Harding v. Atlantic Trust Co.*, 26 Wash. 536.

A mortgage need not expressly mention the homestead: See *Brown v. Elwell*, 17 Wash. 442.

§ 534. (5219.) How Conveyed or Encumbered.

The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife. [L. '95, p. 110, § 6.]

Cited in 44 Wash. 168, 169; 50 Wash. 112.

As to joinder of husband and wife in mortgaging homestead, see 1 Remington's Digest, p. 1374, § 20.

A mortgage by the husband alone of his separate property in which the wife has a right to claim a homestead exemption is

void as to her: *Anderson v. Stadlmann*, 17 Wash. 433.

When husband has power of attorney from wife, authorizing him to mortgage all their real estate, he can make a valid mortgage of their homestead, without her joining: *Oregon Mortgage Co. v. Hoshner*, 14 Wash. 515.

A homestead claimant may mortgage the homestead after final proof, before the issuance of a patent: *Rogers v. Minneapolis Threshing Machine Co.*, 48 Wash. 19.

This section does not apply to homesteads under the federal land laws: *Ritzville Hardware Co. v. Bennington*, 50 Wash. 111.

§ 535. (5220.) **How Abandoned.**

A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged,—

1. By the husband and wife if the claimant is married;
2. By the claimant, if unmarried. [L. '95, p. 110, § 7.]

See *infra*, § 571, and notes, waiver.

Cited in 30 Wash. 56; 35 Wash. 159; 44 Wash. 168.

As to abandonment or waiver of homestead, see 1 *Remington's Digest*, p. 1375, §§ 28-31; *In re Feas' Estate*, 30 Wash. 51; *Asher v. Sekofsky*, 10 Wash. 379; *Anderson v. Stademann*, 17 Wash. 433; *Smith v. Ferry*, 43 Wash. 460.

A widow is not deprived of her homestead rights by the fact that she was driven therefrom by her husband without cause and not permitted to return, where she never evinced any intention of abandoning the same, and the property constituted the home of the husband at the time of his death: *In re Murphy's Estate*, 46 Wash. 574.

§ 536. (5221.) **Declaration, When Effectual.**

A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded. [L. '95, p. 110, § 8.]

See note to § 528.

§ 537. (5222.) **Proceedings on Execution Against Homestead.**

When the execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 533 is levied upon the homestead, the judgment creditor may apply to the superior court of the county in which the homestead is situated for the appointment of persons to appraise the value thereof. [L. '95, p. 110, § 9.]

See note to § 528.

See *infra*, § 552, value of homestead.

Cited in 44 Wash. 169.

§ 538. (5223.) **Verified Petition.**

The application must be made upon verified petition, showing,—

1. The fact that an execution has been levied upon the homestead;
2. The name of the claimant;
3. That the value of the homestead exceeds the amount of the homestead exemption. [L. '95, p. 110, § 10.]

See note to § 528.

§ 539. (5224.) **Petition, Where Filed.**

The petition must be filed with the clerk of the superior court. [L. '95, p. 110, § 11.]

See note to § 528.

§ 540. (5225.) **Notice.**

A copy of the petition, with a notice of the time and place of hearing, must be served upon the claimant at least ten days before the hearing. [L. '95, p. 110, § 12.]

See note to § 528.

§ 541. (5226.) Hearing and Appointment of Appraisers.

At the hearing the judge may, upon the proof of the service of a copy of the petition and notice and of the facts stated in the petition, appoint three disinterested resident freeholders of the county to appraise the value of the homestead. [L. '95, p. 110, § 13.]

See note to § 528.

The statute authorizing the setting aside of a homestead to a widow by the probate court from the community real property does not require the appointment of appraisers to determine the value: *Smith v. Ferry*, 43 Wash. 460.

§ 542. (5227.) Oath of Appraisers.

The persons appointed, before entering upon the performance of their duties, must take an oath to faithfully perform the same. [L. '95, p. 111, § 14.]

See note to § 528.

§ 543. (5228.) View of Premises.

They must view the premises and appraise the value thereof, and if the appraised value exceeds the homestead exemption, they must determine whether the land claimed can be divided without material injury. [L. '95, p. 111, § 15.]

See note to § 528.

§ 544. (5229.) Report of Appraisers.

Within fifteen days after their appointment they must make to the court a report in writing, which report must show the appraised value and their determination upon the matter of a division of the land claimed. [L. '95, p. 111, § 16.]

See note to § 528.

Four lots in one tract may be set aside to a widow as a homestead, although there are two houses thereon, one under lease, where the whole tract was purchased for a home, was less than \$1,000 in value, and the evidence as to the value of the buildings is not clear, one appearing to be a mere shack: *In re Murphy's Estate*, 46 Wash. 574. See *Waldron v. Kineth*, 41 Wash. 459; *Lewis v. Mauerman*, 35 Wash. 156.

§ 545. (5230.) Division of Property, When.

If, from the report, it appears to the court that the land claimed can be divided without material injury the court must, by an order, direct the appraisers to set off to the claimant so much of the land including the residence, as will amount in value to the homestead exemption, and the execution may be enforced against the remainder of the land. [L. '95, p. 111, § 17.]

See note to § 528.

§ 546. (5231.) Sale, When.

If, from the report, it appears to the court that the land claimed exceeds in value the amount of the homestead exemption and that it cannot be divided, the court must make an order directing its sale under the execution. [L. '95, p. 111, § 18.]

See note to § 528.

Where the law respecting the sale of homesteads was not complied with and no exemption at all allowed, an execution sale of premises that have been duly selected as a homestead cannot be sustained on the theory that since the judgment was obtained the exemption for a homestead was increased from \$1,000 to \$2,000, and premises were worth more than \$1,000: *Lewis v. Mauerman*, 35 Wash. 156.

A wife may maintain an action in her own name to restrain the sale of the community realty in which she and her husband claim the right of homestead: *Ross v. Howard*, 25 Wash. 1.

§ 547. (5232.) Bids.

At such sale no bid must be received unless it exceeds the amount of the homestead exemption. [L. '95, p. 111, § 19.]

See note to § 528.

§ 548. (5233.) Application of Proceeds.

If the sale is made, the proceeds thereof, to the amount of the homestead exemption, must be paid to the claimant and the balance applied to the satisfaction of the execution. [L. '95, p. 111, § 20.]

See note to § 528.

§ 549. (5234.) Money from Sale Protected.

The money paid to the claimant is entitled to the same protection against legal process and the voluntary disposition of the husband which the law gives to the homestead. [L. '95, p. 111, § 21.]

See *infra*, § 566, proceeds of homestead exempt.

See note to § 528.

§ 550. (5235.) Compensation of Appraisers.

The compensation of the appraisers shall be two dollars per day each. [L. '95, p. 111, § 22.]

See note to § 528.

§ 551. (5236.) Costs.

The execution creditor must pay the costs of these proceedings in the first instance; but in the case provided for in sections 545 and 546 the amount so paid must be added as costs on execution, and collected accordingly. [L. '95, p. 111, § 23.]

See note to § 528.

§ 552. (5237.) Selection and Value of Homestead.

Homesteads may be selected and claimed in lands and tenements with the improvements thereon, not exceeding in value the sum of two thousand dollars. The premises thus included in the homestead must be actually intended and used for a home for the claimants, and shall not be devoted exclusively to any other purposes. [L. '95, p. 112, § 24.]

See *supra*, § 529, may be selected at any time before sale.

Cited in 30 Wash. 38.

Time for selection: See 1 Remington's Digest, p. 1372, § 9; *McMillan v. Mau*, 1 Wash. 26; *Wiss v. Stewart*, 16 Wash. 376; *In re Feas' Estate*, 30 Wash. 51; *Ross v. Howard*, 25 Wash. 1; *Anderson v. Stadlmann*, 17 Wash. 433.

The widow is entitled to claim a homestead in community land purchased for that purpose and occupied as a home by the deceased at the time of his death, although not previously selected as a homestead: *In re Murphy's Estate*, 46 Wash. 574.

§ 553. (5238.) Head of a Family Defined.

The phrase "head of the family," as used in this chapter, includes within its meaning,—

1. The husband or wife, when the claimant is a married person;
2. Every person who has residing on the premises with him or her, and under his or her care and maintenance, either,—

1. His or her minor child or the minor child of his or her deceased wife or husband;
2. A minor brother or sister or the minor child of a deceased brother or sister;
3. A father, mother, grandmother or grandfather;
4. The father, mother, grandfather or grandmother of deceased husband or wife;
5. An unmarried sister, or any other of the relatives mentioned in this section who has attained the age of majority, and are unable to take care of or support themselves. [L. '95, p. 112, § 25.]

See *infra*, § 565, householder defined.

§ 554. (5239.) Alienation in Case of Insanity.

In case of a homestead, if either the husband or wife shall become hopelessly insane, upon application of the husband or wife not insane to the superior court of the county in which the homestead is situated, and upon due proof of such insanity, the court may make an order permitting the husband or wife not insane to sell and convey or mortgage such homestead. [L. '95, p. 112, § 26.]

Cited in 45 Wash. 23.

Prior to the taking effect of this section there was no statutory authority for the mortgage of the homestead of an insane husband or wife, and a mortgage by a husband, for himself and as guardian for his

insane wife, under authority of the probate court, was void, 2 Hill's Code, § 483, providing that no mortgage of the homestead shall be valid unless joined in by the wife: *Curry v. Wilson*, 45 Wash. 19.

§ 555. (5240.) Notice of Application.

Notice of the application for such order shall be given by publication of the same in a newspaper published in the county in which such homestead is situated, if there be a newspaper published therein, once each week for three successive weeks prior to the hearing of such application, and a copy of such notice shall be served upon the nearest male relative of such insane husband or wife, resident in this state, at least three weeks prior to such application, and in case there be no such male relative known to the applicant, a copy of such notice shall be served upon the prosecuting attorney of the county in which such homestead is situated; and it is hereby made the duty of such prosecuting attorney, upon being served with a copy of such notice, to appear in court and see that such application is made in good faith, and that the proceedings therein are fairly conducted. [L. '95, p. 112, § 27.]

§ 556. (5241.) Petition.

Thirty days before the hearing of any application under the provisions of this chapter, the applicant shall present and file in the court in which such application is to be heard a petition for the order mentioned, subscribed and sworn to by the applicant, setting forth the name and age of the insane husband or wife; a description of the premises constituting the homestead; the value of the same; the county in which it is situated; and such facts in addition to that of the insanity of the husband or wife relating to the circumstances and necessities of the applicant and his or her family as he or she may rely upon in support of the petition. [L. '95, p. 113, § 28.]

§ 557. (5242.) Order and Effect.

If the court shall make the order provided for in section 554, the same shall be entered upon the minutes of the court, and thereafter any sale, conveyance [or] mortgage made in pursuance of such order shall be as valid and effectual as if the property affected thereby was the absolute property of the person making such sale, conveyance or mortgage in fee simple. [L. '95, p. 113, § 29.]

§ 558. (5243.) Mode of Selection.

In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record. [L. '95, p. 113, § 30.]

See supra, § 529, may be selected at any time before sale.

Cited in 30 Wash. 38.

§ 559. (5244.) Declaration, What to Contain.

The declaration of homestead must contain,—

1. A statement showing that the person making it is the head of a family; or when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises or has purchased the same for a homestead and intends to reside thereon and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value. [L. '95, p. 113, § 31.]

See note to § 528.

See supra, § 552, residence.

See supra, § 553, head of family defined.

Cited in 30 Wash. 39, 54.

Where a homestead has been duly selected by recording the declaration, actual occu-

pancy of the same is not necessary to maintain the right to the homestead exemption: *Lewis v. Mauerman*, 35 Wash. 156.

§ 560. (5245.) Declaration must be Recorded.

The declaration must be recorded in the office of the auditor of the county in which the land is situated. [L. '95, p. 114, § 32.]

See note to § 528.

Cited in 30 Wash. 39.

The original declaration, showing indorsement of county auditor of filing and recording, is admissible in evidence: See *Smith v. Veysey*, 30 Wash. 18.

There is no homestead right in property acquired since the passage of this act unless a declaration of homestead is executed and filed as therein required: *Donaldson v. Winningham*, 48 Wash. 374.

§ 561. (5246.) Tenure by Which Homestead is Held.

From and after the time the declaration is filed for record the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this chapter; in other cases, upon the death of the person whose property was selected as a home-

stead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this chapter. [L. '95, p. 114, § 33.]

See note to § 528.

See *infra*, § 1465. probate homestead.

Cited in 24 Wash. 174; 30 Wash. 39, 55; 34 Wash. 90, 91.

Rights of surviving wife, husband, children or heirs: See 1 Remington's Digest, p. 1374, §§ 21-27; *McMillan v. Man*, 1 Wash. 26; *Wortman v. Vorhies*, 14 Wash. 152; *In re Eyre's Estate*, 7 Wash. 291; *Anderson v. Stadlmann*, 17 Wash. 433; *Austin v. Clifford*, 24 Wash. 172; *In re Lloyd's Estate*, 34

Wash. 84; *Stewin v. Thrift*, 30 Wash. 37; *In re Feas' Estate*, 30 Wash. 51.

The husband having failed to select a homestead during his lifetime does not debar his widow and children of such right, they living on the land at the time of and since his death: *McMillan v. Mau*, 1 Wash. 26, 29.

§ 562. (5247.) Subsequent Homestead Acquired by Proceeds of Former.

In case of the sale of said homestead, any subsequent homestead acquired by the proceeds thereof shall also be exempt from attachment and execution; nor shall any judgment or other claim against the owner of such homestead be a lien against the same in the hands of a bona fide purchaser for a valuable consideration. [L. '69, p. 87, § 342; Cd. '81, § 346; 2 H. C., § 485.]

See *supra*, §§ 548, 549, proceeds of sale exempt, when.

Cited in 20 Wash. 7; 44 Wash. 169; 50 Wash. 112.

Under this and § 534, and under a liberal construction of the exemption laws, the proceeds of such sale which the owner intends in good faith to reinvest in another homestead are exempt from garnishment: *Becher v. Shaw*, 44 Wash. 166.

The proceeds of a federal homestead are not exempt from execution, under a claim that the homesteader is the head of a family

and intends to use the proceeds in the acquisition of a new homestead to be owned and occupied by him under the laws of the state; since this and § 534 apply only to the state exemptions of a certain value; the federal exemption from pre-existing debts being but a condition of the grant, irrespective of state exemption laws or value, and not applying to proceeds of a sale: *Ritzville Hardware Co. v. Bennington*, 50 Wash. 111.

§ 563. (5248.) Specification of Exempt Property.

The following property shall be exempt from execution and attachment, except as hereinafter specially provided:—

1. All wearing apparel of every person and family;
 2. All private libraries, not to exceed five hundred dollars in value, and all family pictures and keepsakes;
 3. To each householder, one bed and bedding, and one addition[al] bed and bedding for each additional member of the family, and other household goods and utensils and furniture not exceeding five hundred dollars, coin, in value. The other household goods and utensils and furniture specified above shall on the demand of the officer having the execution or attachment in hand, be selected by the husband, if present, if not present they shall be selected by his wife, and in case neither husband or wife, nor other person entitled to the exemption by having the description of a householder, shall be present to make the selection, then the sheriff shall make a selection of the household goods, utensils and furniture equal in value to said five hundred dollars, and shall return the same as exempt by inventory, and such selection by the sheriff or other person described above shall be prima facie evidence,—
1. That such household goods, utensils, and furniture are exempt from execution and attachment;
 2. That the value of the property so selected is not over five hundred dollars;

4. To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months: Provided, that in case such householder shall not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three, and said selection shall have the same effect as selections made under subdivision three of this section;

5. To a farmer, one span of horses or mules, with harness, or two yoke of oxen, with yokes and chains, and one wagon; also farming utensils actually used about the farm, not exceeding in value five hundred dollars in coin; also one hundred and fifty bushels of wheat, one hundred and fifty bushels of oats or barley, fifty bushels of potatoes, ten bushels of corn, ten bushels of peas, and ten bushels of onions for seeding purposes;

6. To a mechanic, the tools and instruments used to carry on his trade for the support of himself and family, also material used in his trade, not exceeding in value five hundred dollars in coin;

7. To a physician, his library, not to exceed in value five hundred dollars in coin; also, one horse, with harness and buggy; the instruments used in his practice, and medicines not exceeding in value two hundred dollars in coin;

8. To attorneys, clergymen, and other professional men, their libraries, not exceeding one thousand dollars, in coin, value; also office furniture, fuel, and stationery, not exceeding in value two hundred dollars in coin;

9. All firearms kept for the use of any person or family;

10. To any person, a canoe, skiff, or small boat, with its oars, sails, and rigging, not exceeding in value two hundred and fifty dollars;

11. To a person engaged in lightering for his support or that of his family, one or more lighters, barges, or scows, and a small boat, with oars, sails, and rigging, not exceeding in the aggregate two hundred and fifty dollars, in coin, value;

12. To a teamster or drayman engaged in that business for the support of himself or his family, his team, consisting of one span of horses, or mules, or two yoke of oxen, or a horse and mule, with harness, yokes, one wagon, truck, cart, or dray;

13. To a person engaged in the business of logging for his support or that of his family, three yoke of work cattle and their yokes, and axes, chains, implements for the business, and camp equipments, not exceeding three hundred dollars, coin, in value;

14. A sufficient quantity of hay, grain, or feed to keep the animals mentioned in the several subdivisions of this chapter for six weeks. But no property shall be exempt from an execution issued upon a judgment for the price thereof, or any part of the price thereof, or for any tax levied thereon.

Each person shall be entitled to select the property to which he is entitled under the several subdivisions of this section. [Cf. L. '54, p. 178, § 253; L. '69, p. 87, § 343; L. '79, p. 157, § 1; Cd. '81, § 347; L. '83, p. 36, § 1; L. '86, p. 96, § 1; 2 H. C., § 486.]

See Const., Art. XIX, § 1.

See *infra*, § 637, exemption of personal earnings and trust funds.

See *infra*, § 703, exemptions of wages, etc., in garnishment.

See *infra*, §§ 1102, 1103, exemption in assignment for benefit of creditors.

Cited in 6 Wash. 329, 330; 8 Wash. 259; 11 Wash. 468; 13 Wash. 179; 26 Wash. 173.

Property and rights exempt: See 1 Remington's Digest, p. 1233, §§ 10-18; Whitworth v. McKee, 32 Wash. 83; Achey v. Creech, 18 Wash. 186; American Paper Co. v. Sullivan, 34 Wash. 391; Potvin v. Wickersham, 15 Wash. 646; Traders' Nat. Bank v. Schorr, 20 Wash. 1; Charleson v. McGraw, 3 W. T. 344.

As to construction, validity, etc., of exemption laws, see 1 Remington's Digest, p. 1231, §§ 1-3; Flood v. Libby, 38 Wash. 366; Clark v. Eltinge, 38 Wash. 376; Copland v. Pirie, 26 Wash. 481; Puget Sound etc. Co. v. Jeffs, 11 Wash. 466; *In re Heilbron's Estate*, 14 Wash. 536.

The statute relating to exemptions of both personalty and realty is to be liberally construed, to effect their object: Puget Sound etc. Packing Co. v. Jeffs, 11 Wash. 466, and cases cited on page 469; Mikkleson v. Parker, 3 W. T. 531.

The words "himself and family" in subdivision 6 should be construed as "himself or family": See Geiger v. Kobilka, 26 Wash. 171.

Persons entitled to exemption: See 1 Remington's Digest, p. 1232, §§ 5-9; Potvin v.

Wickersham, 15 Wash. 646; Geiger v. Kobilka, 26 Wash. 171.

A partner is entitled to exemption out of partnership property for his individual debt, when he has control thereof pending suit to dissolve the partnership and there are no partnership debts unpaid: Dennis v. Kass, 11 Wash. 353; see Hays v. Dennis, 11 Wash. 364.

Subdivision 3 authorizes the selection of "other household goods, etc.," and prescribes how and by whom to be selected, but confers no right to select other property of a different character: Carter v. Davis, 6 Wash. 327, 330.

Although an attachment defendant may be entitled to exemption under subdivision 4 of this section, it is for him to make the claim, and plaintiff may primarily seize the property: Zelinsky v. Price, 8 Wash. 256.

The term "householder" in subdivision 4 of this section, making certain exemptions in favor of householders, has reference to the head of a family, notwithstanding the language used in § 481 of 2 Hill's Code, which provides for exemptions in certain cases to "any householder, being the head of a family": Peterson v. Bingham, 13 Wash. 178.

§ 564. (5248a.*) No Exemption Against Wages.

No property shall be exempt from execution for clerk's, laborer's or mechanic's wages earned within this state, nor for actual necessities, not exceeding fifty dollars in value or amount furnished to the defendant or his family within sixty days preceding the beginning of an action to recover therefor, nor shall any property be exempt from execution issued upon a judgment against an attorney or agent on account of any liability incurred by such attorney or agent to his client or principal on account of any moneys or other property coming into his hands from or belonging to his client or principal: Provided, that nothing herein shall be construed as repealing or in any wise affecting section 703, *infra*. [L. '97, p. 93, § 1; L. '01, p. 323, § 1; L. '03, p. 135, § 1.]

See *infra*, § 703, exemption of wages in garnishment.

For construction of Laws of 1901, page 323, superseded by this section, see Ervay v. Hill, 46 Wash. 457. Bal. Code, § 5248a was void: Copeland v. Pirie, 26 Wash. 481.

§ 565. (5248b.) Householder Defined.

A householder, as designated in all statutes relating to exemptions, is defined to be:—

1. The husband and wife, or either;
2. Every person who has residing with him or her, and under his or her care and maintenance, either,—
 - (a) His or her minor child, or the minor child of his or her deceased wife or husband;
 - (b) A minor brother or sister, or the minor child of a deceased brother or sister;

- (c) A father, mother, grandfather or grandmother;
- (d) The father, mother, grandfather or grandmother of deceased husband or wife;
- (e) An unmarried sister, or any other of the relatives mentioned in this section who has attained the age of majority, and are unable to take care of or support themselves. [L. '97, p. 93, § 2.]

See *supra*, § 553, head of family defined.

§ 566. (5249.) Pension Money Exempt.

Any money received by any citizen of the state of Washington as a pension from the government of the United States, whether the same be in the actual possession of such person or be deposited or loaned by him, shall be exempt from execution, attachment, or seizure by or under any legal process whatever. [L. '90, p. 88, § 1; 2 H. C., § 487.]

Under the Revised Statutes of the United States, § 108, pension money due or to become due is not liable to attachment, levy or seizure under legal or equitable process. For construction of this section, see Webb

v. Holt, 57 Iowa, 712; *Crow v. Brown*, 81 Iowa, 344; see *Baugh v. Barrett*, 69 Iowa, 495; *Farmer v. Turner*, 64 Iowa, 690; *Goble v. Stephenson*, 68 Iowa, 270.

§ 567. (5250.) When Pension Money Exempt to Family.

When a debtor dies or absconds, and leaves his family any money exempted by the last preceding section, the same shall be exempt to his family as provided in said section. [L. '90, p. 89, § 2; 2 H. C., § 488.]

See *infra*, § 571, and note, waiver of exemption.

§ 568. (5251.) Fire Insurance Money Exempt, When.

Whenever property, which by the laws of this state is exempt from execution or attachment, is insured and the same is destroyed by fire, then the insurance money coming to or belonging to the person thus insured, to an amount equal to the exempt property thus destroyed, shall be exempt from execution and attachment. [L. '95, p. 135, § 1.]

Moneys paid upon an insurance policy for destruction of household furniture are exempt for a reasonable time after loss, when the furniture itself was exempt, notwithstanding the fact that the money paid for

the insurance may not be exempt: *Puget Sound etc. Packing Co. v. Jeffs*, 11 Wash. 466; decided under former laws; distinguished in *Winsor v. McLachlan*, 12 Wash. 156.

§ 569. (5252.) Proceeds of Life Insurance Exempt.

The proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt. [Cf. L. '95, p. 336, § 1; L. '97, p. 70, § 1.]

Cited in 38 Wash. 372, 373.

As to the exemption of life insurance, see 1 Remington's Digest, p. 1234, §§ 15, 17; *Puget Sound etc. Co. v. Jeffs*, 11 Wash. 466; *Winsor v. McLachlan*, 12 Wash. 154.

A policy of life insurance and the money to become due under it belong from the moment the policy is issued to the beneficiary therein named, and it is beyond the power of the insured to transfer to any other person the interest of such beneficiary: *In re Heilbron's Estate*, 14 Wash. 536.

A legislative enactment which so far affects the remedy subsisting when and where a contract is made as substantially to impair and lessen the value of such con-

tract, conflicts with § 10, article I, of the federal constitution, providing that "no state shall pass any law . . . impairing the obligation of contracts": *Id.*

A statute should not be given a retroactive construction when to so construe it impairs existing rights, unless it clearly appears that such was the legislative intention: *Id.*

This section construed and held to be prospective merely: *In re Heilbron's Estate*, 14 Wash. 536.

But it applies to a judgment founded upon a note dated September 10, 1896: *Flood v. Libby*, 38 Wash. 366.

A decision of the federal court that the national bankruptcy act subjects life insurance policies to the payment of debts, notwithstanding this section expressly exempt-

ing the same, does not affect such exemption when an attempt is made to enforce a debt under the state law: *Flood v. Libby*, 38 Wash. 366.

§ 570. (5253.) Separate Property of Wife Exempt, When.

All real and personal estate belonging to any married woman at the time of her marriage, and all which she may have acquired subsequently to such marriage, or to which she shall hereafter become entitled in her own right, and all her personal earnings, and all the issues, rents, and profits of such real estate, shall be exempt from attachment and execution upon any liability or judgment against the husband, so long as she or any minor heir of her body shall be living: Provided, that her separate property shall be liable for debts owing by her at the time of her marriage. [L. '54, p. 178, § 252; L. '69, p. 85, § 337; Cd. '81, § 341; H. C., § 480.]

See supra, § 245, and infra, § 5930, and notes, wife's separate property not liable for husband's debts.

See infra, § 5921, earnings of wife and children, separate property, when.

See infra, § 5931, wife's property liable for necessities.

Cited in 6 Wash. 512.

The statute exempting the personal earnings of wife from execution for her husband's debts must be construed to be a

statute of exemptions, and in no sense as defining separate property: *Abbott v. Wetherby*, 6 Wash. 507, 512. See *Clark v. Eltinge*, 38 Wash. 376.

§ 571. (5254.) Waiver of Exemption—Absconding Debtors.

This chapter shall not be so construed as to prevent any single man, or married man, his wife joining him, from waiving, by agreement in writing, the benefit of this chapter: Provided, That any agreement of waiver made by a husband and wife shall be witnessed and acknowledged as required in case of a deed conveying real estate: And provided also, that nothing in this chapter shall be construed to exempt from attachment or execution the property, real or personal, of nonresidents, or a person who has left or is about to leave the state with the intent to defraud his creditors. [L. '69, p. 88, § 344; L. '77, p. 74, § 352; Cd. '81, § 348; 2 H. C., § 489.]

See supra, § 534, mortgage of homestead.

Notwithstanding the last clause of this section, pension money accruing to an absconding pensioner is exempt to his family under §§ 566, 567, supra.

Cited in 6 Wash. 331; 43 Wash. 181, 182; 48 Wash. 504.

Waiver or forfeiture of exemption: See 1 Remington's Digest, p. 1234, §§ 20, 21; State ex rel. Hill v. Gardner, 32 Wash. 550.

If a person leaves the state with intent to defraud his creditors his property is not exempt from attachment, nor can his wife claim the statutory exemption in his behalf: *Carter v. Davis*, 6 Wash. 327.

The provision of this section regarding waiving of exemptions is held repugnant to and annulled by constitution, article xix: *Slyfield v. Willard*, 43 Wash. 179.

Where debtors removed from their real estate upon which they had lived, and went to another state, secretly selling their personal property or removing the same, with intent to establish their residence in such other state and to defraud their creditors, they cannot, after attachment, return to the premises and claim a homestead exemption thereon by living on the premises for a month, no effort to set aside the attachment being made prior to sale on execution, and the return to the premises not being made in good faith; this section providing that the exemption shall not apply to such persons: *Gullickson v. Fenlon*, 48 Wash. 503.

§ 572. (5255.) Claim of Exemption and Proceedings Thereon.

When a debtor claims personal property as exempt, he shall deliver to the officer making the levy an itemized list of all the personal property owned or claimed by him, including money, bonds, bills, notes, claims, and demands,

with the residence of the person indebted upon the said bonds, bills, notes, claims, and demands, and shall verify such list by affidavit. He shall also deliver to such officer a list, by separate items, of the property he claims as exempt. If the husband be absent or incapable of acting, the claim may be made, the list delivered and verified, by the wife. If the creditor, his agent or attorney, demand an appraisement thereof, two disinterested householders of the neighborhood shall be chosen, one by the debtor and the other by the creditor, his agent or attorney, and these two, if they cannot agree, shall select a third; [but if either party fail to choose an appraiser, or the two fail to select a third, or] if one or more of the appraisers fail to act, the officer shall appoint one. The appraisers shall forthwith proceed to make a list, by separate items, of the personal property selected by the debtor as exempt, which they shall decide as exempt, stating the value of each article, and annexing to the list their affidavit to the following effect: "We solemnly swear that, to the best of our judgment, the above is a fair cash valuation of the property therein described," which affidavit shall be signed by two appraisers at least, and be certified by the officer administering the oaths. The list shall be delivered to the officer holding the execution or other process, and be by him annexed to and made part of his return, and the property therein specified shall be exempt from levy and sale, and the other personal estate of the debtor shall remain subject thereto. In case no appraisement be required, the officer shall return with the process the list of the property claimed as exempt by the debtor. The appraisers shall each be entitled to one dollar, to be paid by the creditor, if all the property claimed by the debtor shall be exempt; otherwise, to be paid by the debtor. [L. '69, p. 88, § 346; L. '77, p. 74, § 353; Cd. '81, § 349; 2 H. C., § 490.]

Cited in 32 Wash. 553, 556; 33 Wash. 355, 358; 34 Wash. 393; 39 Wash. 41; 51 Wash. 328.

Protection and enforcement of right of exemption: See 1 Remington's Digest, pp. 1235, 1236, §§ 22-29; *Messenger v. Murphy*, 33 Wash. 353; *McKinley v. Morgan*, 36 Wash. 561; *Smalley v. Laugenour*, 30 Wash. 561.

Failure to include some articles in itemized list of exempt property does not forfeit debtor's right of exemption as to those articles: *Mikkleson v. Parker*, 3 W. T. 527.

A second list showing separate items of

property is not necessary where the sworn statement already furnished contains a list of all the property: *Wiser v. Thomas*, 39 Wash. 40.

The proceeds of exempt property are also exempt: *Traders' Nat. Bank v. Schorr*, 20 Wash. 1.

Mandamus is the proper remedy to prevent sale of exempt property: See 1 Remington's Digest, p. 1236, § 28; *State ex rel. Achey v. Creech*, 18 Wash. 186; *American Paper Co. v. Sullivan*, 34 Wash. 391; *State ex rel. Hill v. Gardner*, 32 Wash. 550.

CHAPTER IV.

ADVERSE CLAIMS TO PROPERTY LEVIED UPON.

§ 573. (5262.) Claim by Third Person to Property Levied on or Attached.

When any other person than the judgment debtor shall claim property levied upon or attached, he may have the right to demand and receive the same from the sheriff or other officer making the attachment or levy, upon his making an affidavit that the property is his, or that he has a right to the immediate possession thereof, stating on oath the value thereof, and giving to the sheriff or officer a bond, with sureties in double the value of such property, conditioned that he will appear in the superior court of the county in which the property was seized within ten days after the bond is accepted by

the sheriff or other officer, and make good his title to the same, or that he will return the property or pay its value to the said sheriff or other officer. [Cf. L. '54, p. 179, § 256; Cd. '81, § 350; L. '91, p. 79, § 1; 2 H. C., § 491.]

See supra, § 159, limitations of actions for.

See supra, § 363, verdict in action for specific personalty.

See supra, § 434, judgments in actions for specific personalty.

See infra, § 577, judgment in claim by third party.

See infra, § 707 et seq., claim and delivery.

See infra, § 1888, claim to property levied on in justice's court.

Cited in 3 Wash. 678; 4 Wash. 4, 597; 5 Wash. 772; 6 Wash. 88; 9 Wash. 637; 10 Wash. 227, 335; 16 Wash. 45; 18 Wash. 92; 19 Wash. 405; 22 Wash. 62; 26 Wash. 257; 34 Wash. 155, 156; 35 Wash. 530, 534.

As to claims by third persons to property attached, see 1 Remington's Digest, p. 310, §§ 46-52.

The provisions of this section, requiring claimant to make good his title within ten days after filing affidavit and bond is not mandatory. The sheriff and attaching plaintiff cannot after the property has been surrendered to claimant complain that the affidavit required by the statute has never been filed with the sheriff: *Mayer v. Woolery*, 10 Wash. 354; see *Peterson v. Wright*, 9 Wash. 202.

The sheriff cannot compel a claimant for property levied upon to execute the bond for claim and delivery: *Carpenter v. Berry*, 26 Wash. 255.

When property has been attached and released to a third person claiming the same, who makes affidavit and gives bond for the return thereof or its value, the laches of the sheriff in returning and filing the bond and affidavit will not oust the court of jurisdiction to try the question of title, in case judgment goes against him on the trial of title: *Peterson v. Wright*, 9 Wash. 202; *State v. Superior Court*, 6 Wash. 417.

The sheriff is the agent of the attaching creditor in filing bond and affidavit: *Mayer v. Woolery*, supra, 355.

A verdict is not defective nor prejudicial when in favor of the attaching creditor and within the value as admitted in the pleadings: *Peterson v. Wright*, supra,

Under the provisions of this section no pleading other than the claimant's affidavit is necessary, and no answer thereto is contemplated by the statute: *Chapin v. Bokee*, 4 Wash. 1; *Seibenbaum v. DeLanty*, 4 Wash. 596.

The trial of title is based upon the allegations of the affidavit, and a complaint being unnecessary, it is not error to strike it from the files: *Sayward v. Nunan*, 6 Wash. 87.

Pleading and proof on third party claims: See 1 Remington's Digest, p. 311, § 50.

After property has been claimed under this section, the affidavit is deemed to be denied and the question of title is treated as an issue to be tried and determined in the court in which the execution issued: *Levy v. Brown* (Wash.), 53 Fed. 568, 569,

Evidence of ownership is not required to be pleaded in claimant's affidavit, and such allegations therein will be treated as surplusage: *Freeburger v. Gazzam*, 5 Wash. 772; see *Freeburger v. Caldwell*, 5 Wash. 769. And claimant is not limited to proof of absolute ownership: See *First Nat. Bank of Seattle v. Hagan*, 16 Wash. 45.

The vendee in a bill of sale of chattels as security for a debt cannot maintain an action against a sheriff in possession of the same under attachment levy against the vendor: *Seibenbaum v. DeLanty*, supra.

See further as to pleading and proof: *Chapin v. Bokee*, 4 Wash. 1; *Berlin v. Van De Vanter*, 25 Wash. 465.

Where claimant's uncontradicted testimony establishes a prima facie title in himself, the verdict against claimant cannot stand upon evidence to the effect that the debtor's possession was that of an agent of the party from whom claimant derived title: *Medcalf v. Bush*, 4 Wash. 386.

The special statutory action under this section brought against a sheriff and an attaching creditor in which judgment is obtained for return of goods attached is a bar to another action against the sheriff, the attaching creditor, and the sureties on the indemnifying bond, to recover damages for the trespass: *Dawson v. Baum*, 3 W. T. 464; *Scott v. McGraw*, 3 W. T. 675; *Dow v. Dempsey*, 21 Wash. 86.

Upon a wrongful levy, the owner has a choice of remedies—replevin, trover or the statutory relief of claim and delivery: *Carpenter v. Barry*, 26 Wash. 255.

The allegation that the property claimed in the affidavit exceeded two hundred dollars in value is not sufficient to give appellate jurisdiction, but there must be a finding as to value by the lower court to invest the supreme court with jurisdiction: *Herrin v. Pugh*, 9 Wash. 637.

And where property seized under attachment as the property of the attaching debtor is claimed by third persons, and upon a trial of title to the property it is found to have a value exceeding two hundred dollars, an appeal to the supreme court will lie from the judgment in such proceeding, although the amount of the claim of the attaching creditor may be for a less sum: *Eidson v. Woolery*, 10 Wash. 225.

Sureties on a third party or redelivery bond appear in the action by signing the bond and have the right to appeal from the

final judgment: *Carstens v. Gustin*, 18 Wash. 901.

The proceeding authorized by this and the following sections constitute a concurrent remedy with the action of replevin: *Scott v. McGraw*, 3 Wash. 675, 677; *Chapin v. Bokee*, 4 Wash. 1; *Dawson v. Baum*, 3 W. T. 464.

SHERIFF MAY RECOVER INDEMNITY.—A sheriff acting under the express

direction of the attaching creditor, and attaching property of another than the debtor without notice that it is the property of such third person, may, after judgment against him for such wrongful attachment, recover indemnity against the creditor directing such attachment: *Stanley v. Marsh*, 1 Wash. 512.

§ 574. (5263.) Justification of Sureties.

If the sheriff or other officer require it, the sureties shall justify as in other cases, and in case they do not so justify when required, the sheriff or officer shall retain the property; if the sheriff or officer do not require the bail to justify, he shall stand good for their sufficiency. He shall date and indorse his acceptance upon the bond. [Cf. L. '54, p. 179, § 256; Cd. '81, § 351; 2 H. C., § 492.]

See *infra*, § 765, qualifications of bail.

§ 575. (5264.) Return of Officer—Trial.

The officer shall return the affidavit, bond, and justification, if any, to the office of the clerk of the superior court, and this [the] case shall stand for trial in said court. [Cf. L. '54, p. 179, § 257; Cd. '81, § 352; L. '91, p. 80, § 2; 2 H. C., § 493.]

See notes to § 573, *supra*.

Cited in 4 Wash. 763.

The execution plaintiff cannot, on the trial of the issue of title, interpose a counterclaim: *Myers v. Landrum*, 4 Wash. 762.

Where property seized by the sheriff under execution or attachment against a debtor is claimed by a third person, who files his affidavit and bond as required, such proceeding is a new and independent action, which must be placed on the trial docket of the court in the county where the property was seized, and the court of no other county has jurisdiction of the subject matter of the action: *State v. Superior Court*, 5 Wash. 639.

The affidavit and bond mentioned in this section shall be placed upon the trial docket, with claimant as plaintiff and the sheriff and plaintiff in execution as defendants, and no other pleadings are necessary: *Chapin v. Bokee*, 4 Wash. 1.

Plaintiff is not entitled to a directed verdict in his favor, upon a trial of the right of ownership to property, attached as the property of another, but which was claimed by plaintiff under a bill of sale, when there is any testimony tending to show that the transfer to plaintiff was made with intent to hinder, delay or defraud creditors: *Burns v. Woolery*, 15 Wash. 134.

§ 576. (5265.) Parties.

The person claiming the property shall be plaintiff, and the sheriff and plaintiff in the execution defendants. [L. '54, p. 179, § 258; Cd. '81, § 353; 2 H. C., § 494.]

Cited in 16 Wash. 47.

§ 577. (5266.) Judgment and Costs.

If the claimant makes good his title to the property, the bond shall be canceled; if to a portion thereof, a like proportion of the bond shall be canceled; but if he shall not maintain his title, judgment shall be rendered against him and his sureties for the value of the property, or for such less amount as shall not exceed the amount due on the original execution or attachment. When the judgment is in favor of the sheriff for the entire property, the claimant shall pay the costs; when the claimant recovers all the property, judgment shall be given in favor of the claimant for costs; when the claimant

recovers a portion of the property only, the costs shall be apportioned. When the plaintiff prevails, the costs may be taxed against the defendant who was plaintiff in the execution or attachment, or the court may, if it shall be of opinion that the sheriff attached or levied upon said property without the exercise of due caution, adjudge him to pay the costs, or any portion thereof. [L. '54, p. 179, § 259; Cd. '81, § 354; 2 H. C., § 495.]

See supra, § 363, verdict in actions for specific personalty.

See supra, § 434, judgment in actions for specific personalty.

Cited in 4 Wash. 4; 34 Wash. 155, 156; 35 Wash. 533, 534.

See 1 Remington's Digest, p. 312, §§ 51, 52.

The provisions of this section apply only to judgments rendered in special proceedings authorized by § 573, and not to actions brought under the provisions of § 707 et seq.: Eidson v. Woolery, 10 Wash. 225.

The proper judgment against a claimant failing to make good his title is for the

amount of the execution creditor's claim, not exceeding the value of the property in controversy, irrespective of any priority claimant may be entitled to as against such creditor: Sayward v. Nunan, 6 Wash. 87.

The claimant and sureties are bound by claimant's allegations as to value of property attached: See Hill v. Gardner, 35 Wash. 529.

CHAPTER V.

SALE OF PROPERTY UNDER EXECUTION AND REDEMPTION.

§ 578. (5269.) Writ, How Executed.

When the writ of execution is against the property of the judgment debtor, it shall be executed by the sheriff as follows:—

1. If property has been attached, he shall indorse on the execution and pay to the clerk forthwith the amount of the proceeds of sales of perishable property or debts due the defendant received by him sufficient to satisfy the judgment;

2. If the judgment is not then satisfied, and property has been attached and remains in his custody, he shall sell the same, or sufficient thereof to satisfy the judgment;

3. If then any portion of the judgment remains unsatisfied, or if no property has been attached, or the same has been discharged, he shall levy on the property of the judgment debtor sufficient to satisfy the judgment;

4. Property shall be levied on in like manner and with like effect as similar property is attached;

5. Until a levy, personal property shall not be affected by the execution. When property has been sold or debts received by the sheriff on execution, he shall pay the proceeds thereof, or sufficient to satisfy the judgment, as commanded in the writ;

6. When property has been attached, and it is probable that such property will not be sufficient to satisfy the judgment, the execution may be levied on other property of the judgment debtor without delay. If after satisfying the judgment any property, or the proceeds thereof, remain in the custody of the sheriff, he shall deliver the same to the judgment debtor. [L. '69, p. 91, § 351; Cd. 81, § 355; 2 H. C., § 496.]

Sections 497 and 498 of 2 Hill's Code, relating to garnishment, are omitted as superseded by the later law embraced in § 680 et seq.

See supra, § 513, form and contents of writ.

See supra, § 515, sheriff's duty on receiving writ.

See supra, §§ 518, 520, what property subject to execution.

See *supra*, § 528 et seq., exemptions.

See *infra*, § 582 et seq., manner of sale, etc.

See *infra*, § 659 et seq., manner of executing writ of attachment.

Cited in 20 Wash. 6; 28 Wash. 423.

Execution sales in general: See 1 Remington's Digest, pp. 1178-1188, §§ 36-84.

Personal property capable of manual delivery can only be levied on by the officer taking actual possession thereof; and such property of a judgment debtor in the hands of a garnishee is not in custodia legis by virtue of writs issued by the state court; hence there can be no conflict of jurisdiction by reason of a suit in equity to determine the rights of all parties asserting claims to such property commenced in the federal court after the return day of such writ: *Chase v. Cannon* (Wash.), 47 Fed. 674.

If a creditor places his execution in the sheriff's hands with directions not to levy, but to leave the debtor in possession and control of his goods, a levy under a subsequent judgment of another creditor is entitled to priority: *Wunsch v. McGraw*, 4 Wash. 72.

Such levies are treated as fraudulent and void, since the sheriff under the instructions given has no authority to proceed under the writs; hence the delivery to him is without force under such circumstances: *Id.*, 74.

If A, in his own name, but as agent for B, buys chattels, such chattels are the property of B, and a seizure of them, by virtue of an execution against the property of A, is unlawful, and no title passes by means of a sale thereunder: *Sires v. Newton*, 1 W. T. 356. See, also, *Washington Nat. Bank v. Moyer*, 22 Wash. 622.

In decreeing the foreclosure of a lien on a contract for the sale of a lot and certain personalty thereon, it is error to order the personalty to be sold in accordance with

the law governing the sale of real property on execution: *Shelton v. Jones*, 4 Wash. 692.

An equitable interest in lands may be sold on execution: *Calhoun v. Leary*, 6 Wash. 17.

A sale of land upon a judgment rendered for a community debt will divest the title of the community in the land: *Id.*; but the husband's interest in community cannot be sold to satisfy a judgment against him for his individual debt: *Stockand v. Bartlett*, 4 Wash. 730.

Community personalty may, however, be subjected to the husband's individual debt: See *Powell v. Pugh*, 13 Wash. 577; *Morse v. Estabrook*, 19 Wash. 92.

Community real estate is exempt from execution on a judgment rendered against the husband, who, as constable, wrongfully sells mortgaged personalty, under execution: *Brotton v. Langert*, 1 Wash. 73; *Griffin v. Warburton*, 23 Wash. 231.

Where, after levy of execution, the sheriff is informed that the judgment has been assigned, and is directed in writing by the execution plaintiff and his assignee to proceed with the execution, for the benefit of the assignee, the sheriff is liable in damages for releasing the property upon the subsequent direction of the attorney of the execution plaintiff: *Murray v. Mead*, 5 Wash. 693.

An execution creditor under a levy upon real estate in the possession of a prior mortgagee is not entitled to an award of damages paid into the court for the appropriation of the real estate: *Commercial Nat. Bank of Seattle v. Johnson*, 16 Wash. 536.

A judgment creditor purchasing at a sale under an alias execution issued after the judgment was fully paid acquires no title: *O'Brien v. Allen*, 42 Wash. 393.

§ 579. (5270.) Levy on Joint Realty.

When a defendant in execution owns real estate subject to execution jointly or in common with any other person, the judgment shall be a lien, and the execution be levied upon the interest of the defendant only. [L. '54, p. 220, § 499; Cd. '81, § 751; 2 H. C., § 802.]

Cited in 15 Wash. 135.

Under this and the next section, the sheriff, or, in proceedings in a justice's court, the constable, is authorized to levy execu-

tion upon partnership property to satisfy a judgment against an individual partner: *Graden v. Turner*, 15 Wash. 136.

§ 580. (5271.) Levy on Joint Personalty.

When he owns personal property jointly or in copartnership with any other person, and the interest cannot be separately attached, the sheriff shall take possession of the property, unless the other person having an interest therein shall give the sheriff a sufficient bond, with surety, to hold and manage the property according to law; and the sheriff shall then proceed to sell the interest of the defendant in such property, describing such interest in his

advertisement as nearly as may be, and the purchaser shall acquire all the interest of such defendant therein; but nothing herein contained shall be so construed as to deprive the copartner of any such defendant of his interest in any such property. [L. '54, p. 220, § 499; Cd. '81, § 752; 2 H. C., § 802.]

Cited in 21 Wash. 14.

Under this section, the purchaser is not entitled to the possession of specific property as against the copartnership, and a

levy thereon as the property of a member of the firm is void, and a wrongful conversion as against the copartnership: *Skavdale v. Moyer*, 21 Wash. 10.

§ 581. (5272.) Judgment Debtor may Retain Property, When.

When the sheriff shall levy upon personal property by virtue of an execution, he may permit the judgment debtor to retain the same, or any part thereof, in his possession until the day of sale, upon the defendant executing a written bond to the sheriff, with sufficient surety, in double the value of such property, to the effect that it shall be delivered to the sheriff at the time and place of sale; and for nondelivery thereof, an action may be maintained upon such bond by the sheriff or the plaintiff in the execution; but the sheriff shall not thereby be discharged from his liability to the plaintiff for such property. [Cf. L. '54, p. 182, § 268; L. '69, p. 92, § 354; Cd. '81, § 358; 2 H. C., § 499.]

§ 582. (5273.*) Notice of Sale.

Before the sale of property under execution, order of sale or decree, notice thereof shall be given as follows:

1. In case of personal property, by posting written or printed notice of the time and place of sale in three (3) public places in the county where the sale is to take place, for a period of not less than ten (10) days prior to the day of sale.

2. In case of real property, by posting a similar notice, particularly describing the property for a period of not less than four (4) weeks prior to the day of sale, in three (3) public places in the county, one of which shall be at the courthouse door, where the property is to be sold, and publishing a copy thereof once a week, consecutively, for the same period, in a newspaper of general circulation published in the county.

3. All notices of sales of property on execution or order of sale required by law to be published in any newspaper shall be so published in a newspaper of the county which shall be selected by the sheriff, and if there is no newspaper published, in the county, then such notice shall be published in the newspaper published in this state nearest to the place of sale: Provided, that if the person at whose instance the execution or order of sale is issued, or his attorney, shall present to the sheriff a receipt of the publisher of any newspaper, showing full payment for the publication, then the notice shall be published in that newspaper: And provided, further, that the charge for any such publication shall not exceed seventy-five cents per square for first insertion, and thirty-seven and one-half cents per square for each subsequent insertion. [L. '03, p. 381, § 1. Cf. L. '97, p. 265, § 1; L. '99, p. 86, § 3.]

Cited in 17 Wash. 612, 643; 18 Wash. 555, 583; 21 Wash. 400; 33 Wash. 60.

See 1 Remington's Digest, p. 1178, §§ 36-39.

The sale of real property under execution has been governed, since its enactment, by

Laws of 1899, page 85, whether the execution was issued under a judgment rendered prior or subsequent thereto: *Whitworth v. McKee*, 32 Wash. 83.

A sale of land on execution five years after the rendition of judgment is void

where the judgment lien has not been revived, even though the execution may have been issued prior to the expiration of such judgment lien: *Packwood v. Briggs*, 25 Wash. 530; *Hardin v. Day*, 29 Wash. 664.

A stipulation in the instrument creating the debt that a sale may be made immediately after judgment is unenforceable, except in so far as a court of equity may be inclined to take cognizance of the same: *Dennis v. Moses*, 18 Wash. 537.

As to sufficiency of posting notices of sale, see *Whitworth v. McKee*, 32 Wash. 83.

Objection to an execution sale, on the ground that notice of the sale was not given as required by statute, cannot be made where the sheriff's return shows substantial compliance with the statute: *Ervay v. Hill*, 46 Wash. 457.

Parties to an action are not entitled to personal notice of the time and place of an execution sale, under Laws of 1899, page 86, § 3, amended by this section: *Merritt v. Graves*, 52 Wash. 57.

§ 583. (5285.*) **Sale, How Conducted.**

All sales of property under execution, orders of sale or decree, shall be made by auction between nine o'clock in the morning and four o'clock in the afternoon. After sufficient property has been sold to satisfy the execution, no more shall be sold. Neither the officer [officer] holding the execution, nor his deputy, shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery, and not in the possession of a third person, association or corporation, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they shall be sold separately or otherwise as is likely to bring the highest price, or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be sold separately. Sales of real property shall be made at the courthouse door on Saturday. [L. '97, p. 71, § 2; L. '99 p. 87, § 4.]

Sale in parcels, see notes to § 587, *infra*.

Cited in 18 Wash. 558, 592.

Upon the foreclosure of a mortgage upon land, a portion of which had been conveyed away subsequent to the mortgage, it is the duty of the court to ascertain whether the mortgaged premises can be sold in parcels without impairing the security of the mortgage, and, if so, to direct the sale of the

land remaining to the mortgagor prior to the sale of that portion conveyed away by him: *Solicitors etc. Co. v. Wash. etc. Ry. Co.*, 11 Wash. 684.

This section (2 Hill's Code, § 501) seems to recognize the right of one claiming a portion of the property which is to be sold to have his part sold separately: *Id.* 689.

§ 584. **Sale of Leasehold Absolute.**

Upon a sale of real property under execution, decree or order of sale, when the estate is less than a leasehold of two years unexpired term, the sale shall be absolute. In all other cases such property shall be subject to redemption, as hereinafter provided. At the time of the sale the sheriff shall give to the purchaser a certificate of the sale, containing a particular description of the property sold, the price bid for each distinct lot, or parcel, the whole price paid, and when subject to redemption, it shall be so stated. The matters contained in such certificate shall be substantially stated in the sheriff's return of his proceedings upon the writ. [L. '99, p. 87, § 5.]

§ 585. (5286.) **Postponement of Sale.**

If, at the time appointed for the sale, the sheriff should be prevented from attending at the place appointed, or, being present, should deem it for the advantage of all concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the sale not exceeding one week next

after the day appointed, and so from time to time, for the like cause, giving notice of every adjournment by public proclamation made at the same time, and by posting written notices of such adjournment under the notices of sale originally posted by him. The sheriff, for like causes, may also adjourn the sale from time to time, not exceeding thirty days beyond the day at which the writ is made returnable, with the consent of the plaintiff indorsed upon the writ. [Cf. L. '54, p. 182, § 269; L. '69, p. 93, § 357; Cd. '81, § 361; 2 H. C., § 502.]

§ 586. (5287.) Bill of Sale by Sheriff.

When the purchaser of any personal property capable of manual delivery, and not in the possession of a third person, association, or corporation, shall pay the purchase money, the sheriff shall deliver to him the property, and if desired, shall give him a bill of sale containing an acknowledgment of the payment. In all other sales of personal property the sheriff shall give the purchaser a bill of sale with the like acknowledgment. [Cf. L. '54, p. 183, § 270; L. '69, p. 94, § 358; Cd. '81, § 362; 2 H. C., § 503.]

The fact that, at an execution sale, the purchaser did not pay the sheriff until four days thereafter, or that the execution debtor claims that he was not served with process in the action (although liable for the indebtedness and having notice of the action brought against him and others as partners), does not constitute proof of fraud in the sale or support an action for wrongful execution or conspiracy to defraud: *Eaid v. Connolly*, 48 Wash. 584.

§ 587. (5288.) Manner of Selling Real Estate.

The form and manner of sale of real estate by execution shall be as follows: The sheriff shall proclaim aloud at the place of sale, in the hearing of all the by-standers: "I am about to sell the following tracts of real estate (here reading the description) upon the following execution" (here reading the execution). He shall also state the amount which he is required to make upon the execution, which shall include damages, interests, and costs up to the day of sale, and increased costs. He shall then offer the land for sale, the lots and parcels separately or together, as he shall deem most advantageous. All land, except town lots, shall be sold by the acre. [Cf. L. '54, p. 181, § 262; L. '69, p. 94, § 359; Cd. '81, § 363; 2 H. C., § 504.]

Cited in 11 Wash. 266, 689; 19 Wash. 378. It is within the discretion of the sheriff, unless otherwise directed by the court making the order of sale, to sell lands upon execution against a judgment defendant either in mass or in parcels: *Feek v. Brewer*, 11 Wash. 264; *Otis Bros. & Co. v. Nash*, 26 Wash. 39. See, also, *State ex rel. Twiss v. Carpenter*, 19 Wash. 378.

§ 588. (5289.) Allotment When Sold by Acre.

When the land is sold by the acre, and any less number of acres than the whole tract or parcel is sold, it shall be measured off to the purchaser in a square form, from the northeast corner of the tract or parcel, unless some person having an interest in the land shall, at the sale, or prior thereto, and before the bidding is made, request that the land sold shall be taken from some other part, or in some other form; in such case, if such request is reasonable, the officer making the sale shall sell accordingly. [L. '54, p. 181, § 263; Cd. '81, § 364; 2 H. C., § 505.]

Cited in 11 Wash. 689.

§ 589. (5290.) Sale by Acre not to be Measured.

When an entire tract or parcel of land is sold by the acre, it shall not be measured, but shall be deemed and taken to contain the number of acres named in the description, and be paid for accordingly; and when the number of acres is not contained in the description, the officer shall declare, according to his judgment, how many acres are contained therein, which shall be deemed and taken to be the true number of acres. [L. '54, p. 182, § 264; Cd. '81, § 365; 2 H. C., § 506.]

§ 590. (5291.) Striking Off, Return, and Payment.

The officer shall strike off the land to the highest bidder, who shall forthwith pay the money bid to the officer, who shall return the money with his execution and his doings thereon to the clerk of the court from which the execution issued, according to the order thereof: Provided, however, that when final judgment shall have been entered in the supreme court, and the execution upon which sale has been made issued from said court, the proceedings on execution and return shall be docketed for confirmation in the superior court in which the action was originally commenced, and like proceedings shall be had as though said execution had issued from the said superior court. [L. '54, p. 182, § 265; L. '69, p. 95, § 362; Cd. '81, § 366; 2 H. C., § 507.]

Cited in 9 Wash. 109; 12 Wash. 517; 18 Wash. 119; 26 Wash. 76; 46 Wash. 406.

Conveyance, proceeds, and return of sale: See 1 Remington's Digest, pp. 1187, 1188, §§ 78-86; Lawrence v. Times Printing Co., 22 Wash. 482; Bryant v. Stetson & P. Mill Co., 13 Wash. 692; Pennsylvania Mtg. Co. v. Gilbert, 13 Wash. 684; Hamilton v. Carter, 12 Wash. 510; Gleason v. Tacoma Hotel Co., 16 Wash. 412.

This section has no application to cases where mortgaged property under decree of foreclosure is bid in by plaintiff for amount of mortgaged debt: State v. Prince, 9 Wash. 107, 110.

The sheriff is not entitled to commissions upon the sale of mortgaged premises under

foreclosure, where plaintiff bids in the property for the amount of the mortgaged debt, and no moneys pass through the sheriff's hands: Id. 107; State ex rel. Sutter v. O'Loughlin, 9 Wash. 529; State ex rel. Cannon v. Pugh, 9 Wash. 694; Soderberg v. King County, 15 Wash. 194; Moody v. Northwestern etc. Bank, 20 Wash. 413.

Commissions wrongfully deducted should be credited on the judgment: See Spinning v. Pierce County, 20 Wash. 126.

Under this and the following section the "sale" of property under foreclosure means the knocking down of the property by the sheriff: State ex rel. Steele v. Northwestern etc. Bank, 18 Wash. 118.

§ 591. (5292.*) Confirmation of Sale of Land—Disposition of Proceeds.

Upon the return of any sale of real estate as aforesaid, the clerk shall enter the cause, on which the execution or order of sale issued, by its title, on the motion docket, and mark opposite the same: "Sale of land for confirmation," and the following proceedings shall be had:

(1.) The plaintiff at any time after ten days from the filing of such return shall be entitled, on motion therefor, to have an order confirming the sale, unless the judgment debtor, or in case of his death, his representative, shall file with the clerk within ten days after the filing of such return, his objections thereto.

(2.) If such objections be filed the court shall, notwithstanding, allow the order confirming the sale, unless on the hearing of the motion, it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting. In the latter case, the court shall disallow the motion and direct that the prop-

erty be resold, in whole or in part, as the case may be as upon an execution received of that date.

(3.) Upon the return of the execution, the sheriff shall pay the proceeds of sale to the clerk, who shall then apply the same, or so much thereof as may be necessary, in satisfaction of the judgment. If an order of resale be afterwards made, and the property sell for a greater amount to any person other than the former purchaser, the clerk shall first repay to such purchaser the amount of his bid out of the proceeds of the latter sale.

(4.) Upon a resale, the bid of the purchaser at the former sale shall be deemed to be renewed and continue in force, and no bid shall be taken, except for a greater amount. An order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale as to all persons in any other action, suit or proceeding whatever.

(5.) If, after the satisfaction of the judgment, there be any proceeds of the sale remaining, the clerk shall pay such proceeds to the judgment debtor, or his representative, as the case may be, at any time before the order is made upon the motion to confirm the sale: Provided, such party file with the clerk a waiver of all objections made or to be made to the proceedings concerning the sale; but if the sale be confirmed, such proceeds shall be paid to said party of course; otherwise they shall remain in the custody of the clerk until the sale of the property has been disposed of. [L. '99, p. 87, § 6. Cf. L. '54, p. 182, § 266; L. '69, p. 95, § 363; Cd. '81, § 367; 2 H. C., § 508.]

See *infra*, § 592, execution of conveyance.

See *infra*, § 858, confirmation in partition.

See *infra*, § 1121, sales under foreclosure decree.

See *infra*, § 1515, confirmation of probate sales.

Cited in 11 Wash. 266; 17 Wash. 612, 643; 18 Wash. 119, 463, 558; 52 Wash. 59.

See 1 Remington's Digest, p. 1179, § 42; *Morrow v. Moran*, 5 Wash. 692; *Diamond v. Turner*, 11 Wash. 189; *Otis Bros. & Co. v. Nash*, 26 Wash. 39.

It is the duty of the court to confirm a sale of real estate under execution, and it is plaintiff's right to have the same confirmed, unless substantial irregularities exist which would cause probable loss or injury to defendant: *Peek v. Brewer*, 11 Wash. 264, 267.

Where there are no errors to oust the court of jurisdiction, an order confirming a sale under decree of foreclosure concludes inquiry into irregularities attending the sale, such as departure from the terms of the decree, and from the course and practice of the court: *Parker v. Dacres*, 1 Wash. 190. See, also, *Johnson v. Bartlett*, 50 Wash. 114.

A sheriff's deed based upon execution sale of the homestead occupied by the family of the value of less than one thousand dollars is void: *Asher v. Sekofsky*, 10 Wash. 379.

And the fact that the judgment debtor sells the land to a third party and removes therefrom will not cure the sheriff's deed theretofore executed: *Id.*

Proceedings on motion for confirmation: See 1 Remington's Digest, p. 1179, § 43:

Krutz v. Batts, 18 Wash. 460; *Harding v. Atlantic Trust Co.*, 26 Wash. 536; *Hardin v. Day*, 29 Wash. 664; *Whitworth v. McKee*, 32 Wash. 83.

Persons who may question validity of sale—waiver and estoppel: See 1 Remington's Digest, p. 1180, § 45; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670; *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411; *Murray v. Briggs*, 29 Wash. 245; *Hamilton v. Carter*, 12 Wash. 510.

The purchaser of land at an execution sale acquires the equitable title upon payment of the purchase price, if the proceedings antedating the sale have been regular, whether the sale is confirmed or not: *Morrow v. Moran*, 5 Wash. 692.

Time when title passes: See 1 Remington's Digest, p. 1182, § 59; *Hays v. Merchants' Bank*, 14 Wash. 192; *Knowles v. Rogers*, 27 Wash. 211; *Singly v. Warren*, 18 Wash. 434; *De Roberts v. Stiles*, 24 Wash. 611.

The judgment debtor, until after the expiration of the time to redeem, is the holder of the legal title, and must in all respects be treated as the owner of the land: *Hays v. Merchants' Bank*, 10 Wash. 573, 577.

A debtor in failing circumstances cannot, after a levy upon all his real estate, waive any of the formalities established by law for the sale of property under execution: *Murray v. Briggs*, 29 Wash. 245.

A sale to a plaintiff after her death is a nullity and may be vacated at any time: See *Brooks v. Lewis*, 22 Wash. 192.

As to effect of fraud in procuring confirmation of sale, see *Knowles v. Rogers*, 27 Wash. 211; *Bank v. Doherty*, 37 Wash. 32.

A certificate of purchase and confirmation of sale pass the substantial title of defendant upon an execution sale; and a sale of community property upon a judgment for partnership debts cannot be collaterally attacked on the ground that there was sufficient partnership property to satisfy the execution: *Diamond v. Turner*, 11 Wash. 189.

Judgment creditors as purchasers: See 1 *Remington's Digest*, p. 1183, § 64; *Woodhurst v. Cramer*, 29 Wash. 40; *Bloomington v. Weil*, 29 Wash. 611; *Lee v. Wrixon*, 37 Wash. 47; *Hacker v. White*, 22 Wash. 415; *Roher v. Snyder*, 29 Wash. 199; *Scott*

v. McGraw, 3 Wash. 675; *McEachern v. Brackett*, 8 Wash. 652.

An execution plaintiff who purchases the property levied on does not occupy the position either of an innocent purchaser or of a bona fide encumbrancer: *Benney v. Clein*, 15 Wash. 581.

Where a plaintiff has purchased the defendant's property at execution sale under a judgment which has afterward been vacated, he is estopped to dispute the defendant's title thereto in a subsequent action instituted by the defendant against him for the recovery of the property: *Benney v. Clein*, 15 Wash. 581.

The fact that a higher bid is submitted after sale of lands on execution is not ground for refusing to confirm the sale, under subdivision 2 of this section: *Merritt v. Graves*, 52 Wash. 57.

§ 592. (5293.) Eviction of Purchaser—Recovery.

If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of the reversal of the judgment, he may recover the price paid, with interest, and the costs and disbursements of the suit by which he was evicted, from the plaintiff in the writ of execution. [L. '69, p. 96, § 364; Cd. '81, § 368; 2 H. C., § 509.]

§ 593. (5294.) Contribution and Subrogation.

When property liable to an execution against several persons is sold thereon, and more than a due proportion of the judgment is levied upon the property of one of them, or one of them pays without a sale more than his proportion, he may compel contributions from the others; and when a judgment is against several, and is upon an obligation or contract of one of them as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case the person so paying or contributing shall be entitled to the benefit of the judgment to enforce contribution or repayment if within thirty days after his payment he file with the clerk of the court where the judgment was rendered notice of his payment and claim to contribution or repayment. Upon filing such notice, the clerk shall make an entry thereof in the margin of the docket where the judgment is entered. [L. '54, p. 183, § 272; Cd. '81, § 369; 2 H. C., § 510.]

See *infra*, §§ 978, 979, and notes, effect of satisfaction of judgment by sureties.

§ 594. (5295.*) Redemption from Sale.

Property sold subject to redemption, as above provided, or any part thereof separately sold, may be redeemed by the following persons, or their successors in interest:—

1. The judgment debtor or his successor in interest, in the whole or any part of the property separately sold.

2. A creditor having a lien by judgment, decree or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold. The persons mentioned in subdivision two of this section are termed redemptioners. [L. '99, p. 89, § 7. Cf. L. '97, p. 75, § 15.]

See notes to § 6750, *infra*.

As to redemption after sale under execution, see 1 Remington's Digest, pp. 1185, 1186, §§ 73-77. As to right to redeem after sale under mortgage foreclosure, see 2 Remington's Digest, pp. 1972-1974, §§ 252-268.

The enactment of § 513, 2 Hill's Code, did not repeal by implication § 519 thereof: *Debenture Corporation v. Warren*, 9 Wash. 312.

The execution provided in chapter 34 of the Code of 1881 is entirely different from the order of sale on foreclosure of a mortgage: *Parker v. Dacres*, 2 W. T. 439; *Id.*, 130 U. S. 43; *Hays v. Miller*, 1 W. T. 143.

This chapter deals entirely with executions at law, and the right to redeem, granted by §§ 511-513, 1 Hill's Code, and does not in terms or by fair implication extend to property sold in any other manner: *Parker v. Dacres*, *supra*; *Stevens v. Ferry* (Wash.), 48 Fed. 11.

The holder of a sheriff's certificate of sale of land under execution is not such an owner thereof as to be entitled to any rights under § 2172, 1 Hill's Code, relating to preference rights of abutting owners on tide lands: *Hays v. Merchants' Bank*, 10 Wash. 573.

In sales under the foreclosure act, no execution issues, but a copy of the order of sale and judgment issues under the seal of the court to the sheriff, who proceeds to sell in accordance therewith, "as upon execution": *Hays v. Miller*, 1 W. T. 143.

The courts of the United States, sitting in equity, recognize a statutory right of redemption from a sale under a decree of foreclosure, and that the statute conferring it is a rule of property in the state: *Parker v. Dacres*, 130 U. S. 43.

The right to redeem after sale, whenever it exists, is statutory: *Id.*

A court of equity should refuse aid to a party asserting a right of redemption un-

der the statute who has neglected without sufficient cause, before the expiration of six months from the confirmation of sale, to invoke the authority of the proper court to compel the sheriff to accept a tender made in conformity with law: *Id.*

If the mortgagor does not redeem within the time allowed, he cannot afterward recover the land from the purchaser or his grantee, on the ground that no valid deed was made by the sheriff: *Stevens v. Ferry* (Wash.), 48 Fed. 7, 11.

As to notice of application, see *Baggott v. Turner*, 21 Wash. 339.

The notice need not state the hour of the day when the application will be made: *Id.* Service of the notice may be proved by the testimony of the person serving it, without any return or affidavit thereof: *Id.*

The purchaser upon foreclosure sale is entitled to possession, or rental, where there is a tenant, of the property from the day of sale: *Debenture Corp. v. Warren*, 9 Wash. 312. But not where the judgment debtor had made a bona fide assignment of the rents prior to the lien of the judgment: See *Griffith v. Burlingame*, 18 Wash. 429.

Where the purchaser is entitled to possession during the period of redemption, the plaintiff in foreclosure is the proper party, upon the mortgagor's refusal to surrender possession, to proceed by petition for a writ of assistance: *Id.*

"During the same period," means the same period that the purchaser is entitled to when there is no tenant holding under an unexpired lease, viz., from the day of sale until a resale or redemption: *Byers v. Rothschild*, 11 Wash. 296, 299.

Actions to redeem and for accounting: See 1 Remington's Digest, p. 1186, § 77; *McKay v. Smith*, 27 Wash. 442; *Kennedy v. Trumble*, 32 Wash. 614.

§ 595. Time for Redemption.

The judgment debtor or his successor in interest, or any redemptioner, may redeem the property at any time within one year after the sale, on paying the amount of the bid, with interest thereon at the rate of eight per cent per annum to the time of redemption, together with the amount of any assessment or taxes which the purchaser or his successor in interest may have paid thereon after purchase, and like interest on such amount; and if the purchaser be also a creditor having a lien, by judgment, decree or mortgage, prior to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest. [L. '99, p. 89, § 8.]

Compare L. '54, p. 183; L. '69, p. 97; Cd. '81, § 370 et seq.; 2 H. C., § 511 et seq., superseded by the act of Mar. 10, '97.

§ 596. Successive Redemptions.

If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner by paying the sum paid on such last redemption with in-

terest at the rate of eight per cent per annum, and the amount of any taxes or assessment which the last redemptioner may have paid thereon after the redemption by him, with like interest on such amount, and in addition thereto by paying the amount of any liens, by judgment, decree or mortgage, held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption, on paying the sum paid on the last previous redemption with interest thereon at the rate of eight per cent per annum, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with like interest thereon, and the amount of any liens by judgment, decree or mortgage, other than the judgment under which the property was sold, held by the last redemptioner, previous to his own, with interest. If the purchaser or redemptioner shall pay any taxes or assessments, or have or acquire any such lien as herein mentioned, he must file a statement thereof with the auditor of the county where said property is situate before the property shall have been redeemed from him, otherwise the property may be redeemed without paying such tax, assessment or lien. Such statement shall be recorded by such auditor. [L. '99, p. 89, § 9.]

§ 597. Certificate of Redemption.

If no redemption be made within one year after the sale the purchaser or his assignee is entitled to a conveyance; or, if so redeemed, whenever sixty (60) days have elapsed, and no other redemption has been made, or notice given operating to extend period of redemption, and the time for redemption has expired, the last redemptioner or his assignee is entitled to a sheriff's deed; but in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property. If the judgment debtor redeem he must make the same payments as are required to effect a redemption by the redemptioner. If the judgment debtor redeem, the effect of the sale is terminated and he is restored to his estate. A certificate of redemption must be filed and recorded in the office of the auditor of the county in which the property is situated, and the auditor must note the record thereof in the margin of the record of the certificate of sale. [L. '99, p. 90, § 10. Cf. L. '97, p. 75, § 16.]

§ 598. Payment on Successive Redemptions.

When two or more persons apply to the sheriff to redeem at the same time he shall allow the person having the prior lien to redeem first, and so on. The sheriff shall immediately pay the money over to the person from whom the property is redeemed, if he attend at the redemption; or if not, at any time thereafter when demanded. When a sheriff shall wrongfully refuse to allow any person to redeem, his right to redeem shall not be prejudiced thereby, and the sheriff may be required, by order of the court, to allow such redemption. [L. '99, p. 91, § 11.]

§ 599. Notice of Redemption—Certificate.

The mode of redeeming shall be as provided in this section. The person seeking to redeem shall give the sheriff at least five days written notice of his intention to apply to the sheriff for that purpose. It shall be the duty of

the sheriff to notify the purchaser or redemptioner, as the case may be, or his attorney, of the receipt of such notice, if such person be within such county. At the time and place specified in such notice the person seeking to redeem may do so by paying to the sheriff the sum required. The sheriff shall give the person redeeming a certificate stating therein the sum paid on redemption, from whom redeemed, the date thereof and a description of the property redeemed. A person seeking to redeem shall submit to the sheriff the evidence of his right thereto, as follows:—

(1) If he be a lien creditor, a copy of the docket of the judgment or decree under which he claims the right to redeem, certified by the clerk of the court where such judgment or decree is docketed; or if he seeks to redeem upon mortgage, the certificate of the record thereof; also an affidavit, verified by himself or agent, showing the amount then actually due thereon.

(2) A copy of any assignment necessary to establish his claim, verified by the affidavit of himself or agent, showing the amount then actually due on the judgment, decree or mortgage.

(3) If the redemptioner or purchaser has a lien prior to that of the lien creditor seeking to redeem, such redemptioner or purchaser shall submit to the sheriff the evidence thereof, and the amount due thereon, or the same may be disregarded. [L. '99, p. 91, § 12.]

§ 600. Rents and Profits During Period of Redemption.

The purchaser, from the time of the sale until the redemption, and the redemptioner from the time of his redemption until another redemption, except as hereinafter provided, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by such person or persons thus entitled thereto, from the property thus sold, preceding the redemption thereof from him, the amount of such rents and profits, over and above the expenses paid for operating, caring for, protecting and insuring the property, shall be a credit upon the redemption money to be paid; and if the redemptioner or other person entitled to make such redemption, before the expiration of the time allowed for such redemption, files with the sheriff a demand in writing for a written and verified statement of the amounts of such rents and profits thus received, and expenses paid and incurred, the period for redemption is extended five (5) days after such sworn statement is given by such person thus receiving such rents and profits, or by his agent, to the person making such demand, or to the sheriff. It shall be the duty of the sheriff to serve a copy of such demand upon the person receiving such rents and profits, his agent or his attorney, if such service can be made in the county where the property is situate. If such person shall, for a period of ten days after such demand has been given to the sheriff, fail or refuse to give such statement, such redemptioner or other person entitled to redeem from such sale, making such demand, may bring an action within sixty days after making such demand, but not later, in any court of competent jurisdiction, to compel an accounting and disclosure of such rents, profits and expenses, and until fifteen days from and after the final determination of such action the right of redemption is extended to such redemptioner or other person making such demand who shall be entitled to redeem. If a sworn statement is given by the purchaser or other person receiving such

rents and profits, and such redemptioner or other person entitled to redeem, who makes such demand, desires to contest the correctness of the same, he must first redeem in accordance with such sworn statement, and if he desires to bring an action for an accounting thereafter he may do so within thirty days after such redemption, but not later: Provided, that if such property be farming or agricultural property and be in possession of any purchaser or any redemptioner and is redeemed after the first day of April and before the first day of December, and the purchaser or his tenant has performed any work in preparing such property for crops, or planted crops, he shall be entitled to reimbursement for such work and labor or the right to retain possession of such property until the first day of December following, and the redemptioner shall be entitled to collect the reasonable rental value thereof during such farming year, unless such reasonable rental shall have been collected by such purchaser and accounted for to the redemptioner. [L. '99, p. 92, § 13.]

§ 601. Restraining Waste During Redemption Period.

Until the expiration of the time allowed for redemption the court may restrain the commission of waste on the property. But it is not waste for the person in possession of the property at the time of the sale or entitled to possession afterwards during the period allowed for redemption to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor, or for the repairs of fences, or for fuel in his family while he occupies the property. [L. '99, p. 93, § 14.]

§ 602. Possession During Period of Redemption.

The purchaser from the day of sale until a resale or redemption, and the redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the period of redemption: Provided, that when a mortgage contains a stipulation that in case of foreclosure the mortgagor may remain in possession of the mortgaged premises after sale and until the period of redemption has expired the court shall make its decree to that effect and the mortgagor have such right: Provided further, that as to any land so sold which is at the time of the sale used for farming purposes, or which is a part of a farm used at the time of sale for farming purposes the judgment debtor shall be entitled to retain possession thereof during the period of redemption and the purchaser or his successor in interest shall if the judgment debtor do not redeem have a lien upon the crops raised or harvested thereon during the period of such possession for interest on the purchase price at the rate of six per cent per annum during the period of possession and for any taxes with interest: And, provided further, that in case of any homestead occupied for that purpose at the time of sale, the judgment debtor shall have the right to retain possession thereof during the period of redemption without accounting for issues or value of occupation. [L. '99, p. 93, § 15.]

A purchaser, although entitled to rents under this section, cannot recover in advance rents so payable under contract between tenant and execution defendant, as the latter's right of redemption renders uncertain the period of time for which the execution purchaser is entitled to collect rents: *Byers v. Rothchild*, 11 Wash. 296.

Under § 519, 2 Hill's Code, entitling the purchaser at an execution sale of real property to possession and to the rents and profits from the date of sale, such execution sale, although no eviction has in fact occurred, is sufficient to warrant the commencement of an action by a vendee for breach of warranty: *Frank v. Jenkins*, 11 Wash. 611, citing 11 Wash. 460.

Under § 519, 2 Hill's Code, providing that the purchaser upon foreclosure sale shall be entitled to possession of the property from the day of sale until redemption, unless the same be in the possession of a tenant holding under an unexpired lease, in which case he shall be entitled to receive the rents or the value of the use and occupation thereof during the same period, the purchaser is entitled to the rents and profits without being required to account therefor to a subsequent redemptioner: *Knipe v. Austin*, 13 Wash.

189. Compare *Hays v. Bank*, 14 Wash. 195; *Hardy v. Herriott*, 11 Wash. 460.

As to possession during period of redemption, see 1 Remington's Digest, p. 1185, § 67; *Hagerman v. Heltzel*, 21 Wash. 444, 58 Pac. 580; *State ex rel. Montgomery v. Superior Court*, 21 Wash. 564; *State ex rel. Steel v. Northwestern & Pac. etc. Bank*, 18 Wash. 118; *Canadian & Amer. Mort. & T. Co. v. Blake*, 24 Wash. 102; *Woodhurst v. Cramer*, 29 Wash. 40; *Murray v. Briggs*, 29 Wash. 245.

Under § 519, 2 Hill's Code, a purchaser upon a foreclosure sale, who takes possession of the premises and leases them to another, cannot be required to account, at the suit of the mortgagor to redeem, for the rents and profits arising from the use and occupation of such premises for the period between sale and redemption: *Hardy v. Herriott*, 11 Wash. 460; citing *Debenture Corp. v. Warren*, 9 Wash. 312.

Certificate of redemption to the husband alone is sufficient: *Carroll v. Hill Tract Improvement Co.*, 44 Wash. 569.

As to constitutionality, construction, and operation of the latter part of this section, relating to homesteads, see *North Pacific Loan and Trust Co. v. Bennett*, 49 Wash. 34.

§ 603. Sheriff's Deed.

In all cases where real estate has been, or may hereafter be sold in pursuance of law by virtue of an execution or other process, issued upon an ordinary money judgment, or by virtue of execution, or other process issued upon a decree for the foreclosure of a mortgage or other lien it shall be the duty of the sheriff or other officer making such sale to execute and deliver to the purchaser, or other person entitled to the same a deed of conveyance of the real estate so sold immediately after the time for redemption from such sale has expired: Provided, such sale has been duly confirmed by order of the court. In case the term of office of the sheriff or other officer making such sale shall have expired before a sufficient deed has been executed, then the successor in office of such sheriff shall, within the time specified in this act, execute and deliver to the purchaser or other person entitled to the same a deed of the premises so sold, and such deeds shall be as valid and effectual to convey to the grantee the lands or premises so sold, as if the deed had been made by the sheriff or other officer who made the sale. [L. '99, p. 94, § 16. Cf. L. '97, p. 75, § 16.]

See supra, § 591, confirmation of sale.

A certificate of purchase and confirmation of sale passes the substantial title of defendant upon an execution sale, and the fact that a deed in pursuance thereof was executed to the purchaser thereof after his death will not defeat the title of those claiming under him: *Diamond v. Turner*, 11 Wash. 189.

The fact that a judgment debtor, after a void execution sale of his homestead, and the execution of a sheriff's deed thereto, sells the land to a third party and removes therefrom, will not cure the invalidity of the sheriff's deed: *Asher v. Sekofsky*, 10 Wash. 379.

In an action by a redemptioner to set aside a sheriff's deed as having been made before the right of redemption had expired, the complaint does not state a cause of action when it nowhere alleges how long it was after the execution sale when the deed was made nor when there is no sufficient allegation as to any offer to redeem within the time provided by statute after the confirmation of sale: *Bryant v. Stetson & Post M. Co.*, 13 Wash. 692.

The title of the purchaser relates back to the time the lien of the judgment attached: See *Pennsylvania Mtg. Inv. Co. v. Gilbert*, 13 Wash. 684.

§ 604. Entry of Deed.

The party to whom such sheriff's deed is given shall, upon receipt thereof, take the same to the clerk of the superior court, who shall enter in his book of levies, where the levy is recorded, the sale of real estate therein conveyed, and shall indorse the fact upon the deed, with the date when presented to him and when made: And no county auditor shall record any such deed without such indorsement. [L. '99, p. 95, § 17.]

CHAPTER VI.**COMMISSIONERS TO CONVEY REAL ESTATE.****§ 605. (5300.) Court may Appoint, When.**

The several superior courts may, whenever it is necessary, appoint a commissioner to convey real estate,—

1. When, by a judgment in an action, a party is ordered to convey real property to another, or any interest therein;

2. When real property, or any interest therein, has been sold under a special order of the court, and the purchase money paid therefor. [L. '54, p. 205, § 390; Cd. '81, § 528; 2 H. C., § 814.]

§ 606. (5301.) Contents of Deed.

The deed of the commissioner shall so refer to the judgment authorizing the conveyance that the same may be readily found, but need not recite the record in the case generally. [L. '54, p. 205, § 391; Cd. '81, § 529; 2 H. C., § 815.]

§ 607. (5302.) Conveyance Made in Pursuance of Judgment—Effect of.

A conveyance made in pursuance of a judgment shall pass to the grantee the title of the parties ordered to convey the land. [L. '54, p. 205, § 392; Cd. '81, § 530; 2 H. C., § 816.]

§ 608. (5303.) Conveyance Made in Pursuance of a Sale—Effect of.

A conveyance made in pursuance of a sale ordered by the court shall pass to the grantee the title of all the parties to the action or proceeding. [L. '54, p. 205, § 393; Cd. '81, § 531; 2 H. C., § 817.]

§ 609. (5304.) Approval by Court Necessary.

A conveyance by a commissioner shall not pass any right until it has been examined and approved by the court, which approval shall be indorsed on the conveyance, and recorded with it. [L. '54, p. 205, § 394; Cd. '81, § 532; 2 H. C., § 818.]

§ 610. (5305.) Execution of Conveyance.

It shall be sufficient for the conveyance to be signed by the commissioner only, without affixing the name of the parties whose title is conveyed, but the names of the parties shall be recited in the body of the conveyance. [L. '54, p. 205, § 395; Cd. '81, § 533; 2 H. C., § 819.]

§ 611. (5306.) Recording.

The conveyance shall be recorded in the office in which by law it should have been recorded had it been made by the parties whose title is conveyed by it. [L. '54, p. 205, § 396; Cd. '81, § 534; 2 H. C., § 820.]

§ 612. (5307.) Conveyance, How Enforced.

In case of a judgment to compel a party to execute a conveyance of real estate, the court may enforce the judgment by attachment or sequestration, or appoint a commissioner to make the conveyance. [L. '54, p. 205, § 397; Cd. '81, § 535; 2 H. C., § 821.]

CHAPTER VII.

PROCEEDINGS SUPPLEMENTAL TO EXECUTION.

§ 613. (5312.*) Order to Examine Judgment Debtor.

At any time within six years after entry of a judgment for the sum of twenty-five (\$25) dollars or over, and after the return of an execution against property wholly or partially unsatisfied upon proof thereof, by affidavit or other competent written evidence satisfactory to the judge or after the issuing of an execution against property and upon proof by the affidavit of a party or otherwise to the satisfaction of the court or a judge thereof judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place before the judge granting the order, or a referee appointed by him, to answer concerning the same; and the judge to whom application is made under this act may, if it is made to appear to him by the affidavit of the judgment creditor, his agent or attorney that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before the judge granting the order. Upon being brought before the judge he may be ordered to enter into a bond, with sufficient sureties, that he will attend from time to time before the judge or referee, as shall be directed, during the pendency of the proceedings and until the final termination thereof. [L. '93, p. 435, § 1; L. '99, p. 146, § 1.]

For former laws on this subject compare: L. '54, pp. 183-186; L. '69, pp. 101-102; Cd. '81, §§ 381-387; 2 H. C., §§ 522-528.

See *infra*, § 647 et seq., attachments.

See *infra*, § 680 et seq., garnishments.

Cited in 11 Wash. 653; 13 Wash. 632; 18 Wash. 152; 21 Wash. 200.

See 1 Remington's Digest, pp. 1188-1191, §§ 85-106.

Issuance of an execution is a jurisdictional step necessary to sustain proceedings of this character: *Timm v. Stegman*, 6 Wash. 13; *Allen v. Stalleup*, 13 Wash. 631, 633.

The return of an execution unsatisfied is sufficient to authorize proceedings supplementary to execution: *Klepsch v. Donald*, 18 Wash. 150.

Such proceedings are held to be of equitable jurisdiction, intended to serve the end of a creditor's bill, and to be heard and determined by the judge with or without a jury, as he may desire: *Murne v. Schwabacher*, 2 W. T. 130. See *infra*, § 638; *Mears v. Lamona*, 17 Wash. 148; *Klepsch v. Donald*, 18 Wash. 150. Proceedings supplementary to execution involve the same principle as garnishment; *Frankenthal v. Solomonson*, 20 Wash. 460.

The provisions of title 8, chapter 6, of 2 Hill's Code, governing supplementary proceedings, do not afford an adequate remedy for setting aside a fraudulent conveyance of real property, and resort may consequently be had to a court of equity: *Klosterman v. Mason Co. etc. Ry. Co.*, 8 Wash. 281.

As to contents of affidavit, see *Klepsch v. Donald*, 18 Wash. 150; *Flood v. Libby*, 38 Wash. 366.

The affidavit may be amended by permission so as to make it conform to the original proceedings: *Murne v. Schwabacher*, *supra*.

After arrest, and being advised of supplementary proceedings against him, a party cannot dispose of property in question and thus avoid responsibility: *Id.*, 191.

This chapter does not warrant the citation and examination of officers of an insolvent corporation for which a receiver has been appointed: *Allen v. Stalleup*, 13 Wash. 631.

Salaries of public officers or employees cannot be reached: See *Flood v. Libby*, 38 Wash. 366.

Held, under §§ 524, 525, 2 Hill's Code, that the affidavit filed as basis for order need not state that execution has been issued

against the judgment debtor: *Timm v. Stegman*, 6 Wash. 13.

This chapter does not authorize the enforcement, by contempt proceedings, of a judgment annulling a marriage and ordering the payment of certain money: *Van Alstine, In re*, 21 Wash. 194.

§ 614. (5313.) **Warrant, How Vacated, etc.**

A warrant issued as prescribed in the last section may be vacated or modified by the judge making the same, or by the court out of which the execution was issued, upon giving three days' notice to the opposite party. [L. '93, p. 435, § 2.]

§ 615. (5314.) **Order to Discover Property, etc., of Judgment Debtor.**

Upon proof by affidavit or otherwise, to the satisfaction of the judge, that execution has been issued as prescribed by section 613 of this chapter, and also that any person or corporation has personal property of the judgment debtor of the value of twenty-five dollars or over, or is indebted to him in said amount, the judge may make an order requiring such person or corporation, or an officer thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same. [L. '93, p. 436, § 2.]

Cited in 20 Wash. 460.

An order in supplemental proceedings "to appear before S., court commissioner," for examination, will be considered as an order of reference to a court commissioner, especially where the court of original

jurisdiction construed the same to have that effect; since the journal entry is only evidence of the court's action, and on appeal will be given the same interpretation as given by the lower court: *Howard v. Hanson*, 49 Wash. 314.

§ 616. (5315.) **Before Whom Examined—Referee to Certify Evidence.**

An order requiring a person to attend and be examined, made pursuant to any provision of this chapter, must require him so to attend and be examined either before the judge to whom the order is returnable or before a referee designated therein. Where the examination is taken before a referee, he must certify to the judge to whom the order is returnable all of the evidence and other proceedings taken before him. [L. '93, p. 436, § 4.]

§ 617. (5316.) **Proceedings upon Examination—Adjournment.**

Upon an examination made under this chapter, the answer of the party or witness examined must be under oath. A corporation must attend by and answer under the oath of an officer thereof, and the judge may, in his discretion, specify the officer. Either party may be examined as a witness in his own behalf, and may produce and examine other witnesses as upon the trial of an action. The judge or referee may adjourn any proceedings under this chapter, from time to time, as he thinks proper. [L. '93, p. 436, § 5.]

The wife of a judgment debtor may be examined as to whether she has any of his

property in her possession: See *Frankenthal v. Solomonson*, 20 Wash. 460.

§ 618. (5317.) **Referee to be Sworn.**

Unless the parties expressly waive the referee's oath, a referee appointed as prescribed in this chapter must, before entering upon an examination or taking testimony, subscribe and take an oath that he will faithfully and fairly discharge his duty upon the reference, and make a just and true report ac-

according to the best of his understanding. The oath must be returned to the judge with the report of the testimony. [L. '93, p. 436, § 6.]

§ 619. (5318.) Order Authorizing Payment to Sheriff.

At any time after the commencement of a special proceeding authorized by this chapter, and before the appointment of a receiver therein, or the extension of a receivership thereto, the judge by whom the order or warrant was granted or to whom it is made returnable, may in his discretion upon proof by affidavit to his satisfaction that a person or corporation is indebted to the judgment debtor, and upon such notice given to such person or corporation as he deems just, or without notice make an order permitting the person or corporation to pay the sheriff designated in the order a sum on account of the alleged indebtedness not exceeding the sum which will satisfy the execution. A payment thus made is to the extent thereof a discharge of the indebtedness except as against a transferee from the judgment debtor in good faith, and for a valuable consideration, of whose rights the person or corporation had actual or constructive notice when the payment was made. [L. '93, p. 436, § 7.]

Judgment against a garnishee is unwarranted where it appears from the evidence that he signed a promissory note in his own name in favor of the principal debtor, but that his liability thereon was in fact as a

trustee for others; that the note was not due; and that it was in the hands of a third party not before the court: *Timm v. Stegman*, 6 Wash. 13.

§ 620. (5319.) Order Requiring Delivery of Money, etc., to Sheriff or Receiver.

Where it appears from the examination or testimony taken in the special proceedings authorized by this chapter that the judgment debtor has in his possession or under his control money or other personal property belonging to him, or that one or more articles of personal property capable of manual delivery, his right to the possession whereof is not substantially disputed, are in the possession or under the control of another person, the judge by whom the order or warrant was granted, or to whom it is returnable, may in his discretion, and upon such notice given to such persons as he deems just, or without notice, make an order directing the judgment debtor, or other person, immediately to pay the money or deliver the articles of personal property to a sheriff designated in the order, unless a receiver has been appointed or a receivership has been extended to the special proceedings, and in that case to the receiver. [L. '93, p. 437, § 8.]

See notes to § 613, *supra*.

Cited in 38 Wash. 375.

See 1 Remington's Digest, p. 1190, § 99 et seq.

The finding in supplemental proceedings that certain realty is liable to execution and an order for its sale to satisfy a judgment, creates no special lien against the property, and where such property is claimed as a homestead it is entitled to exemption to the extent allowed under the statute granting a judgment debtor exemption of his homestead premises: *Field v. Greiner*, 11 Wash. 8.

In supplemental proceedings, upon a trial of the issue that the judgment debtors had property which they unjustly refused to apply toward the satisfaction of the judgment,

the failure of the judgment debtors to assert their homestead rights in certain realty will not bar such claim thereafter: *Field v. Greiner*, 11 Wash. 8; decided under §§ 522, 528, 2 Hill's Code.

A garnishee cannot be required to turn over property upon which he has a lien until such lien is satisfied: *Coombs v. Davis*, 2 Wash. 466.

Where it appears from examination of defendant in proceedings supplementary to execution that he has personal property which he has withheld from execution, the court is warranted in ordering him to turn over such property to the sheriff for sale: *Kleisch v. Donald*, 18 Wash. 159.

A receivership in proceedings under this section will not be disturbed where the court finds generally that property is unjustly withheld by the judgment debtors, although

an order as to certain exempt property is erroneous and reversed: *Flood v. Libby*, 38 Wash. 366.

§ 621. (5320.) Duty of Sheriff.

If the sheriff to whom money is paid or other property is delivered, pursuant to an order made as prescribed in the last section of this chapter, does not then hold an execution upon the judgment against the property of the judgment debtor, he has the same rights and power, and is subject to the same duties and liabilities with respect to the money or property, as if the money had been collected or the property had been levied upon by him by virtue of such an execution, except as provided in the next section. [L. '93, p. 437, § 9.]

§ 622. (5321.) How Money or Property Applied.

After a receiver has been appointed or a receivership has been extended to the special proceedings, the judge must, by order, direct the sheriff to pay the money, or the proceeds of the property, deducting his fees, to the receiver; or if the case so requires to deliver to the receiver the property in his hands. But if it appears to the satisfaction of the judge that an order appointing a receiver or extending a receivership is not necessary, he may, by an order reciting that fact, direct the sheriff to apply the money so paid, or the proceeds of the property so delivered, upon an execution in favor of the judgment creditor issued either before or after the payment or delivery to the sheriff. [L. '93, p. 438, § 10.]

§ 623. (5322.) Balance, How Disposed of.

Where money is paid or property is delivered as prescribed in the last four sections and afterwards the special proceeding is discontinued or dismissed, or the judgment is satisfied without resorting to the money or property, or a balance of the money or of the proceeds of the property, or a part of the property remains in the sheriff's or receiver's hands after satisfying the judgment and the costs and expenses of the special proceeding, the judge must make an order directing the sheriff or receiver to pay the money or deliver the property so remaining in his hands to the debtor, or to such other person as appears to be entitled thereto, upon payment of his fees and all other sums legally chargeable against the same. [L. '93, p. 438, § 11.]

§ 624. (5323.) Transfer of Property may be Enjoined, etc.

The judge by whom the order or warrant was granted or to whom it is returnable may make an injunction order restraining any person or corporation, whether a party or not a party to the special proceeding, from making or suffering any transfer or other disposition of or interference with the property of the judgment debtor or the property or debt concerning which any person is required to attend and be examined, until further direction in the premises. Such an injunction may be made simultaneously with the order or warrant by which the special proceeding is instituted, and upon the same papers or afterwards, upon an affidavit showing sufficient grounds therefor. The judge or court may, as a condition of granting an application to vacate or modify the injunction order require the applicant to give security in such sum and in such manner as justice requires. [L. '93, p. 438, § 12.]

§ 625. (5324.) Mode of Service of Certain Orders.

An injunction order or an order requiring a person to attend and be examined made as prescribed in this chapter must be served,—

1. By delivering to the person to be served a certified copy of the original order and a copy of the affidavit on which it was made;
2. Service upon a corporation is sufficient if made upon an officer, to whom a copy of a summons must be delivered. Where a summons is personally served upon a corporation, unless the officer to be served is specially designated in the order, the order may be served by any person who can serve a summons in an action. [L. '93, p. 439, § 13.]

§ 626. (5325.) Service of Warrant.

The sheriff, when he arrests a judgment debtor by virtue of a warrant issued as prescribed in this chapter, must deliver to him a copy of the warrant and of the affidavit upon which it was granted. [L. '93, p. 439, § 14.]

§ 627. (5326.) Proceedings, How Discontinued or Dismissed.

A special proceeding instituted as prescribed in this chapter may be discontinued at any time upon such terms as justice requires, by an order of the judge made upon the application of the judgment creditor. Where the judgment creditor unreasonably delays or neglects to proceed, or where it appears that his judgment has been satisfied, his proceedings may be dismissed upon like terms by a like order made upon the application of the judgment debtor, or of plaintiff in a judgment creditor's action against the debtor, or of a judgment creditor who has instituted either of the special proceeding[s] authorized by this chapter. Where an order appointing a receiver or extending a receivership has been made in the course of the special proceeding, notice of the application for an order specified in this section must be given in such manner as the judge deems proper, to all persons interested in the receivership as far as they can conveniently be ascertained. [L. '93, p. 439, § 15.]

§ 628. (5327.) Costs to Judgment Creditor.

The judge may make an order allowing to the judgment creditor a fixed sum as costs, consisting of his witness fees and referee's fees and other disbursements, and of a sum in addition thereto not exceeding twenty-five dollars, and directing the payment thereof out of any money which has come or may come to the hands of the receiver or of the sheriff within a time specified in the order. [L. '93, p. 439, § 16.]

Cited in 49 Wash. 320.

A judgment in supplemental proceedings requiring the judgment debtor to deliver certain personal property to the sheriff cannot require the payment of costs into court; but under this section, a fixed sum

may be allowed as costs, to be paid out of any money which may come to the hands of the sheriff or receiver within a specified time: *Howard v. Hanson*, 49 Wash. 314.

§ 629. (5328.) Costs to Judgment Debtor.

Where the judgment debtor or other person against whom the special proceeding is instituted has been examined, and property applicable to the payment of the judgment has not been discovered, the judge may make an order allowing him a like sum as costs, and directing the payment thereof within a time specified in the order by the judgment creditor. [L. '93, p. 440, § 17.]

§ 630. (5329.) Disobedience of Order, How Punished.

A person who refuses, or without sufficient excuse neglects, to obey an order of a judge or referee made pursuant to any of the provisions of this chapter, and duly served upon him, or an oral direction given directly to him by a judge or referee in the course of the special proceeding, or to attend before a judge or referee according to the command of a subpoena duly served upon him, may be punished by the judge of the court out of which the execution issued, as for contempt. [L. '93, p. 440, § 18.]

§ 631. (5330.) Attendance of Judgment Debtor, Where.

A judgment debtor who resides or does business in the state cannot be compelled to attend pursuant to an order made under the provisions of this chapter at a place without the county where his residence or place of business is situated. Where the judgment debtor to be examined under this chapter is a corporation the court may cause such corporation to appear and be examined by making like order or orders as are prescribed in this chapter, directed to any officer or officers thereof. [L. '93, p. 440, § 19.]

§ 632. (5331.) Not Excused from Answering, When.

A party or witness examined in a special proceeding authorized by this chapter is not excused from answering a question on the ground that his examination will tend to convict him of a commission of a fraud, or to prove that he has been a party to or privy to or knowing of a conveyance, assignment, transfer or other disposition of property for any purpose; or that he or another person claims to be entitled as against the judgment creditor or receiver appointed or to be appointed in the special proceeding to hold property derived from or through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor or to a person in his behalf. But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding. [L. '93, p. 440, § 20.]

§ 633. (5332.) Proceedings in Case of Joint Debtors.

When, in proceedings under this chapter, personal service of the summons in the action was not made on all of the defendants, a debt due to, or other personal property owned by, one or more of the defendants not summoned jointly with the defendants summoned, or with any of them, may be reached by proceedings under this chapter. [L. '93, p. 441, § 21.]

§ 634. (5333.) Continuance.

A special proceeding under this chapter instituted before one judge may be continued from time to time before another judge of the same court with like effect as if it had been instituted or commenced before the judge who last heard the same. [L. '93, p. 441, § 22.]

§ 635. (5334.) Proceedings Applicable to Judgments of Justices' Courts.

This chapter shall apply to judgments recovered in justice court upon which a transcript has been issued and filed with the clerk of the superior court. [L. '93, p. 441, § 23.]

§ 636. (5335.*) Proceedings, Before Whom Instituted.

Special proceedings under this chapter may be instituted and prosecuted before the superior court of the county in which the judgment was entered

or any judge thereof, or before the superior court of any county to the sheriff of which an execution has been issued or in which a transcript of said judgment has been filed in the office of the clerk of said court or before any judge thereof. [L. '99, p. 146, § 2. Cf. L. '93, p. 441, § 24.]

§ 637. (5336.) Property Exempt from Seizure.

This chapter does not authorize the seizure of, or other interference with, any property which is expressly exempt by law from levy and sale by virtue of an execution, or any money, thing in action or other property held in trust for a judgment debtor where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor; or the earnings of the judgment debtor for his personal services rendered within sixty days next before the institution of the special proceeding, where it is made to appear by his oath or otherwise that those earnings are necessary for the use of a family wholly or partly supported by his labor. [L. '93, p. 441, § 25.]

See *supra*, § 563 et seq., property exempt from execution.

Cited in 38 Wash. 371.

§ 638. (5337.) Proceedings are Special—To be Heard Without Jury.

Proceedings under this chapter are special proceedings, and shall be heard by the judge or referee before whom the same are returnable without a jury. [L. '93, p. 441, § 26.]

See note to § 613, *supra*.

§ 639. (5338.) Fees of Referee.

The fees of referees appointed in proceedings under this chapter shall be five dollars per day. [L. '93, p. 441, § 27.]

§ 640. (5339.) Receiver, When and How Appointed.

At any time after making an order requiring the judgment debtor or any other person to attend and be examined, or the issuing of a warrant, as prescribed in this chapter, the judge to whom the order or warrant is returnable, or the court out of which the order was issued, may make an order appointing a receiver of the property of the judgment debtor. At least two days' notice of the application for the order appointing a receiver must be given personally to the judgment debtor, unless the judge or court is satisfied that he cannot, with reasonable diligence, be found within the state, in which case the order must recite that fact and may dispense with the notice, or may direct notice to be given in any manner which the judge thinks proper. But where the order to attend and be examined or the warrant has been served upon the judgment debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him. [L. '93, p. 441, § 28.]

§ 641. (5340.) Notice to Other Creditors.

The judge must ascertain, if practicable, by the oath of the judgment debtor or otherwise, whether any other special proceeding authorized by this chapter is pending against the judgment debtor, or if a receiver has been appointed or application has been made for the appointment of a receiver of the property of the judgment debtor in any other action by a judgment

creditor. If either is pending, and a receiver has not been appointed therein, notice of the application for the appointment of a receiver, and of all of the subsequent proceedings respecting the receivership, must be given in such manner as the judge directs to the judgment creditor prosecuting it. [L. '93, p. 442, § 29.]

§ 642. (5341.) Only One Receiver Appointed—Extending Receivership.

Only one receiver of the property of the judgment debtor shall be appointed. Where a receiver thereof has already been appointed the judge, instead of making the order prescribed in the last section, must make an order extending the receivership to the special proceedings before him. Such an order gives to the judgment creditor the same rights as if a receiver was appointed upon his application, including the right to apply to the court to control, direct or remove the receiver, or to subordinate the proceedings in or by which the receiver was appointed to those taken under his judgment. [L. '93, p. 442, § 30.]

§ 643. (5342.) Order to be Filed, Where.

An order appointing a receiver or extending a receivership must be filed in the office of the county clerk wherein the judgment-roll in the action is filed; or if the special proceeding is founded upon an execution issued out of a court other than that in which the judgment was rendered, in the office of the clerk of the county wherein the transcript of the judgment is filed. [L. '93, p. 442, § 31.]

§ 644. (5343.) When Property Vests in Receiver.

The property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him or extending his receivership, as the case may be, subject to the following exceptions:—

1. Real property is vested in the receiver only from the time when the order, or a certified copy thereof, as the case may be, is filed with the auditor of the county where it is situated;

2. When the judgment debtor, at the time when the order is filed, resides in another county of the state, his personal property is vested in the receiver only from the time when a copy of the order, certified by the auditor in whose office it is recorded, is filed with the auditor of the county where he resides. [L. '93, p. 443, § 32.]

§ 645. (5344.) Receiver's Title, How Extended by Relation.

Where the receiver's title to personal property has become vested, as prescribed in the last section, it also extends back by relation, for the benefit of the judgment creditor, in whose behalf the special proceeding was instituted as follows:—

1. When an order requiring the judgment debtor to attend and be examined, or a warrant requiring the sheriff to arrest him and bring him before the judge, has been served, before the appointment of the receiver, or the extension of the receivership, the receiver's title extends back so as to include the personal property of the judgment debtor at the time of the service of the order or warrant;

2. Where an order or warrant has not been served as specified in the foregoing subdivision, but an order has been made requiring a person to attend

and be examined concerning property belonging or a debt due to the judgment debtor, the receiver's title extends to the personal property belonging to the judgment debtor, which was in the hands or under the control of the person or corporation thus required to attend at the time of the service of the order, and to a debt then due to him from that person or corporation;

3. In every other case where notice of application for the appointment of a receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor at the time when the notice was served, either personally or by complying with the requirements or [of] an order prescribing a substitute for personal service;

4. Where the case is within two or more of the foregoing subdivisions of this section, the rule most favorable to the judgment creditor must be adopted. But this section does not affect the title of a purchaser in good faith without notice, and for a valuable consideration; or the payment of a debt in good faith and without notice. [L. '93, p. 443, § 33.]

§ 646. (5345.) Records to be Kept by Clerk.

Each county clerk must keep in his office a book indexed to the names of the judgment debtors, styled "book of orders appointing receivers of judgment debtors." A county clerk in whose office an order or a certified copy of an order is filed, as prescribed in this chapter, must immediately note thereupon the time of filing it, and as soon as practicable, must record it in the book so kept by him. He must also, upon request, furnish forthwith to any party or person interested, one or more certified copies thereof. For each omission to comply with any provision of this section, a county clerk forfeits to the party aggrieved two hundred and fifty dollars, in addition to all damages sustained by reason of the omission. [L. '93, p. 444, § 34.]

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CHAPTER I. ATTACHMENTS.

§ 647. (5350.) Attachment, When Granted.

The plaintiff at the time of commencing an action, or at any time afterward before judgment, may have the property of the defendant, or that of any one or more of several defendants, attached in the manner hereinafter prescribed, as security for the satisfaction of such judgment as he may recover. [L. '86, p. 39, § 1; 2 H. C., § 288.]

For former enactments on this subject see: L. '54, pp. 155-162; L. '60, pp. 30-36; L. '63, pp. 112-120; L. '69, pp. 41-47; L. '71, pp. 9, 10; L. '73, pp. 43-50; L. '77, pp. 35-40; Cd. '81, §§ 174-192.

The foregoing provisions are repealed by the provisions of this chapter.

See supra, § 220 et seq., manner of commencing civil actions.

See supra, § 573 et seq., claim of third person to property attached.

See infra, § 680 et seq., provisions relating to garnishments.

See infra, § 1888, claim of third person in justice's court.

Cited in 10 Wash. 450; 29 Wash. 203.

Nature and grounds of attachment: See 1 Remington's Digest, p. 300, §§ 1-4.

The provisions of § 171, 2 Hill's Code, providing that civil actions shall be commenced by filing complaint with clerk, has not been repealed, in so far as issuance of writs of attachments are concerned, by § 220, supra: Cosh-Murray Co. v. Tutlich, 10 Wash. 449.

An attachment may issue in an equitable action, when the object is to recover a specified amount of money: Bingham v. Keylor, 19 Wash. 555; Rohrer v. Snyder, 29 Wash. 199.

An attachment is but an auxiliary proceeding: Nesqually M. Co. v. Taylor, 1 W. T. 1; Windt v. Banniza, 2 Wash. 147; Denny v. Sayward, 10 Wash. 422.

Property vested in a nonresident administrator is liable to attachment: Barlow v. Coggin, 1 W. T. 257.

There can be no valid attachment, unless property is found liable to attachment upon which the same can be made: Jean v. Dee, 5 Wash. 580, 582.

An attachment lien is sufficient to support a creditor's bill, without first obtaining judgment, where it is shown that the debtor is insolvent, and that an execution would prove unavailing: Benham v. Ham, 5 Wash. 128; following Meacham Arms Co. v. Swarts, 2 W. T. 412; Thompson v. Caton, 3 W. T. 31.

The owner of a mortgage has the right to intervene in a suit in which the mortgagor is a party defendant and in which the mortgaged property has been attached, for the purpose of having his mortgage lien declared prior to that of the attachment: Langert v. Brown, 3 W. T. 102.

An attachment may issue after the filing of a complaint and before service of summons, under the statutes of this state: Schwabacher Bros. & Co. v. Grocery Co., 14 Wash. 225; Cosh-Murray Co. v. Tutlich, supra.

Ownership or possession of property as determining liability: See 1 Remington's Digest, p. 301, § 8; Clerf v. Montgomery, 15 Wash. 483, 1028; Johnson v. Irwin, 16 Wash. 652; Standard Furniture Co. v. Van Alstine, 31 Wash. 499.

§ 648. (5351.) Issuance of Writ, Affidavit for.

The writ of attachment shall be issued by the clerk of the court in which the action is pending; but before any such writ of attachment shall issue, the plaintiff, or some one in his behalf, shall make and file with such clerk an affidavit showing that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all just credits and offsets), and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant, and either,—

1. That the defendant is a foreign corporation; or
2. That the defendant is not a resident of this state; or
3. That the defendant conceals himself so that the ordinary process of law cannot be served upon him; or

4. That the defendant has absconded or absented himself from his usual place of abode in this state, so that the ordinary process of law cannot be served upon him; or

5. That the defendant has removed or is about to remove any of his property from this state, with intent to delay or defraud his creditors; or

6. That the defendant has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, any of his property, with intent to delay or defraud his creditors; or

7. That the defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or

8. That the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or

9. That the damages for which the action is brought are for injuries arising from the commission of some felony, or for the seduction of some female. [L. '86, p. 39, § 2; 2 H. C., § 289.]

See references to last section.

See *infra*, § 677, and notes, amendment of affidavit.

Cited in 1 Wash. 463; 2 Wash. 151; 12 Wash. 284; 17 Wash. 297; 19 Wash. 557; 21 Wash. 635; 47 Wash. 164.

As to proceedings to procure attachment, see 1 Remington's Digest, p. 302, §§ 10-16.

If, in instituting attachment proceedings, a paper is filed in form of an affidavit, signed by plaintiff's attorney, but not verified, the court is without jurisdiction of the subject matter: *Tacoma Grocery Co. v. Draham*, 8 Wash. 263; see, also, *Nesqually Mill Co. v. Taylor*, 1 W. T. 1.

An affidavit in attachment alleging that "defendant is about to assign, secrete and dispose of his property, with intent to delay and defraud his creditors," and an affidavit on a motion to discharge, averring that defendant "is not about to assign, secrete and dispose of his property with intent, etc.," admits that defendant is about to do any of the acts mentioned: *Hanson v. Doherty*, 1 Wash. 461.

A transfer of property by way of preference by an insolvent corporation, while against equity and good conscience, is not such a fraud in fact as will support an attachment by another creditor: *Holbrook v. Peters & Miller Co.*, 8 Wash. 344.

There is sufficient ground to attach property in the hands of a third person when the testimony shows that the transfer of property to such party was fraudulent: *Burns v. Woolery*, 15 Wash. 134.

A plaintiff is entitled to a writ of attachment in an action to recover upon a debt which has been fraudulently contracted: *Blackinton v. Rumpf*, 12 Wash. 279.

An affidavit which alleges that defendant has assigned, etc., his property with intent

to delay and defraud his creditors and that he is about to assign, etc., his property with like intent, is not open to the objection of being inconsistent and bad in form: *Id.*

In an action to recover the price of goods, in which the complaint alleged a secret partnership between the two defendants and that they conspired and colluded to defraud their creditors, the business being carried on in the name of one, who subsequently disposed of his property to the other and fled the country, the refusal of the court to dissolve an attachment which had been issued on the ground that defendants had secreted and disposed of their property and were about to do so with intent to delay and defraud creditors, and that they had been guilty of fraud in contracting the debt, is warranted, when it appears that the two had been partners, and after an alleged dissolution had maintained intimate relations; that on the night of the departure of the defendant conducting the business in his own name, they were seen removing goods from the store in a clandestine manner; that the alleged secret partner, while allowing an overdraft to be charged up to him at the bank, was able to pay the sum of \$5,000 to the absconding debtor, which sum had been carried by him on his person for sixteen days; and that there had been a transfer of all the absconding debtor's real estate to the other defendant: *Id.*

Damages arising from the commission of a felony as grounds for attachment: See 1 Remington's Digest, p. 301, § 4; *Brandenstein v. Way*, 17 Wash. 293; *Bingham v. Keylor*, 19 Wash. 555; *Tacoma Mill Co. v. Perry*, 32 Wash. 650.

§ 649. (5352.) Attachment on Debt not Due.

An action may be commenced and the property of a debtor may be attached previous to the time when the debt becomes due, when nothing but time

is wanting to fix an absolute indebtedness, and when the affidavit, in addition to that fact, states,—

1. That the defendant is about to dispose of his property with intent to defraud his creditors; or

2. That the defendant is about to remove from the state, and refuses to make any arrangements for securing the payment of the debt when it falls due, and which contemplated removal was not known to the plaintiff at the time the debt was contracted; or

3. That the defendant has disposed of his property, in whole or in part, with intent to defraud his creditors; or

4. That the debt was incurred for property obtained under false pretenses. [L. '86, p. 39, § 3; 2 H. C., § 290.]

See references to § 647.

Cited in 1 Wash. 153; 2 Wash. 382; 23 Wash. 595; 40 Wash. 337.

Under this section, the plaintiff must allege the fraudulent disposition of the property in his complaint, and, in case of denial, prove the same upon the trial: *Cox v. Dawson*, 2 Wash. 381.

In an action upon a note not yet due, when the allegation that defendants have disposed of their property, with intent to delay and defraud creditors, and that they are about to depart from the state without providing for payment of the note, are de-

nied, and no proof is offered by plaintiff, judgment for plaintiff is unauthorized: *Hanson v. Tompkins*, 2 Wash. 508; citing *Cox v. Dawson*, supra; *Augir v. Foresman*, 23 Wash. 597.

Upon attachment for debt not due brought under this section, the complaint is demurrable, where it fails to allege a fraudulent disposition of the defendant's property, and it is not aided by the statements of the affidavit for attachment: *Carstens v. Milo*, 40 Wash. 335.

§ 650. (5353.) Answer, When to be Filed in Case Debt not Due.

If the debt or demand for which the attachment is sued out is not due at the time of the commencement of the action, the defendant is not required to file any pleadings until the maturity of such debt or demand, but he may, in his discretion, do so, and go to trial as early as the cause is reached. [L. '86, p. 40, § 4; 2 H. C., § 291.]

See references to § 647.

§ 651. (5354.) Judgment Suspended.

No final judgment shall be rendered in such action, unless the party consents, as in the last section, until the debt or demand upon which it is based becomes due. But property of a perishable nature may be sold as in other cases of attachment. [L. '86, p. 40, § 5; 2 H. C., § 292.]

See references to § 647.

§ 652. (5355.*) Bond for Attachment.

Before the writ of attachment shall issue the plaintiff, or some one in his behalf, shall execute and file with the clerk a bond or undertaking, with two or more sureties, in the sum in no case less than three hundred dollars, in the superior court, nor less than fifty dollars in the justice court, and double the amount for which plaintiff demands judgment, conditional that the plaintiff will prosecute his action without delay and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the amount specified in such bond or undertaking, as the penalty thereof, should the same be wrongfully, oppressively or maliciously sued out. With said bond or undertaking there shall also be filed

the affidavit of the sureties, from which it must appear that such sureties are qualified and that they are, taken together, worth the sum specified in the bond or undertaking, over and above all debts and liabilities, and property exempt from execution. No person not qualified to become bail upon arrest shall be qualified to become surety upon a bond or undertaking for an attachment: Provided, that when it is desired to attach real estate only, and such fact is stated in the affidavit for attachment and the ground of attachment is that the defendant is a foreign corporation or is not a resident of the state, or conceals himself so that the ordinary process of law cannot be served upon him, or has absconded or absented himself from his usual place of abode, so that the ordinary process of law cannot be served upon him, the writ of attachment shall issue without bond or undertaking by or on behalf of the plaintiff: And provided further, that when the claim, debt or obligation, whether in contract or tort, upon which plaintiff's cause of action is based, shall have been assigned to him, and his immediate or any other assignor thereof retains or has any interest therein, then the plaintiff and every assignor of said claim, debt or obligation who retains or has any interest therein, shall be jointly and severally liable to the defendant for all costs that may be adjudged to him and for all damages which he may sustain by reason of the attachment, should the same be wrongfully, oppressively or maliciously sued out. [L. '03, p. 47, § 1. Cf. L. '86, p. 40, § 6; 2 H. C., § 293.]

See references to § 647.

See § 654, and notes, action on bond.

See infra, § 765, qualifications of sureties in arrest and bail.

Cited in 6 Wash. 306; 11 Wash. 187; 20 Wash. 110.

An action having been brought against the sheriff for taking goods not belonging to the attachment debtor, and a judgment having been obtained therein against the sheriff, a subsequent action for trespass will not lie against him for the same matter, nor against the attaching creditor, or his sureties on the attachment bond: Dawson v. Baum, 3 W. T. 464.

If sureties on attachment bond did not justify, the attachment will hold between an attaching creditor and mortgagee; failure to justify is mere irregularity which can be cured: Baxter v. Smith, 2 W. T. 97.

Illegal foreclosure sale under a chattel mortgage cannot be shown by the sheriff in mitigation of damages for wrongful attachment: See Chezum v. Parker, 19 Wash. 645.

§ 653. (5356.) Additional Security, When may be Required.

The defendant may, at any time before judgment, move the court or judge for additional security on the part of the plaintiff, and if, on such motion, the court or judge is satisfied that the surety in the plaintiff's bond has removed from this state, or is not sufficient, the attachment may be vacated, and restitution directed of any property taken under it, unless in a reasonable time, to be fixed by the court or judge, further security is given by the plaintiff in form as provided in the preceding section. [L. '86, p. 40, § 7; 2 H. C., § 294.]

See references to § 647.

Cited in 48 Wash. 428.

§ 654. (5357.) Action on Bond, Damages.

In an action on such bond, the plaintiff therein may recover, if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained and reasonable attorney's fees to be fixed by the court; and if it be shown that such attachment was sued out maliciously, he

may recover exemplary damages, nor need he wait until the principal suit is determined before suing on the bond. [L. '86, p. 41, § 8; 2 H. C., § 295.]

See references to § 647.

See notes to § 404, *supra*, effect of judgment against an "insane surety."

Cited in 6 Wash. 29, 307; 12 Wash. 16; 20 Wash. 108.

LIABILITY FOR WRONGFUL ATTACHMENT: See 1 Remington's Digest, p. 312, §§ 53-62. Sureties on sheriff's official bond are liable for the wrongful acts of sheriff or his deputy in attaching property exempt from execution: *Mace v. Gaddis*, 3 W. T. 125.

In an action for damages upon an attachment bond, an allegation that defendants gave a bond to plaintiff, not that they executed one, is insufficient: *Church v. Campbell*, 7 Wash. 547. And where there is a failure to allege that the damages incurred have not been paid, and no proof is offered to that effect, defendants are entitled to a nonsuit: *Id.*, 548.

An action on an attachment bond for wrongful attachment is premature where an appeal from the final judgment is pending, involving the order dissolving the attachment, and the courts will take judicial notice of the pendency of the appeal: *Maxwell v. Griffith*, 20 Wash. 106.

A complaint is insufficient which fails to allege execution of the bond by the sureties, although a copy of the bond may be set out in the complaint: *Seattle Crockery Co. v. Haley*, 6 Wash. 302.

Plaintiff may show want of reasonable cause for the levy by proof as to conduct of his affairs and good faith of his transactions: *Id.*

Sureties on an attachment bond may be liable for damages, without prior demand upon the principal, or suit against him: *Id.*

The principal and sureties giving bond for attached property of a corporation are thereby estopped to deny its corporate existence: *Id.*

The wrongfulness of an attachment does not entitle the defendant therein to recover, but there must be proof that the same was sued out without reasonable cause to believe the grounds alleged: *McGill v. Fuller & Co.*, 45 Wash. 615. Exemplary damages are not recoverable in a common-law action for the wrongful suing out of an attachment, the statute authorizing them only in actions on the attachment bond: *Id.*

In an action upon a bond for wrongful levy of an attachment, recovery may be had in one suit for damages to both the joint and individual property of obligees: *Sloan v. Langert*, 6 Wash. 26; and exemplary damages may be recovered for malicious attachment: *Id.*; *Spokane T. & D. Co. v. Hoefer*, 2 Wash. 45, distinguished.

Presumption of malice may be rebutted by testimony that defendant believed the matters stated in the attachment affidavit

to be true, at time of its issuance, and that he fully laid the matter before his counsel and acted upon his advice: *Id.*

For sureties on an attachment bond to avoid liability for actual damages, reasonable cause must exist as a fact for the issuance of the writ; credible information warranting a belief in the existence of reasonable cause tends merely to disprove malice and thereby relieve from exemplary damages: *Seattle Crockery Co. v. Haley*, *supra*.

As to persons liable, see 1 Remington's Digest, p. 313, § 56; *Rudolph v. Mayer*, 1 W. T. 133; *Chezum v. Parker*, 19 Wash. 645; *Van de Vanter v. Davis*, 23 Wash. 693.

Injury to commercial credit is not an element of damages for malicious attachment: *Id.* An assignee cannot maintain an action against an attaching creditor and sheriff for injury to business credit of his assignor as a result of an alleged malicious levy of the writ prior to assignment: *Slauson v. Schwabacher*, 4 Wash. 783.

Where no actual damages are proven, exemplary damages cannot be recovered upon an attachment maliciously sued out; and the mere fact of a failure to establish indebtedness in the principal action is not proof of malice in the issuance of the writ: *Hilfrich v. Meyer*, 11 Wash. 186; *Levy v. Fleischner, Mayer & Co.*, 12 Wash. 15. Damages for detention of property cannot be recovered, where there is no proof of actual injury in consequence thereof: *Hilfrich v. Meyer*, *supra*. The fact that an attachment was dissolved is merely prima facie evidence that it was rightfully dissolved, and does not preclude further inquiry in an action on the bond: *Sloan v. Langert*, 6 Wash. 26.

In an action upon the bond, the costs of the principal action, to which the attachment was auxiliary, cannot be recovered as damages: *Hilfrich v. Meyer*, *supra*; *Seattle Crockery Co. v. Haley*, *supra*; *Levy v. Fleischner, Mayer & Co.*, *supra*; *Spokane T. & D. Co. v. Hoefer*, *supra*.

The attorney's fees in proceedings for dissolving an attachment is a matter of damages to be submitted to the jury in an action on a bond, while the fees in an action on the bond are, under this section, to be fixed by the court: *Maxwell v. Griffith*, 20 Wash. 106.

In the particular case, sheriff held liable for failure to serve writ: *Zelinsky v. Price*, 8 Wash. 256. Damages for wrongful attachment: See *Barnett v. O'Loughlin*, 8 Wash. 260; *Liebenthal v. Price*, 8 Wash. 206. Sheriff not liable, when: See *Haas*

v. Gaddis, 1 Wash. 89; *Dixon v. Barnett*, 3 Wash. 645.

The fact that an attachment was sued out by the advice of attorneys to whom had been submitted all the facts in the case raises the presumption of reasonable cause for the action on the part of the attaching creditor, and in such cases there can be no recovery on the attachment bond even if the writ was wrongfully sued out: *Id.* But where the attorney has been falsely informed and not put in possession of all the facts, the question of probable cause for the wrongful attachment is for the jury: *Voss v. Bender*, 32 Wash. 566.

In an action for damages for wrongful attachment the measure of damages, where a sale of the goods levied on had been negotiated prior to attachment and the completion of the contract had been prevented by the levy, is the price of sale agreed upon and not the market value of the goods: *Curry v. Catlin*, 12 Wash. 323.

As to pleadings in actions on attachment bonds, see 1 Remington's Digest, p. 314, § 59; *Cole v. Noerdlinger*, 22 Wash.

51; *Voss v. Bender*, 32 Wash. 566; *Church v. Campbell*, 7 Wash. 547.

LIABILITY ON INDEMNIFYING BOND.—Sureties on an indemnifying bond, preliminary to issuance of attachment, are not liable for a tort committed by the sheriff making a levy, as by a willful conversion of the goods taken to his own use, unless such act was contemplated or advised by them: *Dawson v. Baum*, 3 W. T. 464.

Malice cannot be presumed as against sureties on such an indemnifying bond, who are mere strangers to the controversy, though they signed it without previously investigating the case: *Dawson v. Baum*, *supra*.

In an action on an attachment bond, under this section, the plaintiff is not entitled to damages by way of punishment, but the term, "exemplary damages," must be construed as being in compensation for injury to reputation, feelings and other damage of that character, of an intangible nature: *Levy v. Fleischner, Mayer & Co.*, *supra*.

§ 655. (5358.) Contents of Writ—Levy.

The writ of attachment shall be directed to the sheriff of any county in which property of the defendant may be, and shall require him to attach and safely keep the property of such defendant within his county, to the requisite amount, which shall be stated in conformity with the affidavit. The sheriff shall in all cases attach the amount of property directed, if sufficient not exempt from execution be found in his county, giving that in which the defendant has a legal and unquestionable title a preference over that in which his title is doubtful or only equitable, and he shall, as nearly as the circumstances of the case will permit, levy upon property fifty per cent greater in valuation than the amount which plaintiff in his affidavit claims to be due. When property is seized on attachment, the court may allow to the officer having charge thereof such compensation for his trouble and expenses in keeping the same as shall be reasonable and just. [L. '86, p. 41, § 9; 2 H. C., § 296.]

See references to § 647.

See *supra*, § 528 et seq., exemptions.

Cited in 5 Wash. 689.

Writ and levy: See 1 Remington's Digest, pp. 303-306, §§ 17-29.

The statute fails to provide a method of determining whether the levy is excessive or not, but the debtor in such cases should make application to the court for relief against an excessive levy: *McConnell v. Kaufman*, 5 Wash. 686.

Seizure of property under attachment does not divest the title; it merely creates a lien. The debtor may still sell subject to the lien, and title will become absolute upon its discharge, though other levies have been made thereon while in the sheriff's hands, subsequent to such sale: *Dixon v. Barnett*, 3 Wash. 645.

PROPERTY ATTACHABLE: See 1 Remington's Digest, p. 301, §§ 5-9.

Lands acquired under the homestead laws of the United States are not subject to attachment or execution for homesteader's debts contracted prior to issuance of patent: *Jean v. Dee*, 5 Wash. 580; *Hunter v. Wenatchee Land Co.*, 36 Wash. 541.

The property of a debtor, who has left the state with intent to defraud his creditors, is not exempt from attachment, and the wife cannot claim in his behalf the statutory exemption: *Carter v. Davis*, 6 Wash. 327.

Under the provisions of the assignment law (§ 1086 et seq.) property in possession of an assignee of an insolvent debtor is in custodia legis, and cannot be seized under attachment, although the assignment be alleged as fraudulent: *Hamilton-Brown Shoe Co. v. Adams*, 5 Wash. 333.

The assets of an insolvent corporation form a trust fund for the benefit of its creditors, and are not subject to attachment: *Thompson v. Huron Lum. Co.*, 4 Wash. 600; *Conover v. Hull*, 10 Wash. 673; *McKay v. Elwood*, 12 Wash. 579; *Compton v. Schwabacher Bros. Co.*, 15 Wash. 306; *State ex rel. Krisch v. Superior Court*, 36 Wash. 91.

A levy of an attachment on chattels, subsequent to the execution of a mortgage thereon and prior to its filing of record, gives no lien on the same when mortgagee is in possession: *First Nat. Bank v. Carter*, 6 Wash. 494.

Notice to the sheriff that the goods about to be levied upon are in the possession of a chattel mortgagee is sufficient notice to the attaching creditors: *First Nat. Bank v. Carter*, 6 Wash. 494.

Prohibition will not lie at the instance of an attaching creditor to prevent a receiver, whose appointment is void, from taking possession of property other than that attached and which he is seeking to have seized under his attachment: *State v. Superior Court*, 7 Wash. 77.

A receiver appointed under a general order to take possession of an insolvent corporation's property takes no title to property in the custody of the sheriff under attachment lien, when the sheriff and lienors were not parties to the action in which the receiver was appointed: *State v. Superior Court*, 8 Wash. 210, following *State v. Superior Court*, 7 Wash. 77; distinguished in *State v. Superior Court*, 11 Wash. 63.

Although a defendant in attachment may be entitled to exemption under § 563, subdivision 4, it is for him to set up his claim, but the plaintiff has the right to primarily seize the property upon the writ: *Zelinsky v. Price*, 8 Wash. 256.

An attachment cannot be levied upon mortgaged chattels held by a debtor as mortgagee under a bill of sale absolute in form, although the officer was without notice of the true relation of debtor to the property: *Voorhies v. Hennessy*, 7 Wash. 243.

Any interest that a mortgagor has in mortgaged property can be reached by process of garnishment, but if the mortgagee be in possession thereof such possession cannot be disturbed until the mortgage debt is fully satisfied; modifying *Byrd v. Forbes*, 3 W. T. 318; *Marsh v. Wade*, 1 Wash. 538.

Where partnership property was attached in an action against one of the partners, and subsequently, but prior to judgment, creditors of the partnership attached and obtain judgment against the partnership, the sheriff's sale of the property on the individual judgment will not render him liable in damages: *Haas v. Gaddis*, 1 Wash. 89.

The holder of a bill of sale as security for a debt cannot maintain an action against the sheriff in possession of the goods under an attachment levy: *Seibensbaum v. De Lanty*, 4 Wash. 596.

Evidence held sufficient in a particular case to sustain a verdict against a sheriff for failure to levy a writ of attachment: *Zelinsky v. Price*, supra.

Where a sheriff has levied upon goods under an attachment, and possession thereof has been obtained by another under the terms of a delivery bond which requires a return to the officer, if return thereof shall be adjudged, the goods are in custodia legis, and cannot be levied upon by another officer pending the litigation of the case in which the original attachment was issued: *Eidson v. Woolery*, 10 Wash. 225.

In an action brought to foreclose a chattel mortgage, an attachment cannot be issued and levied upon other property, in anticipation of an unknown deficiency, in view of § 1125, providing that the plaintiff shall not prosecute any other action for the same matter while he is foreclosing his mortgage: *Advance Thresher Co. v. Schimke*, 47 Wash. 162.

PERSONAL PROPERTY CAPABLE OF MANUAL DELIVERY.—The sheriff must actually take into his possession or control property of this description: *Byrd v. Forbes*, 3 W. T. 324.

§ 656. (5359.) Writs to Different Counties—Costs.

Writs of attachment may be issued from the superior courts to different counties, and several may, at the option of the plaintiff, be issued at the same time, or in succession and subsequently, until sufficient property has been attached; but only those executed shall be taxed in the costs, unless otherwise ordered by the court, and if more property is attached in the aggregate than the plaintiff is entitled to have held, the surplus must be abandoned and the plaintiff pay all costs incurred in relation to such surplus. After the first writ shall have issued, it shall not be necessary for the plaintiff to file any further affidavit or bond, but he shall be entitled to as many writs as may be necessary to secure the amount claimed. [L. '86, p. 41, § 10; 2 H. C., § 297.]

See supra, references to § 647.

Cited in 25 Wash. 183.

See *Bingham v. Keyler*, 25 Wash. 157.

§ 657. (5360.) Order of Execution of Writs.

Where there are several attachments against the same defendant, they shall be executed in the order in which they were received by the sheriff. [L. '86, p. 41, § 11; 2 H. C., § 298.]

See references to § 647.

Cited in 15 Wash. 645.

PRIORITY OF ATTACHMENTS: See 1 Remington's Digest, p. 304, § 21.

Where a sheriff has possession of mortgaged goods by consent of mortgagor and mortgagee, the levy of an attachment upon the same by a deputy sheriff, where he takes actual possession, will prevail over the rights acquired by another creditor who had, prior to such levy, placed a writ of attachment in the hands of the sheriff, but which was not levied until after the deputy had made his levy: *Meacham Arms Co. v. Strong*, 3 W. T. 61.

The prior levy by a deputy sheriff of a writ of attachment placed in his hands subsequent to the placing of an execution in the hands of the sheriff, will give the attachment lien priority over the execution: *Wallace etc. Mfg. Co. v. Sharick*,

15 Wash. 643; following *Meacham Arms Co. v. Strong*, 3 W. T. 65.

Priorities between attachments and other liens or claims: See 1 Remington's Digest, p. 304, § 22; *State ex rel. Hunt v. Superior Court*, 7 Wash. 77; *State ex rel. Perkins v. Graham*, 9 Wash. 528; *State ex rel. Baum v. Superior Court*, 14 Wash. 324; *Alexander v. Hemrich*, 4 Wash. 727; *Wells v. Columbia Nat. Bank*, 6 Wash. 621; *Puget Sound Nat. Bank v. Levy*, 10 Wash. 499; *Schwabacher Bros. Co. v. Superior Court*, 11 Wash. 63.

Transfers of property pending or subject to attachment: See 1 Remington's Digest, p. 305, § 23; *Baxter v. Smith*, 2 W. T. 97; *Langert v. Brown*, 3 W. T. 102; *First Nat. Bank v. Carter*, 6 Wash. 494; *Johnson v. Irwin*, 16 Wash. 652; *Clerf v. Montgomery*, 15 Wash. 483; *Hacker v. White*, 22 Wash. 415; *Rohrer v. Snyder*, 29 Wash. 199.

§ 658. (5361.) Following Property into Adjoining County.

If, after an attachment has been placed in the hands of the sheriff, any property of the defendant is moved from the county, the sheriff may pursue and attach the same in an adjoining county, within twenty-four hours after removal. [L. '86, p. 42, § 12; 2 H. C., § 299.]

See references to § 647.

§ 659. (5362.) Manner of Executing Writ.

The sheriff to whom the writ is directed and delivered must execute the same without delay, as follows:—

1. Real property shall be attached by filing a copy of the writ, together with a description of the property attached, with the county auditor of the county in which the attached real estate is situated;

2. Personal property capable of manual delivery shall be attached by taking into custody;

3. Stock or shares, or interest in stock or shares, of any corporation, association, or company shall be attached by leaving with the president or other head of the same, or the secretary, cashier, or managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ. [L. '86, p. 42, § 13; 2 H. C., § 300.]

See references to § 647.

See supra, § 578, manner of levy of execution.

See supra, § 655, contents of writ and property attachable.

Cited in 14 Wash. 177; 23 Wash. 423.

Part of §§ 300, 303, 308, 312, 313, of 2 Hill's Code, the same being §§ 659, 662, 666, 667, 668, infra, together with all of §§ 305, 309, 310, 311, of 2 Hill's Code, are omitted, the same having been repealed by chapter II of this title, relating to gar-

nishments: See *Wooding v. Puget Sound Nat. Bank*, 11 Wash. 527, 535.

Mode, sufficiency, etc., of levy: See 1 Remington's Digest, p. 303, §§ 18-20; *Meacham Arms Co. v. Strong*, 3 W. T. 61; *McConnell v. Kaufman*, 5 Wash. 686.

The sheriff must take into his actual custody chattels capable of manual delivery, in order to make an attachment levy thereon: *Byrd v. Forbes*, 3 W. T. 318.

Without the levy of an attachment on the property of a foreign corporation no jurisdiction can be obtained of the defendant, where the service is by publication: *Dittenhoefer v. Clothing Co.*, 4 Wash. 519.

After judgment against a sheriff for wrongful levy, he may recover indemnity against the attaching creditor, under whose direction he attached the property of another without knowledge or notice that it was the property of another than the debtor: *Standley v. Marsh*, 1 Wash. 512.

Where property seized under attachment is sold by the debtor and the attachment released, but subsequent to the sale the sheriff levies another writ prior to the release, he cannot be held for its value without demand therefor, notwithstanding the demand should precede levy last made: *Dixon v. Barnett*, 3 Wash. 645.

Where the sheriff has attached defendant's property, and acting under an in-

demnity bond and by plaintiff's direction, holds the same against the rightful claimant, and has been compelled to pay a judgment for such wrongful levy, the title to the property remains in the sheriff in trust for the attachment plaintiff; and a private sale thereof by the sheriff under plaintiff's direction does not constitute a trespass, nor prejudice a recovery on the indemnity bond: *Barnett v. O'Loughlin*, 8 Wash. 260.

The filing of a writ of attachment in the county auditor's office is not constructive notice to one who subsequently acquires rights under a grantee of the attachment debtor: *Johnson v. Irwin*, 16 Wash. 652.

Where partnership property was attached in an action against one of the partners, and subsequently, but prior to judgment, creditors of the partnership attach and obtain judgment against the partnership, the sheriff's sale of the property on the individual judgment will not render him liable for damages: *Haas v. Gaddis*, 1 Wash. 89.

§ 660. (5363.) Examination of Defendant Touching His Property.

Whenever it appears by the affidavit of the plaintiff, or by the return of the attachment, that no property is known to the plaintiff or officer on which the attachment can be executed, or not enough to satisfy the plaintiff's claim, and it being shown to the court or judge by affidavit that the defendant has property within the state not exempt, the defendant may be required by such court or judge to attend before the court or judge, or referee appointed by the court or judge, and give information on oath respecting the same. [L. '86, p. 42, § 14; 2 H. C., § 301.]

See references to § 647.

§ 661. (5364.) Receiver Appointed for Attached Property.

The court before whom the action is pending, or the judge thereof, may at any time appoint a receiver to take possession of property attached under the provisions of this chapter, and to collect, manage, and control the same, and pay over the proceeds according to the nature of the property and the exigency of the case. [L. '86, p. 42, § 15; 2 H. C., § 302.]

See references to § 647.

Cited in 7 Wash. 80; 14 Wash. 326; 20 Wash. 249.

An attaching creditor has the right not only to have his debt paid out of the proceeds of the property attached, but also to have it retained intact until he obtains judgment and issues execution; and a non-attaching creditor cannot interfere therewith by securing a receiver: *State v. Superior Court*, 7 Wash. 77; see *State v. Superior Court*, 8 Wash. 210.

An attaching creditor whose application to intervene in a proceeding for the appointment of a receiver has no remedy by

appeal, but may resort to prohibition to prevent the receiver from taking possession of the property attached: *State v. Superior Court*, supra.

The superior court has jurisdiction, under this section, to appoint a receiver in an attachment case, who shall have power to manage, control and sell the property, when it is of such a character that its value would be diminished by mere lapse of time, although there is an assignment for the benefit of creditors pending in the court: *State v. Superior Court*, 14 Wash. 324.

§ 662. (5365.) Sale Before Judgment, Perishable Property.

If any of the property attached be perishable, or in danger of serious and immediate waste or decay, the sheriff shall sell the same in the manner in which such property is sold on execution. Whenever it shall be made to appear satisfactorily to the court or judge that the interest of the parties to the action will be subserved by a sale of any attached property, the court or judge may order such property to be sold in the same manner as like property is sold under execution. Such order shall be made only upon notice to the adverse party or his attorney, in case such party shall have been personally served with a summons in the action. [L. '86, p. 42, § 16; 2 H. C., § 303.]

See references to § 647.

See note to § 659, omission of portion of section explained.

Cited in 5 Wash. 690.

The title to goods sold under an attachment levy passes to the purchaser at the sale, although the levy may have been ex-

cessive, and the sale made between time of levy and of the judicial sale: *McConnell v. Kaufman*, 5 Wash. 686.

§ 663. (5366.) Custody of Money Received.

All moneys received by the sheriff under the provisions of this chapter and all other attached property shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment. [L. '86, p. 43, § 17; 2 H. C., § 304.]

See references to § 647.

Cited in 23 Wash. 697.

Money must be left intact until judg-

ment: *State ex rel. Arthur Mach. Co. v. Superior Court*, 7 Wash. 77.

§ 664. (5367.) Attachment of Moneys in Hands of Officer.

A sheriff or constable may be garnished for money of the defendant in his hands. So may a judgment debtor of the defendant when the judgment has not been previously assigned on the record, or by writing filed in the office of the clerk, and by him minuted as an assignment on the margin of the execution docket, and also an executor or administrator may be garnished for money due from the decedent to the defendant. [L. '86, p. 43, § 19; 2 H. C., § 306.]

See references to § 647.

Cited in 3 Wash. 375; 14 Wash. 177; 16 Wash. 127; 20 Wash. 215; 30 Wash. 273.

An order requiring persons, not impleaded in an action, except as garnishees, and having no notice, to deliver property claimed by them to another also not a party, but being the sheriff holding the attachment writ, is void for want of juris-

diction, and amounts to taking of private property without due process of law: *Weisbach v. Arnold*, 3 W. T. 111.

This section was not repealed by the later enactment on the subject of garnishments: See *Pierce v. Commercial Inv. Co.*, 30 Wash. 272.

§ 665. (5368.) Attachment of Moneys in Court.

When the property to be attached is a fund in court, the execution of a writ of attachment shall be by leaving with the clerk of the court [a copy] thereof, with notice in writing specifying the fund. [L. '86, p. 43, § 20; 2 H. C., § 307.]

See references to § 647.

Cited in 3 Wash. 375; 16 Wash. 127; 20 Wash. 216; 30 Wash. 273.

§ 666. (5369.) Inventory of Sheriff.

The sheriff shall make a full inventory of the property attached, and return the same with the writ. [L. '86, p. 43, § 21; 2 H. C., § 308.]

See references to § 647.

See note to § 659, omission of portion of section explained.

See infra, § 676, sheriff's return.

See infra, § 677, and notes, construction of this chapter.

§ 667. (5370.) Subjection of Attached Property to Judgment.

If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached by him which has not been delivered to the defendant or claimant as in this chapter provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose,—

1. By applying on the execution issued on said judgment the proceeds of all sales of perishable or other property sold by him, or so much as shall be necessary to satisfy the judgment;

2. If any balance remain due, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands.

Notice of the sale shall be given and the sale conducted as in other cases of sales on execution. [L. '86, p. 44, § 25; 2 H. C., § 312.]

See references to § 647.

See note to § 659, omission of portion of section explained.

See supra, § 578 et seq., notice and sale on execution.

Cited in 6 Wash. 62; 23 Wash. 697.

See 1 Remington's Digest, p. 305, §§ 27-30.

The proceeds of an attachment levy must, at the instance of a creditor lawfully obtaining the same, be left intact until he may obtain judgment: *State ex rel. Arthur Mach. Co. v. Superior Court*, 7 Wash. 77.

In entering judgment in a cause wherein property has been attached pending the litigation, the correct practice is to have the lien by virtue of the attachment expressly preserved in the judgment, and the property levied upon made subject to the execution to be issued thereon by express direction: *Sheppard v. Guisler*, 10 Wash. 41.

The lien of an attachment is continuous from the moment of a levy until sale on execution: *Sheppard v. Guisler*, 10 Wash. 41; *Van De Vanter v. Davis*, 23 Wash. 693.

The lien of an attachment of real estate is merged in that of the judgment when the latter is entered: *Gullickson v. Fenlon*, 48 Wash. 503.

The necessary expenses incurred by the sheriff in caring for attached property by plaintiff's direction, pending litigation, are a proper charge against plaintiff, and may be retained out of the proceeds of sale: *Barnett v. O'Loughlin*, 8 Wash. 260.

Where an attaching creditor in a foreign jurisdiction also files his claim with the assignee of his debtor, the amount received by means of the attachment ought to be

deducted from the claim as filed with the assignee, and the balance treated as the true amount of the indebtedness: *Neufelder v. North British etc. Ins. Co.*, 10 Wash. 393.

An attachment sale is not invalidated by a failure to give notice to a mortgagee of the property sold: *Byrd v. Forbes*, 3 W. T. 318.

Where an attachment has been levied upon the goods of a debtor and a sale has been made thereof under order of court, the title to the goods passes to the purchaser at such sale, although the levy made may have been excessive and the debtor may have made a sale of such goods between the time of the levy and the judicial sale: *McConnell v. Kaufman*, 5 Wash. 686.

Under the statutes of this state, it is unnecessary that the judgment in an attachment suit should direct a foreclosure of the lien and a sale of the property attached, where personal service was had upon the defendant: *Pa. Mtg. etc. Co. v. Gilbert*, 13 Wash. 684.

The proceeds of goods directed to be sold under attachment levies should be applied on the claims of attaching creditors in the order of their levy, and not pro rata: *Bradley v. Gotzian*, 12 Wash. 71.

Title acquired by an execution creditor under his own attachment levy and sale will not prevail over a prior unrecorded deed: *Hacker v. White*, 22 Wash. 415; *Rohrer v. Snyder*, 29 Wash. 199.

§ 668. (5371.) Collection When Property Attached Insufficient—Surplus.

If, after selling all the property attached by him remaining in his hands, and applying the proceeds, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff shall proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment. [L. '86, p. 44, § 26; 2 H. C., § 313.]

See references to § 647.

See note to § 659, omission of portion of section explained.

Cited in 23 Wash. 697.

§ 669. (5372.) Procedure in Case Execution Returned Unsatisfied.

If the execution be returned unsatisfied, in whole or in part, the plaintiff may proceed as in other cases upon the return of an execution. [L. '86, p. 45, § 27; 2 H. C., § 314.]

See references to § 647.

§ 670. (5373.) Judgment for Defendant, Effect of.

If the defendant recover judgment against the plaintiff, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, shall be delivered to the defendant or his agent. The order of attachment shall be discharged, and the property released therefrom. [L. '86, p. 45, § 28; 2 H. C., § 315.]

See references to § 647.

Cited in 23 Wash. 697.

§ 671. (5374.) Discharge of Attachment on Counter Bond.

If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff with sufficient sureties, to be approved by the officer having the attachment, or after the return thereof, by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged and restitution made of property taken or proceeds thereof. The execution of such bond shall be deemed an appearance of such defendant to the action. [L. '86, p. 45, § 29; 2 H. C., § 316.]

See references to § 647.

Cited in 1 Wash. 463; 2 Wash. 151; 37 Wash. 485, 487-489.

As to discharge of attachment on counter bond, see 1 Remington's Digest, p. 309, § 42.

If defendant gives bond, and obtains a release of attached property (Laws of 1860, § 140), judgment given against him

may, at the same time, be rendered against his sureties: *Rodolph v. Mayer*, 1 W. T. 133.

After the discharge by bond there can be no discharge for irregularity: *Brady v. Onffroy*, 37 Wash. 482.

It is intimated in *Rohrer v. Snyder*, 29 Wash. 199, that the pendency of an action to foreclose a mortgage is ground for the dissolution of an attachment for the recovery of the same debt.

§ 672. (5375.) Judgment on Bond.

Such bond shall be part of the record, and if judgment go against the defendant, the same shall be entered against him and sureties. [L. '86, p. 45, § 30; 2 H. C., § 317.]

See references to § 647.

Cited in 37 Wash. 485, 488.
Judgment against the sureties upon a forthcoming bond in an action wherein an attachment is levied is authorized by this

section, without notice to him: *Park v. Mighell*, 3 Wash. 737. See *Rodolph v. Mayer*, 1 W. T. 133.

§ 673. (5376.) Motion to Discharge Attachment.

The defendant may at any time after he has appeared in the action, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued. [L. '86, p. 45, § 31; 2 H. C., § 318.]

See references to § 647.

See notes to next section.

See *supra*, § 648, grounds for attachment.

See *infra*, § 677, amendments.

See *infra*, § 1716, subd. 4, appeal from order discharging attachment.

Cited in 1 Wash. 463; 2 Wash. 151; 15 Wash. 311; 19 Wash. 284; 23 Wash. 597; 25 Wash. 191; 37 Wash. 489; 48 Wash. 26.

Quashing or vacating attachment: See 1 Remington's Digest, pp. 306-310, §§ 33-45.

A defendant, in order to move for a dissolution of an attachment, must appear and answer: *Rodolph v. Mayer*, 1 W. T. 133; *Holman v. Cooper*, 48 Wash. 24.

A motion to discharge is addressed to the court, and does not contemplate the interposition of a jury: *Windt v. Banniza*, 2 Wash. 147; *Gehres v. Orłowski*, 36 Wash. 156.

When the motion to discharge is made upon affidavits, the same may be opposed by counter-affidavits or oral testimony, but the defendant has no right in the first instance to introduce testimony in support of his motion other than by affidavits: *Windt v. Banniza*, *supra*; modifying *Hanson v. Doherty*, 1 Wash. 461.

A motion to discharge on the ground of the insufficiency of plaintiff's affidavit for the writ should point out explicitly the nature of the insufficiency: *Windt v. Banniza*, *supra*.

Compromising an attachment suit for less than was sued for is not evidence that the attachment was fraudulent as to other creditors: *Alexander v. Hemrich*, 4 Wash. 727; nor is an effort by the parties to prevent the issuance of an attachment becoming known evidence of fraud: *Id.*

As to grounds for quashing, vacating or dissolving, see *Alexander v. Hemrich*, 4 Wash. 727; *Carter v. Davis*, 6 Wash. 327; *Zelinsky v. Price*, 8 Wash. 256; *Rohrer v. Snyder*, 29 Wash. 199.

A motion to dissolve an attachment upon the ground that the property attached was exempt is not warranted under this section: *Holman v. Cooper*, 48 Wash. 24.

Where, prior to the rendition of final judgment in a case in which an attachment had been issued, a motion to dissolve

has been made, and, after a full hearing upon affidavits, denied, it is error for the trial court to entertain another motion to dissolve the attachment: *Sheppard v. Griesler*, 10 Wash. 41.

A motion to dissolve an attachment should not be decided upon facts which have been made to appear in another action, without making them a part of the record in the attachment action: *Id.*

As to issues and questions considered, and burden of proof on motion to discharge, see 1 Remington's Digest, p. 308, § 39; *Bender v. Rinker*, 21 Wash. 633; *Sheppard v. Guisler*, 10 Wash. 41; *Bingham v. Keylor*, 25 Wash. 156; *Hanson v. Tompkins*, 2 Wash. 508; *Cox v. Dawson*, 2 Wash. 381; *Blackington v. Rumpf*, 12 Wash. 279.

Under the amendment of the assignment law of March 10, 1893 (§ 1086, *infra*), an attachment lien is not discharged by the subsequent filing of a general assignment by the debtor: *Bierer v. Blurock*, 9 Wash. 63.

Under § 2022 of the Code of 1881, after the court, in insolvency cases, orders the proceedings stayed against a debtor, it has no authority to set aside the stay or allow attachment proceedings commenced: *Traders' Bank v. Van Wagenen*, 2 Wash. 172.

An attaching creditor, under § 1997 of the Code of 1881, may, although his attachment has been dissolved by a general assignment, intervene in an action to foreclose a mortgage upon the assigned property for the purpose of having the mortgage declared invalid as against him: *Ephraim v. Kelleher*, 4 Wash. 243.

Error in overruling a motion to dissolve an attachment, and continuing the lien by judgment, is harmless, if the judgment in the main action is right and the goods attached would have been subject to execution upon the judgment: *Turpin v. Whitney*, 6 Wash. 61. See *Williams v. Miller*, 1 W. T. 88.

The fact that one of several attaching creditors of an assignor in insolvency pro-

sents his claim to the assignee does not affect the remaining attaching creditors: *Neufelder v. Ger. Am. Ins. Co.*, 6 Wash. 336, 341.

A confession of judgment by a defendant in an attachment suit does not, under our statute, operate to discharge the attachment lien: *Schloss v. State Bank*, 4 Wash. 726.

Although a complaint be improperly dismissed, a writ of attachment founded thereon falls, but is restored when an appeal is perfected from the erroneous decision: *Renton v. St. Louis*, 1 W. T. 215. A transfer, in good faith, of attached property, during this interval, is valid: *Id.*

Effect of dissolution: See 1 *Remington's Digest*, p. 309, § 44; *Dixon v. Barnett*, 3 Wash. 645; *Ephraim v. Kelleher*, 4 Wash. 243; *Sloan v. Langert*, 6 Wash. 26; *Penna. Mtg. Inv. Co. v. Gilbert*, 18 Wash. 667; *Auger v. Foresman*, 23 Wash. 595; *Bingham v. Keylor*, 25 Wash. 156; *Brady v. Onffroy*, 37 Wash. 482; *Carstens v. Milo*, 40 Wash. 335.

An order discharging an attachment held to be final and appealable, under Laws of 1873, § 189: *Sufferin v. Chisholm*, 1 W. T. 486; but not under Laws of 1890, pp. 333-336; *Windt v. Banniza*, *supra*.

When the appeal record shows that defendants in attachment retook possession of the attached property on a forthcoming bond, the refusal of the lower court to dissolve the attachment on their motion will not be considered by the supreme court, excepting as affecting costs, and not then

when no error in that particular has been assigned: *Kratz v. Dawson*, 3 W. T. 100.

The fact that an order of court is made refusing to dissolve an attachment under this section does not establish the validity of such attachment as against creditors, but it may be attacked by the receiver: *Compton v. Schwabacher Bros. & Co.*, 15 Wash. 306.

An attachment levied upon the property of an insolvent corporation by a creditor having knowledge of its condition may be set aside, although insolvency proceedings had not been instituted, under the rule in this state constituting the assets of an insolvent corporation a trust fund for the benefit of all its creditors: *Id.*

An attachment creditor who withholds possession from a receiver of the property of an insolvent corporation, which had been obtained by attachment levy, is not entitled to recover costs paid to the sheriff for the care and custody of the property levied on, including rent of the premises where the property had been kept, in an action instituted by the receiver to dissolve the attachment: *Id.*

An order dissolving an attachment against a corporation will not be disturbed on appeal when the record does not show what the evidence was before the court: *Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176.

Upon dissolution of an attachment, the court need not enter a finding that there was reasonable ground for the attachment, the same being immaterial in such action: *Hendelman v. Kahan*, 48 Wash. 549.

§ 674. (5377.) Hearing of Motion to Discharge—Affidavits.

If the motion be made upon affidavits upon the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the attachment was issued. [L. '86, p. 45, § 32; 2 H. C., § 319.]

See references to § 647.

See notes to last section.

Cited in 1 Wash. 463; 2 Wash. 151.

See 1 *Remington's Digest*, p. 308, § 39; *Gehres v. Orlowski*, 36 Wash. 156. Affidavits used on the hearing of a motion to discharge an attachment are not part of the record and can only be made so by a statement or bill of exceptions: *Windt v. Banniza*, 2 Wash. 147.

An attachment may be dissolved on motion and affidavit of but one of several defendants: *Id.*

An affidavit in attachment alleging that "defendant is about to assign, secrete and dispose of his property, with intent to delay and defraud his creditors," and an affidavit on a motion to discharge, averring that defendant "is not about to assign, secrete and dispose of his property, etc.," admits that defendant is about to do any one of the acts mentioned: *Hanson v. Doherty*, 1 Wash. 461.

§ 675. (5378.) Discharge of Writ.

If upon application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged. [L. '86, p. 45, § 33; 2 H. C., § 320.]

See references to § 647.

If an attachment has been dissolved, the sheriff's right of possession ceases, and a subsequent levy will not create a lien where there is a bona fide sale prior to actual levy under a second writ: *Anderson v. Land*, 5 Wash. 493.

Where property was attached, but before judgment the action was dismissed by plaintiff, and a chattel mortgage taken and foreclosed thereon, the fact that certain labor claim notices under § 1206, *infra*, were served in the original action, will not give such claimants a cause of

action against the mortgagee: *Wells v. Columbia Nat. Bank*, 6 Wash. 621.

An order of dissolution made after two levies have been made on the same property dissolves the lien of both, unless it clearly appears that the order of dissolution was limited to one of the writs: *Pennsylvania Mtg. Inv. Co. v. Gilbert*, 18 Wash. 667.

In an action for wrongful attachment, final judgment of the defendant in the attachment suit is conclusive evidence that the attachment was wrongful: *McGill v. Fuller & Co.*, 45 Wash. 615.

§ 676. (5379.) Return of Sheriff.

The sheriff must return the writ of attachment with the summons, if issued at the same time, otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto, and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be filed in the offices of the county auditors in which the notices of attachment have been filed, and be indexed in like manner. [L. '86, p. 45, § 34; 2 H. C., § 321.]

See references to § 647.

See *supra*, § 666, return of inventory.

A defective return may be amended: See notes to next section.

§ 677. (5380.) Liberal Construction—Amendments.

This chapter shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the complaint, affidavit, bond, writ, or other proceeding; and no attachment shall be quashed or dismissed, or the property attached released, if the defect in any of the proceedings has been or can be amended so as to show that a legal cause for the attachment existed at the time it was issued, and the court shall give the plaintiff a reasonable time to perfect such defective proceedings. The causes for attachment shall not be stated in the alternative. [L. '86, p. 46, § 35; 2 H. C., § 322.]

See references to § 647.

See *supra*, § 144, code to be liberally construed.

See *supra*, § 303, amendments in general.

Cited in 16 Wash. 127; 17 Wash. 296; 19 Wash. 557; 21 Wash. 635; 25 Wash. 184; 40 Wash. 339.

See 1 Remington's Digest, p. 303, § 15.

A defective affidavit for attachment is not cause for disturbing a judgment; such affidavit may be cured by a supplemental affidavit: *Nesqually M. Co. v. Taylor*, 1 W. T. 1. But a supplemental affidavit filed after an appeal is taken should be stricken: *Brandenstein v. Way*, 17 Wash. 293.

Although the sheriff's return in attach-

ment is not accompanied by an inventory of the attached property, subsequent attaching creditors are not entitled to priority over the defective attachment; their only remedy being to compel an amendment: *Fleischner v. P. P. Tel. Cable Co.* (Wash.), 55 Fed. 738.

The dissolution of an attachment on one ground is not *res judicata* when a new affidavit sets up an entirely different ground for the writ: *Bingham v. Keylor*, 25 Wash. 156. See further, *Brady v. Onffroy*, 37 Wash. 482; *Carstens v. Milo*, 40 Wash. 335.

§ 678. (5381.) Power of Judge at Chambers.

The judge of any superior court shall have power to make every order which, by the provisions of this chapter, may be made by the court. [L. '86, p. 46, § 36; 2 H. C., § 323.]

§ 679. (5382.) Sheriff, Defined—Proceedings in Justices' Courts.

The word "sheriff," as used in this chapter, is meant to apply to constables, when the proceedings are in a justice's court; and when the proceedings are in a justice's court, the justice is to be regarded as the clerk of the court for all purposes herein contemplated: Provided, that nothing contained in this chapter shall be construed to confer upon a justice of the peace power to issue a writ of attachment to be served out of the county in which such justice shall have his office, or to confer upon a sheriff, constable, or other officer power or authority to serve a writ of attachment issued out of justice's court beyond the limits of the county in which such justice shall have his office, except in cases provided for in section 658. And provided further, that nothing contained in this chapter shall be construed or held to authorize the attachment of real estate, or of any interest therein, under a writ of attachment issued out of any justice's court. [L. '86, p. 46, § 37; 2 H. C., § 324.]

See supra, § 44, subd. 8, jurisdiction of justices of the peace in attachments.

See supra, § 647, note.

CHAPTER II.

GARNISHMENTS.

§ 680. (5390.) Writ, Grounds for Issuance of.

The clerks of the superior courts in the various counties in the state may issue writs of garnishment returnable to their respective courts in the following cases:—

1. Where an original attachment has been issued in accordance with the statutes in relation to attachments;

2. Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, and that the garnishment applied for is not sued out to injure either the defendant or the garnishee;

3. Where the plaintiff has a judgment wholly or partially unsatisfied in the court from which he seeks to have a writ of garnishment issued. [L. '93, p. 95, § 1.]

For former laws on the subject of garnishment, see 2 Hill's Code, §§ 497, 498, and notes to §§ 647 and 659, supra.

See notes to § 578.

See supra, § 665, attachment of money in court.

See supra, § 613, proceedings supplemental to execution.

See infra, § 1807, garnishment in justice's court.

See notes to § 3720, infra.

Cited in 8 Wash. 537; 10 Wash. 162; 16 Wash. 127; 17 Wash. 369; 30 Wash. 273.

Where a fire insurance company has been garnished in another state upon its indebtedness to a citizen in this state upon its policy of insurance, such fact is a good defense to an action in this state against the corporation: *Neufelder v. German etc. Ins. Co.*, 6 Wash. 336.

As to nature of and grounds for garnishment, see 1 Remington's Digest, p. 1322, §§ 1-4; *Timm v. Stegman*, 6 Wash. 13; *Gaffney v. McGrath*, 23 Wash. 476.

The requirement of § 182, Code of 1881, that the garnishee shall appear and be examined does not create an adversary pro-

ceeding, but is simply a method of probing his conscience, and unless on the hearing he admits having possession of the defendant's property, the court has no jurisdiction to compel him to turn it over: *Coombs v. Davis*, 2 W. T. 466; *Weisbach v. Arnold*, 3 W. T. 111; but if he claim a lien upon the property, he can only be required to turn it over to the sheriff until such lien is satisfied: *Coombs v. Davis*, supra.

A garnishment proceeding is subsidiary to and dependent upon the main suit: *Kelly v. Ryan*, 8 Wash. 536; *Seattle Trust Co. v. Pitner*, 17 Wash. 365; *Title Guarantee & Trust Co. v. Seattle Theater Co.*, 23 Wash. 517; *Tatum v. Geist*, 40 Wash. 575.

Garnishment or attachment is the only remedy of creditors of a vendor of a stock of goods in bulk as against a vendee who does not comply with the statute in regard

to demanding a list of vendor's creditors: *Rothschild Bros. v. Trewella*, 36 Wash. 679. See *Kohn v. Fishbach*, 36 Wash. 69; *Holford v. Trewella*, 36 Wash. 654.

§ 681. (5391.) Bond to be Executed, When.

In the case mentioned in subdivision two of the preceding section the plaintiff shall execute a bond with two or more good and sufficient sureties, to be approved by the clerk issuing the writ, payable to the defendant in the suit, in double the amount of the debt claimed therein, conditioned that he will prosecute his suit and pay all damages and costs that may be adjudged against him for wrongfully suing out such garnishment. [L. '93, p. 95, § 2.]

§ 682. (5392.) Application for—Affidavit.

Before the issuance of the writ of garnishment the plaintiff or some one in his behalf shall make application therefor by affidavit, stating the facts authorizing the issuance of the writ, and that the plaintiff has reason to believe, and does believe, that the garnishee, stating his name and residence, is indebted to the defendant, or that he has in his possession, or under his control, personal property or effects belonging to the defendant, or that the garnishee is an incorporated or joint stock company, and that the defendant is the owner of shares in such company or has an interest therein. [L. '93, p. 95, § 3.]

Persons and property subject to garnishment: See 1 *Remington's Digest*, p. 1323, §§ 5-22; *Dittenhoefer v. Coeur d'Alene Clo. Co.*, 4 Wash. 519; *Neufelder v. German-American Ins. Co.*, 6 Wash. 336; *State ex rel. Summerfield v. Tyler*, 14 Wash. 494; *Flood v. Libby*, 38 Wash. 366; *Drake v. Catlin*, 18 Wash. 316; *Hardin v. White Swan Min. & Mill. Co.*, 26 Wash. 583; *Coombs v. Davis*, 2 W. T. 466; *Weisbach v. Arnold*, 3 W. T. 111; *Millar & Co. v. Plass*, 11 Wash. 237; *McAlmond v. Bevington*, 23 Wash. 315; *Pierce v. Commercial Inv. Co.*, 30 Wash. 272; *Russell v. Millet*, 20 Wash. 212; *Smith v. Cullen*, 18 Wash. 398; *Merwin v. Fowler*, 20 Wash. 587.

A county cannot be garnished when not liable to an action by the principal defendant, as the claim is not subject to presentation for allowance or rejection: *Eureka Sandstone Co. v. Pierce County*, 8 Wash. 236.

Funds deposited by public officer in bank in his individual name belong, in equity, to the municipal corporation of which he is an officer, and cannot be garnished at suit of his individual creditors: *Marx v. Parker*, 9 Wash. 473.

The fact that a custodian of city funds must give a bond for their proper disposition does not thereby constitute him a mere debtor to the city therefor, but he is the bailee, subject to special obligations; and such funds, when deposited in bank by him, are not subject to garnishment at suit of judgment creditor: *Id.*; cited in *Fairchild v. Hedges*, 14 Wash. 121.

Where a bank summoned as garnishee sets up in its answer that it has money deposited by the judgment defendant, but that it has been collected and deposited by defendant as city marshal, and that all sums held in defendant's name by garnishee belong to the city, it is error for the court, of its own motion, to require the city to appear therein as intervener: *Marx v. Parker*, *supra*.

School warrants issued for the salary of teachers cannot be reached by proceedings supplemental to execution, since their seizure would in effect involve a garnishment of a municipal corporation, which cannot be done: *Flood v. Libby*, 38 Wash. 366.

As to property in safe deposit vaults, see *Trowbridge v. Spinning*, 23 Wash. 48.

A draft is property and subject to garnishment within the meaning of the garnishment law: *Washington Brick etc. Co. v. Traders' Nat. Bank*, 46 Wash. 23.

The drawing of checks upon a general deposit in a bank, prior to garnishment of the drawer's account, does not exempt an amount equal to such checks, when the latter are not prepared until after the service of the writ in garnishment: *Commercial Bank v. Chilberg*, 14 Wash. 247.

The superior court has no authority in a garnishment proceeding to make an order directing that a person not regularly served shall be made a party defendant, although it may appear from the answer or examination of the garnishee that such person is a necessary party: *State v. Su-*

perior Court, 15 Wash. 500; *Moore v. Gilmore*, 16 Wash. 123.

A county is not liable to garnishment unless made so by express statutory provision: *State v. Tyler*, 14 Wash. 495; and the fact that corporations are named by statute as among those upon whom process in garnishment may be served does not apply to municipal corporations, unless they are expressly included: *Id.*

A judgment against a county as garnishee defendant is void on collateral attack, when the statutes do not make a county subject to garnishee process: *Id.*

Money due under an insurance policy for the loss of property by fire is not exempt from garnishment, if it is not made to appear by pleading and proof that the property itself was exempt from execution: *Wilson v. McLachlan*, 12 Wash. 154; distinguishing *P. S. D. B. & P. Co. v. Jeffs*, 11 Wash. 466.

A trespasser in possession of another's goods cannot be charged as garnishee of the owner: *Wooding v. Puget Sound Nat. Bank*, 11 Wash. 527.

Proceedings against garnishees should be prosecuted by the creditor with reasonable diligence; and the failure of a

creditor to prosecute his claim for a period of two years after service of the writ is sufficient to defeat his rights thereunder: *Id.*

Where a law giving a right to garnishment proceedings has been repealed subsequent to the commencement thereof, and the repealing act contains no saving clause, the effect of the repeal is to quash pending proceedings: *Id.*

Where a draft is deposited with a bank which has a rule that in receiving collections it acted only as agent and assumed no responsibility beyond due diligence, the depositor receiving credit for the amount of the draft, but if the draft was not paid the amount was charged back, the ownership of the draft remains in the depositor, although he was allowed to check against it, as that was simply an accommodation extended; and upon garnishee process against the bank in an action against the depositor, it is properly found that, pending collection, an accepted draft deposited by the defendant is property of the defendant in possession of the garnishee: *Washington Brick Lime & Mfg. Co. v. Traders' National Bank*, 46 Wash. 23.

§ 683. (5393.) Writ, When and How Issued.

When the foregoing requisites have been complied with the clerk shall docket the case in the name of the plaintiff as plaintiff and of the garnishee as defendant, and shall immediately issue a writ of garnishment directed to the garnishee, commanding him to appear before the court from which it is issued within twenty days after the service of the writ upon him, if the same be served upon him within the county in which the same is issued, or within thirty days if served in any other county in this state, and to answer on oath what, if anything, he is indebted to the defendant, and was when such writ was served, and what personal property or effects, if any, of the defendant he has in his possession or under his control, or had when such writ was served. [L. '93, p. 96, § 4.]

Cited in 8 Wash. 537; 23 Wash. 68; 40 Wash. 578.

§ 684. (5394.) Writ Against Incorporated Companies, How Served.

Where it appears from the plaintiff's affidavit that the garnishee is an incorporated or joint stock company, in which the defendant is the owner of shares, or is interested therein, the writ of garnishment shall further require the garnishee to answer upon oath what number of shares, if any, the defendant owns in such company, or owned when such writ was served. [L. '93, p. 96, § 5.]

§ 685. (5395.) Writ, Form of.

Said writ may be substantially in the following form:—

State of Washington, to A B, Greeting:

Whereas, in the superior court of the state of Washington, in and for ——— county, in a certain cause wherein C D is plaintiff and E F is defendant, the

plaintiff claiming an indebtedness against the said E F of — dollars, besides interest and cost of suit, has applied for a writ of garnishment against you:

Now, therefore, you are hereby commanded to be and appear before the said court within twenty days after the service upon you of this writ, if served within — county, and within thirty days after the service of this writ upon you if served in any other county of this state, then and there to answer upon oath what, if anything, you are indebted to the said E F, and were when this writ was served upon you, and what effects, if any, of the said E F you have in your possession or under your control, and had when this writ was served (and if the garnishee be an incorporated or joint stock company, in which the defendant is alleged to be the owner of shares, or interested therein, then the writ shall proceed; and further, to answer what number of shares, if any the said E F owns in such company, and owned when this writ was served upon you). [L. '93, p. 96, § 6.]

Cited in 40 Wash. 578.

§ 686. (5396.*) **Dating and Attestation.**

The writ of garnishment shall be dated and tested [attested] in like manner as the writ of attachment and the name and office address of the plaintiff's attorney shall be indorsed thereon or in case the plaintiff has no attorney, then the name and address of the plaintiff shall be indorsed thereon and delivered by the clerk who issues it to the plaintiff or his attorney. [L. '93, p. 97, § 7; L. '03, p. 91, § 1.]

§ 687. (5397.*) **Service of.**

The writ of garnishment may be served by the sheriff or any constable of the county in which the garnishee lives or it may be served by any citizen of the state of Washington over the age of twenty-one years and not a party to the action in which it is issued in the same manner as a summons in an action is served. And in case such writ is served by an officer, such officer shall make his return thereon showing the time, place and manner of service and noting thereon his fees for making such service and shall sign his name to such return. In case such service is made by any person other than an officer, such person shall attach to the original writ his affidavit showing his qualifications to make such service and the time, place and manner of making service, but no fee shall be allowed for the service of such writ unless the same is served by an officer. [L. '93, p. 97, § 8; L. '03, p. 91, § 2.]

Cited in 43 Wash. 375.

See 1 Remington's Digest, p. 1326, §§ 27-30.

Notice of garnishment, under § 2722 of 1 Hill's Code, must be served personally upon the attorney of a foreign insurance company, but where the notice is left with a third person in the attorney's office, while he is absent from the state, his subsequent answer in the proceedings will uphold jurisdiction: *Dittenhoefer v. Clothing Co.*, 4 Wash. 519. Where there is a void service of a writ of garnishment, the invalidity of which is subsequently cured by an appearance, and in the meanwhile

other writs are served, such other writs take precedence and are a first lien: *Id.* Where sheriff is a party, service of the writ may be made upon him by a private party: See *Russell v. Millett*, 20 Wash. 212.

The court acquires jurisdiction of non-resident defendants on service of summons by publication and the garnishment of assigned claims, where the assignment was not completed by delivery and acceptance before the issuance of the garnishment: *Nixon v. Hendy Machine Works*, 51 Wash. 419.

§ 688. (5398.) Effect of Service.

From and after the service of such writ of garnishment, it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects, nor shall the garnishee if an incorporated or joint stock company, in which the defendant is alleged to be the owner of shares or to have an interest, permit or recognize any sale or transfer of such shares or interest; and any such payment, delivery, sale or transfer shall be void and of no effect as to so much of said debt, effects, shares, or interest as may be necessary to satisfy the plaintiff's demand. [L. '93, p. 97, § 9.]

Cited in 23 Wash. 68; 26 Wash. 587; 40 Wash. 578.

Lien of garnishment and liability of garnishee: See 1 Remington's Digest, p. 1327, §§ 31-36.

A garnishee cannot object that judgment was rendered against the principal defendant, who was out of the state, upon a service by publication: *Holford v. Trewella*, 36 Wash. 654.

The fact that a garnishment proceeding had not been properly docketed and indexed is no defense to a garnishee who pays over money after having been duly

served with process: *Ward v. Ward*, 14 Wash. 640.

A garnishee defendant, by disposing of property in his possession after service of the writ upon him, becomes liable to the plaintiff for the amount of the judgment obtained in such proceeding: *Eidemiller v. Elder*, 32 Wash. 605.

As to liability of garnishee for interest, see *Bellingham B. B. Co. v. Busbois*, 14 Wash. 173.

Safe deposit company, as garnishee, should retain exclusive control over safe deposit box rented by defendant until discharged: See *Trowbridge v. Spinney*, 23 Wash. 48.

§ 689. Bond to Discharge Writ.

If the defendant in the principal action, cause a bond to be executed to the plaintiff with sufficient sureties, to be approved by the officer having the writ or garnishment, or after the return of said writ, by the clerk of the court out of which said writ was issued, to the effect that he will perform the judgment of the court: The writ of garnishment shall, upon the filing of said bond with the clerk, be immediately discharged, and all proceedings had thereunder shall be vacated: Provided, that the garnishee shall not be thereby deprived from recovering any costs in said proceeding, to which he would otherwise be entitled under this act. [L. '03, p. 282, § 1.]

§ 690. (5399.) Answer and Service of.

The answer of the garnishee shall be under oath in writing and signed by him, and shall make true answers to the several matters inquired of in the writ of garnishment, and shall be served upon the plaintiff or his attorney and filed with the clerk of the superior court. [L. '93, p. 97, § 10.]

Cited in 23 Wash. 69.

The statute [§ 209, supra] in regard to change of venue is applicable to garnishment proceedings: *State ex rel. Wyman etc. v. Superior Court*, 40 Wash. 443.

As to answer or disclosure of garnishee, see 1 Remington's Digest, p. 1328, §§ 41-

46; *Timm v. Stegman*, 6 Wash. 13; *Trowbridge v. Spinning*, 23 Wash. 48; *Connor v. Scott*, 16 Wash. 371; *McAvoy v. Jennings*, 39 Wash. 109; *Green v. Moore*, 24 Wash. 241; *Everton v. Parker*, 3 Wash. 331; *McDaniels v. Connolly Shoe Co.*, 30 Wash. 549.

§ 691. (5400.) Garnishee Discharged When.

Should it appear from the answer of the garnishee that he is not indebted to the defendant, and was not so indebted when the writ of garnishment was served on him, and that he has not in his possession or under his control any personal property or effects of the defendant, and had not when the writ was served; and when the garnishee is an incorporated or joint stock company in

which the defendant is alleged to be the owner of shares of stock or interested therein, if it shall further appear from such answer that the defendant is not, and was not when the writ was served, the owner of any of such shares or interested in such company, and should the answer of the garnishee not be controverted as hereinafter provided, and within the time hereinafter provided, the court shall enter judgment discharging the garnishee. [L. '93, p. 98, § 11.]

An appeal duly taken from an order discharging a writ of garnishment has the effect of continuing the garnishee before the court to determine his liability: See *Attle Trust Co. v. Pitner*, 17 Wash. 365.

§ 692. (5401.) Judgment by Default, When.

Should the garnishee fail to make answer to the writ within the time prescribed therein, it shall be lawful for the court, and on or after the time to answer such writ has expired, to render judgment by default against such garnishee for the full amount claimed by plaintiff against the defendant, or in case plaintiff has a judgment against defendant, for the full amount of such judgment with all accruing interest and costs. [L. '93, p. 98, § 12.]

Cited in 40 Wash. 578.

§ 693. (5402.) Judgment Against Garnishee, Enforcement of.

Should it appear from the answer of the garnishee or should it be otherwise made to appear, as hereinafter provided, that the garnishee is indebted to the defendant in any amount, or was so indebted when the writ of garnishment was served, the court shall render judgment for the plaintiff against such garnishee for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount shall exceed the amount of plaintiff's claim or demand against the defendant with interest and costs, in which case it shall be for the amount of such claim or demand, interest and costs: Provided, however, if it shall appear from the answer of the garnishee and the same is not controverted, or if it shall appear from the trial hereinafter provided for, that the garnishee is indebted to the principal defendant in any sum, but that such indebtedness is not matured and is not due and payable, the court shall make an order requiring the garnishee to pay such sum into court when the same becomes due, the date when such payment is to be made to be specified in said order, and in default thereof that judgment shall be entered against the garnishee for the amount of such indebtedness so admitted or found due. In case the garnishee shall pay said sum at the time specified in said order, said payment shall operate as a discharge, otherwise judgment shall be entered against him for the amount of such indebtedness, which judgment shall have the same force and effect, and be enforced in like manner as other judgments provided for in this chapter: Provided further, that if judgment shall be rendered in favor of the principal defendant, or if any judgment rendered against him be satisfied prior to the date of payment specified in said order, the garnishee shall not be required to make the payment hereinbefore provided for, nor shall any judgment in such case be entered against him. [L. '93, p. 98, § 13.]

Cited in 18 Wash. 318; 24 Wash. 243; 40 Wash. 579.

An order requiring persons, not impleaded in an action, except as garnishees,

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and having no notice, to deliver property claimed by them to another also not a party to this suit, but being the sheriff holding the attachment writ, is void for

want of jurisdiction and amounts to taking of private property without due process of law: *Weisback v. Arnold*, 3 W. T. 111.

Notice to the debtor of an assignment of a chose in action, before the service of notice of garnishment upon him for a debt of the assignor, is not essential to the protection of the assignee; but the garnishee, upon subsequent notice of the assignment, is bound to bring it to the attention of the court; and if he fails so to do, neither a subsequent voluntary payment to his creditor or the garnishor, nor a judgment against him as garnishee, will be available as a defense to an action against him by the assignee: *Bellingham Bay B. Co. v. Brisbois*, 14 Wash. 173.

The fact that a garnishment proceeding has not been properly docketed and indexed is no defense to a garnishee who pays over money after having been duly served with process in the garnishment proceeding and having appeared and answered therein prior to the time of making such payment: *Ward v. Ward*, 14 Wash. 640.

The payment by a garnishee defendant of moneys in dispute to the clerk of the court will not discharge the garnishee from liability when the payment is made in satisfaction of a judgment against the garnishee in favor of the principal debtor, and the money is not deposited with the clerk for the purpose of disclaiming any interest therein, as provided by §§ 199 and 200, *supra*, when money, property or indebtedness is claimed by different parties: *Id.*

The deposit in court by a garnishee defendant of the amount due from it on a judgment to the principal defendant, without including the interest, entitles it to only a pro tanto discharge in the garnishment proceeding: *Bellingham Bay B. Co. v. Brisbois*, *supra*.

In garnishment proceedings plaintiff is entitled to show that the garnishee defendant, by reason of some understanding, either secret or expressed, is the trustee or holder of the property of the principal debtor in order to keep it out of the reach of creditors; and in such case the garnishee may be held by the creditor for the amount of the property, although the principal debtor may have no right to enforce a claim therefor against such garnishee: *Miller & Co. v. Plass*, 11 Wash. 237.

When the only issue in a garnishment proceeding is as to whether or not the garnishee has in his possession personal property belonging to the principal debtor, it is error, upon a finding against the garnishee, to enter a money judgment against him: *Campbell v. Simpkins*, 10 Wash. 160.

If the object of a garnishment proceeding is to ascertain the title and right of possession of personal property, instead of the recovery of money, the action is within the appellate jurisdiction of the supreme court, although the principal debt may be less than two hundred dollars: *Id.*

Plaintiff in garnishment may recover against garnishee where he is the maker of a note not due, but which matures before garnishee files his answer, notwithstanding that before filing answer and after maturity of note, the garnishee paid it to payee: *Thompson v. Nat. Bank*, 66 Tex. 156, 18 S. W. 350.

Defendant's interest in a joint debt may be reached by garnishment: See *Moore v. Gilmore*, 16 Wash. 123.

Where a garnishee has been misled by deceit into answering that he is indebted to the principal defendant, when in fact he is not, his remedy, if he has any, is to apply in that proceeding for relief on some one of the grounds provided for the vacation of judgments: *Belond v. Rayburn*, 38 Wash. 406.

Where a judgment debtor, a foreign steamship company, in order to evade the jurisdiction of the courts of this state, exacted from its ticket broker in this state a cash deposit to pay in advance for transportation to be thereafter furnished on sales by the broker, checks of the broker for \$10,000, given and accepted as cash, extinguish the liability of the broker to the steamship company for transportation thereafter sold from time to time, although the broker was charged with the sales as reported and the checks were presented from time to time as reports of sales were made; accordingly, upon garnishment of the broker, the garnishee is properly found not indebted to the judgment debtor, the only liability being by reason of the checks; nor was the garnishee under obligation to stop payment of the checks after service of the writ: *Larsen v. Allen Line Steamship Co.*, 45 Wash. 406.

§ 694. (5403.) Execution.

Execution may be issued on the judgment against the garnishee herein provided for in like manner as upon any other judgment. The amount made upon any such execution shall be paid by the officer executing the same to the clerk of the superior court from which such execution was issued; and in cases where judgment has been rendered against the defendant the amount made on the execution shall be applied to the satisfaction of the judgment,

interests and costs against the defendant. In case judgment has not been rendered against the defendant at the time execution issued against the garnishee is returned, any amount made on said execution shall be paid to the clerk of the court from which such execution issued who shall retain the same until judgment be rendered in the action between the plaintiff and defendant. In case judgment be rendered therein in favor of the plaintiff, the amount made on the execution against the garnishee shall be applied to the satisfaction of such judgment and the surplus, if any there be, shall be paid to the defendant. In case judgment be rendered in such action in favor of the defendant, the amount made on said execution against the garnishee shall be paid to the defendant. . [L. '93, p. 99, § 14.]

Cited in 48 Wash. 131.

Under this section, upon judgment against a garnishee, and payment of the same to the clerk of the court, the judgment and payment inure to the benefit

of the successful party in the principal action, and the plaintiff is not entitled to the fund in court until after recovery of judgment against the defendant: *State ex rel. Tatum v. Fitzhenry*, 48 Wash. 130.

§ 695. (5404.) Decree to Deliver Effects.

Should it appear from the garnishee's answer or otherwise that the garnishee has in his possession or under his control, or had when the writ was served, any personal property or effects of the defendant liable to execution, the court shall render a decree requiring the garnishee to deliver up to the sheriff on demand such personal property or effects or so much of them as may be necessary to satisfy the plaintiff's claim. In cases where a judgment has been rendered in favor of the plaintiff against the defendant, such personal property or effects may be sold in like manner as any other property is sold upon an execution issued on said judgment. In cases where judgment has not been rendered in the principal action, the sheriff shall retain said personal property or effects in his possession until the rendition of judgment therein, and in case judgment is rendered in said principal action in favor of the plaintiff, said goods or effects, or sufficient of them to satisfy such judgment, may be sold in like manner as other property is sold on execution, by virtue of an execution issuing on said judgment. In case judgment shall be rendered in said action against the plaintiff and in favor of the defendant, such effects and personal property shall be by the sheriff returned to the defendant: Provided, however, that in cases where such effects or personal property are of a perishable nature, or the interests of the parties will be subserved by making a sale thereof before judgment, the court may order a sale thereof by the sheriff in like manner as sales upon execution are made and the proceeds of such sale shall be paid to the clerk of the superior court, and like disposition shall be made of such proceeds at the termination of the action as would have been made of such personal property or effects under the provisions of this section, in case such sale had not been made. [L. '93, p. 100, § 15.]

Cited in 10 Wash. 162; 18 Wash. 318; 23 Wash. 68.

A corporation which conducts a safe deposit vault business by renting to individuals boxes in the vault which can only be opened by the use of two keys—one a master key, in the possession of the corporation, and the other a private key,

in the possession of the renter of the box—is subject to garnishment under this section: See *Trowbridge v. Spinning*, 23 Wash. 48.

When the only issue in a garnishment proceeding is as to whether or not the garnishee has in his possession personal property belonging to the principal

debtor, it is error, upon a finding by the garnishee, to enter a money judgment against him; but the goods should be ordered delivered to the sheriff: *Campbell v. Simpkins*, 10 Wash. 160.

§ 696. (5405.) Procedure on Failure of Garnishee to Surrender Effects.

Should the garnishee adjudged to have effects or personal property of the defendant in his possession or under his control as provided in the [last] preceding article [section], fail or refuse to deliver them to the sheriff on such demand, the officer shall immediately make return of such failure or refusal, whereupon, on motion of the plaintiff, the garnishee shall be cited to show cause why he should not be attached for contempt of court for such failure or refusal, and should the garnishee fail to show some good and sufficient excuse for such failure and refusal, he shall be fined for such contempt and imprisoned until he shall deliver such personal property or effects. [L. '93, p. 101, § 16.]

Cited in 10 Wash. 162; 32 Wash. 609.

§ 697. (5406.) Sale of Shares of Stock, When.

Where the garnishee is an incorporated or joint stock company, and it appears by the answer or otherwise that the defendant is or was, when the writ of garnishment was served, the owner of any shares of stock in such company or any interest therein, the court shall render a decree ordering the sale under execution in favor of the plaintiff, against the defendant, of such shares or interest of the defendant in such company, or so much thereof as may be necessary to satisfy such execution. [L. '93, p. 101, § 17.]

Cited in 26 Wash. 587.

See *Hardin v. White Swan Min. & Mill. Co.*, 26 Wash. 583.

Shares of stock may be sold to the extent of the judgment debtor's interest:

§ 698. (5407.) Sale, How Made.

The sale so ordered shall be conducted in all respects as other sales of personal property under execution, and the sheriff making such sales shall execute a transfer of such shares or interest to the purchaser with a brief recital of the judgment of the court under which the same was sold. [L. '93, p. 101, § 18.]

§ 699. (5408.) Effect of Sale.

Such sale shall be valid and effectual to pass to the purchaser all the right, title and interest which the defendant had in such shares of stock, or in such company, and the proper officers of such company shall enter such sale and transfer on the books of the company in the same manner as if the sale had been made by the defendant himself. [L. '93, p. 101, § 19.]

§ 700. (5409.) Plaintiff may Controvert Answer.

If the plaintiff should not be satisfied with the answer of the garnishee he may controvert the same by affidavit in writing signed by him, stating that he has good reason to believe and does believe that the answer of the garnishee is incorrect, stating in what particulars he believes the same is incorrect. [L. '93, p. 101, § 20.]

Cited in 11 Wash. 242; 23 Wash. 68; 30 Wash. 551.

In garnishment proceedings, the fraudulent character of the transfer of property

from principal debtor to garnishee defendant may be shown under the statutory issue provided for in this and § 702: *Miller & Co. v. Plass*, 11 Wash. 237.

An answer in garnishment, which admitted that the garnishee held the property of the principal defendants as a trustee for the benefit of all the creditors in the absence of demurrer or motion should be treated as amended to allege that the assignment was made at the instance of the plaintiff, thereby precluding the plaintiff from attacking the assignment as fraud-

ulent, and raising an issue of fact: *McAvoy v. Jennings*, 39 Wash. 109.

If the answer is defective, the remedy is by motion or demurrer: See *Green v. Moore*, 24 Wash. 241.

Traverse of answer and issues thereon: See *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549.

§ 701. (5410.) Defendant may Controvert Answer.

The defendant may also in like manner controvert the answer of the garnishee. [L. '93, p. 101, § 21.]

Cited in 51 Wash. 329.

§ 702. (5411.) Issue and Trial.

If the answer of the garnishee is controverted, as provided in the two preceding sections, an issue shall be formed, under the direction of the court, and tried as other cases: Provided, however, no pleadings shall be necessary on such issue other than the affidavit of the plaintiff, the answer of the garnishee and the reply of the plaintiff or defendant controverting such answer, unless otherwise ordered by the court. [L. '93, p. 101, § 22.]

Cited in 11 Wash. 242; 23 Wash. 519. Evidence as between plaintiff and garnishee: See 1 Remington's Digest, p. 1329, §§ 47-49; *McAlmond v. Bevington*, 23 Wash. 315; *Millar & Co. v. Plass*, 11 Wash. 237; *Hardin v. White Swan Min. & Mill. Co.*, 26 Wash. 583.

§ 703. (5412.*) Exemption of Wages and Family Necessaries.

Current wages or salary to the amount of one hundred dollars (\$100.00) for personal services rendered by any person having a family dependent upon him for support, shall be exempt from garnishment, and where it appears upon the trial, or by answer of the garnishee, when not controverted as hereinafter provided, that the garnishee is indebted to the defendant for such current wages or salary for an amount not exceeding one hundred dollars (\$100.00), the garnishee shall be discharged as to such indebtedness: Provided, that if the garnishment be founded upon a debt for actual necessities furnished to the defendant or his family or his dependents, no exemption shall be allowed in excess of ten dollars (\$10.00) out of each week's wages or salary, whether said wages or salary are paid, or to be paid, weekly, bi-weekly, monthly or at other intervals, and whether there be due the defendant wages for one week or a longer period: Provided, however, that said exemption shall in no event be allowed out of wages or salary for a longer period than four (4) consecutive weeks: And provided further, that no money due or earned as wages or salary shall be exempt from garnishment in lieu of any other property. The provisions of this section shall apply to actions in the superior court or before justice of the peace, and shall govern exemptions of wages or salary to the exclusion of all other statutes or parts of statutes. [L. '07, p. 477, § 1. Cf. L. '93, p. 102, § 23; L. '97, p. 24, § 1; L. '01, p. 294, § 1.]

See *supra*, § 563, specification of exempt property.

See *supra*, § 564, property not exempt from wages of clerks, laborers, etc.

§ 704. (5413.) Costs and Attorney's Fees.

Where the garnishee is discharged upon his answer, the costs of the proceeding, including a reasonable compensation to the garnishee for attorneys'

fees, shall be taxed against the plaintiff; where the answer of the garnishee has not been controverted and the garnishee is held thereon such costs shall be taxed against the defendant and included in the judgment. Where the answer is controverted the costs shall abide the issue of such contest. [L. '93, p. 102, § 24.]

Cited in 43 Wash. 178.

See 1 Remington's Digest, p. 1331, § 54.

Under this section the garnishee is entitled to recover the attorney's fee and costs in all cases when discharged from liability, whether on the answer or hearing: Whitehouse v. Nelson, 43 Wash. 174.

The failure to award costs to a garnishee against whom no judgment was entered cannot be made the basis for the right to an appeal by the garnishee: Durk v. Scully, 41 Wash. 357. See Kelly v. Ryan, 8 Wash. 536.

§ 705. (5414.) Sufficiency of Answer Against Defendant.

It shall be a sufficient answer to any claim of the defendant against the garnishee founded on any indebtedness of such garnishee or on the possession by him of any personal property or effects, or where the garnishee is an incorporated or joint stock company, in which the defendant was the owner of shares of stock or other interest therein for the garnishee to show that such indebtedness was paid or such effects delivered, or such shares of stock or other interest in such company were sold under the judgment of the court in accordance with the provisions of this chapter. [L. '93, p. 102, § 25.]

§ 706. (5415.) Provisions Inapplicable to Justices of the Peace.

The provisions of this chapter shall not apply to actions and proceedings before justices of the peace, but garnishments shall be made in such actions and proceedings in the manner now provided by existing laws. [L. '93, p. 102, § 26.]

CHAPTER III.

CLAIM AND DELIVERY (REPLEVIN).

§ 707. (5418.) Plaintiff may Claim Immediate Delivery.

The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property as herein provided. [L. '54, p. 150, § 100; L. '69, p. 35, § 140; Cd. '81, § 142; 2 H. C., § 255.]

See supra, § 159, limitations of actions for.

See supra, § 198, substitution and interpleader.

See supra, § 363, verdict in actions for specific personalty.

See supra, § 434, judgments in actions for specific personalty.

See supra, § 573 et seq., claim of third persons to property levied upon.

See supra, § 577, judgment in claim of third person.

See infra, § 1796, claim and delivery in justices' courts.

Cited in 10 Wash. 227; 21 Wash. 95.

Right of action and defenses: See 2 Remington's Digest, pp. 2500-2502, §§ 1-17.

Proceedings for taking and delivery: See Id., pp. 2502, 2503, §§ 18-20.

The proceedings authorized by § 573 et seq. constitute a concurrent remedy with the action of replevin: Scott v. McGraw, 3 Wash. 675, 678; Chapin v. Bokee, 4 Wash. 15.

In replevin plaintiff must have either the actual possession, or the right of re-

ducing the property to possession, at the time of the unlawful taking: Sires v. Newton, 1 W. T. 356.

Where plaintiff alleges ownership generally, without setting out his source of title, and introduces a bill of sale as evidence, defendant may set up in his answer that the bill of sale under which plaintiff holds is a mortgage: Kerron v. N. P. L. & M. Co., 1 Wash. 241.

As to evidence admissible under general denial or general issue, see 2 Rem-

ington's Digest, p. 2504, § 27; *Harvey v. Ivory*, 35 Wash. 397; *Coey v. Low*, 36 Wash. 10; *Shine v. Culver*, 42 Wash. 484.

The defendant in an action to recover specific personal property may, under the general denial prove ownership or the right of possession in a third person: *Chamberlin v. Winn*, 1 Wash. 501; same, 1 Wash. 259.

Where defendant in replevin sets himself up as owner of the chattels in controversy, necessity of demand prior to institution of action is waived: *National Bank v. Meerwaldt*, 8 Wash. 630; *Carstens v. Earles*, 26 Wash. 676.

Demand on husband for community property is sufficient: See *Standard Furniture Co. v. Anderson*, 38 Wash. 582.

In replevin, the person in possession of the chattel in question is the only necessary defendant, although an interest may be asserted in others: *Nat. Bank v. Meerwaldt*, 8 Wash. 630; affirming *Scott v. McGraw*, 3 Wash. 675, holding that where a sheriff is in possession he is the only necessary party defendant.

In an action to recover specific personal property, an allegation of venue in the complaint is necessary to give the court jurisdiction: *Stiles v. James*, 2 W. T. 194; but where the sheriff's return filed in the cause shows that property is within the jurisdiction of the court, the omission of an allegation of venue in the pleading is cured: *Id.*

An instruction to the jury that "the plaintiff claims that the defendant detains her property, fifty head of neat cattle. . . . The defendant denies that he detains any of said property; so, as to the cattle, the issue is clear and positive," is misleading, because it ignores the question of ownership or right of possession: *Chamberlain v. Winn*, supra.

If an officer, through mistake or design, seize property under execution and attachment not belonging to the defendant in the writ, or not subject to seizure, though belonging to defendant, he is a trespasser, and the goods may be recovered in replevin, or the owner may sue him in trespass or trover at his election: *Scott v. McGraw*, 3 Wash. 675, 677; *Dawson v. Baum*, 3 W. T. 464.

The vendor of goods, sold on credit, may rescind the sale for vendee's fraud and maintain replevin against the sheriff in whose custody the goods are by virtue of a valid writ of execution: *Scott v. McGraw*, 3 Wash. 675; *Page v. Urick*, 31 Wash. 601.

Where it appears from the complaint in replevin that plaintiffs have a special property in a certain hay crop, and are entitled to its possession, the complaint is not subject to a general demurrer, notwithstanding it may be alleged therein that they hold a mortgage on the crop, if, at the same time, it is made to appear that their right to possession is not dependent

upon their title as mortgagees: *Brookman v. State Ins. Co.*, 15 Wash. 29; *Silsby v. Aldridge*, 1 Wash. 117, distinguished.

In determining whether title has or has not passed by a contract of sale, the primary test is one of intention, and, if that is manifested clearly and unequivocally, it controls: *Pacific Lounge etc. Co. v. Rudebeck*, 15 Wash. 336.

Where goods have been sold to a purchaser in consideration of an antecedent debt, due him from the seller, although nothing in furtherance of the sale beyond the manifest intention of the parties to pass title has been done, replevin will lie at the instance of the purchaser against a third party, who holds the goods under a lease from the seller, which has been violated: *Id.*

Where, upon the breach of a conditional bill of sale of a stock of goods and fixtures, the vendor takes possession of additional stock purchased since the bill of sale, replevin lies to recover such additional stock: *Hennig v. Claussen Brewing Association*, 44 Wash. 116.

The right of possession under a chattel mortgage may be enforced by an action of claim and delivery: See *Bancroft-Whitney Co. v. Gowan*, 24 Wash. 66.

Where a dwelling-house was personal property, and was sold under a conditional contract of sale, on a breach of the conditions of sale the house could be recovered in an action of replevin: *Page v. Urick*, 31 Wash. 601.

Replevin will not lie for crops grown by one in adverse possession of the land: *Churchill v. Ackerman*, 22 Wash. 227.

Or for sawlogs severed from the land by one in adverse possession thereof under claim of right: *Clarke v. Clyde*, 25 Wash. 661.

Replevin will lie for property sold to one hopelessly insolvent and who had no intention of paying for same: See *Kulzer v. Simonton*, 41 Wash. 587.

A fixture subject to a mechanic's lien, purchased at a judicial sale and severed from the land, and afterward taken back to the land by the judgment creditor, cannot be recovered in an action of replevin by the purchaser: *Second Nat. Bank of Colfax v. Hatch*, 24 Wash. 421.

A tenant in common cannot maintain an independent action of replevin for the recovery of grain raised by the tenants and in the possession of third persons: *Vermont L. & T. Co. v. Cardin*, 19 Wash. 304.

A consignee of goods may maintain replevin against the carrier thereof without first making a tender of the amount of freight due where the consignment of goods has been delayed to such an extent as to subject the carrier to a liability for damages greater than the amount of freight due, and the claim for damages may be adjudicated in the replevin suit:

Moran Bros. Co. v. Northern Pac. R. Co., 19 Wash. 266.

In replevin to recover wheat seized by a constable under foreclosure notice on chattel mortgage, the mortgagee is estopped from asserting that the constable and not himself was in possession, when he admitted he had possession, and refused to deliver it upon demand, and gave a delivery bond therefor when seized by the sheriff: *Harris v. Hayfield*, 5 Wash. 230.

Plaintiff cannot recover if defendant was not in possession at time of demand or commencement of action: See *Dow v. Dempsey*, 21 Wash. 86.

The rule that replevin does not lie against one not in possession of the property does not obtain where the defendant had been in possession and wrongfully disposed of the property prior to the commencement of the action, without the knowledge of the plaintiff at the time: *Andrews v. Hoeslich*, 45 Wash. 220.

In replevin for hay claimed by virtue of ownership of land of which defendant is in possession, title may be inquired into: *Laurendeau v. Fugelli*, 1 Wash. 559.

One in possession of railroad land under preference right of purchase may maintain replevin for crops grown thereon against a trespasser, although the latter, subsequent to his forcible entry, may have filed a declaratory statement thereon as a part of the public domain: *Laurendeau v. Fugelli*, 5 Wash. 94, 632.

A mortgagee in possession, the mortgage being valid between the parties, and made in good faith, has the right of possession against all the world, and cannot be deprived thereof except on payment of the mortgage debt: *Marsh v. Wade*, 1 Wash. 538.

Where a mortgagee seeks to recover in replevin mortgaged property attached by creditors of the mortgagor, while in the plaintiff's possession, it is error to treat the transaction as a pledge, after excluding the mortgage for invalidity: *Marsh v. Wade*, supra.

If personal property has been mortgaged to plaintiffs by third parties, and afterward, but prior to the maturity of the debt, delivered by the mortgagors to defendant, it is a failure of proof, and not a mere variance, to prove the existence of the mortgage in support of the allegation of ownership: *Silsby v. Aldridge*, 1 Wash. 117; cited in *Kerron v. N. P. etc. M. Co.*, 1 Wash. 244.

As to what constitutes variance, see *Dow v. Dempsey*, 21 Wash. 86.

Where the lessee of school lands quarries stone thereon, and subsequently assigns the lease and sells the stone to another, the latter's possession under claim of ownership will support an action in replevin against one who, without right, enters the land and removes the stone: *Reynolds v. Dexter Horton & Co.*, 2 Wash. 185.

In an action by wife to recover possession of personal property she is not required to deraign her title thereto: *Freeburger v. Caldwell*, 5 Wash. 769; *Hester v. Stine*, 46 Wash. 469.

If plaintiff claims as owner under a bill of sale from a third party, proof that he is merely a mortgagee will defeat a recovery: *Kerron v. N. P. etc. M. Co.*, 1 Wash. 241.

Where a debtor, in view of a general assignment, mortgages chattels in fraud of his creditors, and subsequently executes a general assignment, his assignee may replevy the goods thus fraudulently transferred: *Mansfield v. Bank*, 5 Wash. 665.

But where he sues to recover the proceeds of goods converted into money, as an incident to a judgment in his favor he is entitled to costs: *Mansfield v. Bank*, 6 Wash. 603.

Where, however, the goods in controversy have been converted into money and with the consent of the parties deposited in court, the only question for decision is as to which party is entitled to receive same from the officer, and neither party is liable for its safekeeping as against the other: *Id.*

Where plaintiffs have given bond in replevin and taken possession of the property in controversy, and thereafter plaintiff voluntarily dismisses the action, it is error to dismiss without also rendering judgment restoring to defendant the property or give judgment for its value: *Liebmann v. McGraw*, 3 Wash. 520; *Harvey v. Ivory*, 35 Wash. 397.

Pleading and evidence: See 2 Remington's Digest, pp. 2503-2506, §§ 21-36.

Burden of proof to show title and right of possession: *Id.*, p. 2509, § 29.

Where the defense in replevin gives no evidence showing greater value than as stated in claimant's affidavit, no issue thereof is to be submitted to the jury, but the value alleged binds the claimant, and it is unnecessary for an attaching creditor to show bona fides until attacked by his adversary: *Peterson v. Woolery*, 9 Wash. 390. See, also, *Johnston v. McCart*, 24 Wash. 19.

To show wrongful taking or detention, see *Dodd & Co. v. Williams-Smithson Co.*, 27 Wash. 89.

VERDICT: See 2 Remington's Digest, pp. 2507, § 42.

In replevin, the jury should, under § 363, supra, assess the value of the property, whether their verdict be for plaintiff or defendant: *Meeker v. Johnson*, 3 Wash. 247; approved in *Quinn v. Park & L. M. Co.*, 5 Wash. 279.

A verdict is defective in replevin which merely finds for the plaintiff and assesses his damages at a specific sum: *Quinn v. Park & L. M. Co.*, 5 Wash. 276.

But when the point that the verdict is not in the alternative is not raised in the court below, the error will be disregarded: *McGraw v. Franklin*, 2 Wash. 17.

Judgment, form and requisites: See 2 Remington's Digest, p. 2508, §§ 44, 45; *Dow v. Dempsey*, 21 Wash. 86; *Hall v. Law G. & T. Soc.*, 22 Wash. 305; *Eidson v. Woolery*, 10 Wash. 225; *Bancroft-Whitney Co. v. Gowan*, 24 Wash. 66; *Kehoe v. McConaghy*, 29 Wash. 175; *Springer v. Ayer*, 50 Wash. 642.

Judgment for plaintiff in replevin should be for possession of the property in controversy, or, in case a delivery cannot be had, for its value, with damages for detention: *National Bank v. Meerwaldt*, 8 Wash. 630.

Form and requisites of complaint: See 2 Remington's Digest, pp. 2503-2505, § 21 et seq.; *Phillippos v. Mihran*, 38 Wash. 402; *Standard Furniture Co. v. Anderson*, 38 Wash. 582; *Stiles v. James*, 2 W. T. 194; *Hall v. Law Guarantee & T. Soc.*, 22 Wash. 305; *Casey v. Malidore*, 19 Wash. 279.

Where the bailee, without authority to sell or pawn, is given goods to show to a proposed customer, and the bailee delivers the goods to a third person to sell or pawn, and the latter pawns same and absconds with the proceeds, the legal owner is entitled to recover the possession of the goods: *Rumpf v. Barto*, 10 Wash. 382.

In an action of replevin to recover stolen goods pledged to a pawnbroker, the defendant is not entitled to instructions on the theory that he had a right to rely upon the apparent title or the apparent agency of the pledgor: *Id.*

Where the complaint, in replevin, alleges title generally in plaintiff, without setting forth the source of title, defendant may under denial of ownership meet the plaintiff's evidence to sustain such allegation, by any competent proof that tends to show its untruth, as by proof that plaintiff's bill of sale under which he claimed title was only a mortgage: *Kerron v. N. P. etc. Mfg. Co.*, 1 Wash. 241. See *Silsby v. Aldridge*, 1 Wash. 117.

Liability on bonds and undertakings: See 2 Remington's Digest, p. 2510, §§ 55-62.

A complaint for breach of replevin bond held, in a particular case, sufficient: *Meigs v. Keach*, 1 W. T. 305; but see *Boyer v. Fowler*, 1 W. T. 101.

There is no liability upon a replevin bond where it appears that the property was not delivered under the bond, but under the judgment of the justice: *Rinear v. Skinner*, 20 Wash. 541. See, also, *Arthur v. Sherman*, 11 Wash. 254.

Admissibility, weight and sufficiency of evidence: See 1 Remington's Digest, p. 2505, §§ 31-35; *Goodyear Rubber Co. v. Schreiber*, 29 Wash. 94; *Shine v. Culver*, 42 Wash. 484; *Levy v. Sheehan*, 3 Wash. 420; *Glass v. Buttner*, 39 Wash. 296; *Marsh v. Wade*, 1 Wash. 538; *Kehoe v. McConaghy*, 29 Wash. 175; *Goodyear Rubber Co. v. Schreiber*, 29 Wash. 94; *Dodd & Co. v. Williams-Smithson Co.*, 27 Wash. 89.

As to excessive damages for detention, see *Doe v. Tenino Coal & Iron Co.*, 43 Wash. 523.

Instructions on trial: See 2 Remington's Digest, p. 2506, §§ 38-41; *Chamberlin v. Winn*, 1 Wash. 259, 501; *Eicholtz v. Holmes*, 8 Wash. 71; *Carstens v. Earles*, 26 Wash. 676; *Lillie v. Shaw*, 22 Wash. 234; *Dow v. Dempsey*, 21 Wash. 86.

Satisfaction and discharge of judgment: See 2 Remington's Digest, p. 2509, § 50; *Standard Furniture Co. v. Van Alstine*, 31 Wash. 499; *High v. Emerson*, 23 Wash. 103.

Appeal and error: See 2 Remington's Digest, p. 2509, §§ 52-54.

Appellate jurisdiction is determined by the value of property as found by court or jury and not by amount claimed: See *Graves v. Thompson*, 35 Wash. 282.

Where the amount in controversy in replevin is \$200, the value of the goods, and \$500 damages for their detention, an appeal will lie to the supreme court: *Freeburger v. Caldwell*, 5 Wash. 769. See further, *First Nat. Bank of Aberdeen v. Carter*, 10 Wash. 11; *Rawson v. Ellsworth*, 13 Wash. 667; *Second Nat. Bank of Colfax v. Hatch*, 24 Wash. 421.

§ 708. (5419.) Affidavit for Delivery.

When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing,—

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth;
2. That the property is wrongfully detained by defendant;
3. That the same has not been taken for a tax, assessment, or fine pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is by law exempt from such seizure; and

4. The actual value of the property. [Cf. L. '54, p. 150, § 101; L. '69, p. 35, § 141; Cd. '81, § 143; 2 H. C., § 256.]

Cited in 3 Wash. 678; 21 Wash. 95.

Plaintiff may elect whether to proceed under this section or under § 573 et seq., but a judgment in one action would be a bar to a recovery in the other: *Scott v. McGraw*, 3 Wash. 675; following *Dawson v. Baum*, 3 W. T. 464.

The language of the third subdivision plainly implies that in all cases, where the property has not been seized under an execution or attachment against the property of the plaintiff himself, he may recover its possession from the officer seizing it: *Scott v. McGraw*, supra.

If, in an action of replevin for property pawned, plaintiff is obliged to keep

good his tender of the sum received on the pledge, it is sufficient if the money was paid into court and remained there before service of summons upon defendant, although not paid, as alleged, with the filing of the complaint: *Andrews v. Hoeslich*, 47 Wash. 220.

In an action of claim and delivery for property wrongfully sold under a chattel mortgage, the tender of the amount due on the mortgage before foreclosure sale, entitling the plaintiff to the property, need not be kept good by bringing the money into court: *Thomas v. Seattle Brewing & Malting Co.*, 48 Wash. 560.

§ 709. (5420.) Bond—Service of Bond and Affidavit.

Upon the receipt of the affidavit, and a bond to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit and bond by delivering the same to him personally, if he can be found, or his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither have any known place of abode, by putting them in the postoffice, directed to the defendant, at the postoffice nearest his place of residence. [Cf. L. '54, p. 150, § 102; L. '69, p. 35, § 142; Cd. '81, § 144; 2 H. C., § 157.]

See notes to § 707.

Cited in 32 Wash. 553.

Where plaintiff brought suit in replevin, gave bond, and obtained possession of the property, and defendant gave bond and retook same, and thereupon plaintiff discontinued his suit, it was held that an action

for damages would lie for breach of bond: *Meigs v. Keach*, 1 W. T. 305.

But where a replevin suit in which a bond is given is dismissed, and no judgment rendered in favor of the obligee in the bond, no action will lie by him on the bond: *Boyer v. Fowler*, 1 W. T. 101.

§ 710. (5421.) Objections to Bond—Justification of Sureties.

The defendant may, within three days after the service of a copy of the affidavit and bond, give notice to the sheriff that he excepts to the sufficiency of the sureties; if he fail to do so he shall be deemed to have waived all objections to them. When the defendant excepts, the sureties shall justify on notice in like manner as bail on arrest, and the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim

the property, as provided in the next section. [Cf. L. '54, p. 150, § 103; L. '69, p. 36, § 143; Cd. '81, § 145; 2 H. C., § 258.]

See *infra*, § 765, qualifications of bail.

See notes to § 707.

Sureties failing to justify after objection by defendant are released from further liability: See *Binear v. Skinner*, 20 Wash. 541.

§ 711. (5422.) Redelivery Bond.

At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a bond, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 716. [Cf. L. '54, p. 151, § 104; L. '69, p. 36, § 144; Cd. '81, § 146; 2 H. C., § 259.] :

See *infra*, § 765, qualifications of bail.

Cited in 32 Wash. 553.

Although the names of the principals upon a redelivery bond in replevin were signed by their attorney without authority, yet the principals are bound by its conditions, when by means thereof they have obtained possession of the property: *Arthur v. Sherman*, 11 Wash. 254.

Under such circumstances, the sureties upon the redelivery bond are also bound, as against the obligee named therein, by signing what appeared to be the signatures of the principals, thereby estopping themselves from questioning their genuineness: *Id.*

The parties to such bond are not relieved from liability for nonreturn of the property, as required by the judgment,

by the institution of injunction proceedings by a stranger to the action, after an opportunity had been given for the return of the property, if the judgment defendant had been in a position to make return: *Id.*

The fact that, upon a special execution for a return of the property held under a redelivery bond, the sheriff visited the mill where the property was in the custody of a third person, who did not allow him to do anything further toward taking possession than to check up the different articles to see that all the property described in the execution was there, does not constitute such a taking of possession by the sheriff as to excuse a return of the property in compliance with the conditions of the bond: *Id.*

§ 712. (5423.) Justification of Defendant's Sureties.

The defendant's sureties, upon a notice to the plaintiff or his attorney of not less than two nor more than six days, shall justify in the same manner as bail upon arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff. [Cf. L. '54, p. 151, § 105; L. '69, p. 36, § 145; Cd. '81, § 147; 2 H. C., § 260.]

See notes to § 707.

Cited in 14 Wash. 46.

The fact that the obligee in a redelivery bond elects to sue thereon in the first instance will not preclude a subsequent action by him against the sheriff for damages, when it develops that the bond which the sheriff had taken and turned over to

him was not in fact a genuine one: *Magnus v. Woolery*, 14 Wash. 43.

Under this section, providing that unless the sureties in a redelivery bond justify or their justification is waived by the plaintiff, the sheriff shall be responsible for them, it is not necessary, in an action

against the sheriff for failure to take a good bond, to plead and prove the value of the property released by him, but he is liable for the value of the property as determined in the prior proceeding in which the bond had been given: Id.

§ 713. (5424.) Qualifications of Sureties.

The qualification of sureties and their justification shall be as prescribed in respect to bail upon an order of arrest. [L. '54, p. 151, § 106; Cd. '81, § 148; 2 H. C., § 261.]

See *infra*, § 765, qualifications of bail.

§ 714. (5425.) Buildings may be Broken Open, When.

If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession, and if necessary, he may call to his aid the power of his county. [L. '54, p. 151, § 107; Cd. '81, § 149; 2 H. C., § 262.]

Cited in 44 Wash. 516.

§ 715. (5426.) Sheriff must Safely Keep Property.

When the sheriff shall have taken the property as herein provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the same. [L. '54, p. 151, § 108; Cd. '81, § 150; 2 H. C., § 263.]

§ 716. (5427.) Proceedings upon Claim by Third Person.

If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or his right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff before the delivery of the property to the plaintiff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand [of him or his agent], indemnify the sheriff against such claim by a bond, executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property as specified in the affidavit of plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and freeholders or householders of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity. [L. '54, p. 151, § 109; Cd. '81, § 151; 2 H. C., § 264.]

The words "of him or his agent" in brackets appear to be inadvertently omitted from Code of 1881 and Hill's Code: See Laws of 1877, p. 32, § 151.

§ 717. (5428.) Return of Sheriff.

The sheriff shall file the affidavit, with the proceedings thereon, with the clerk of the court in which the action is pending within twenty days after taking the property mentioned therein. [Cf. L. '54, p. 152, § 110; Cd. '81, § 152; L. '91, p. 72, § 1; 2 H. C., § 265.]

CHAPTER IV. INJUNCTIONS.

§ 718. (5431.) By Whom Granted.

. Restraining orders and injunctions may be granted by the superior court, or by any judge thereof. [L. '54, p. 152, § 111; Cd. '81, § 153; 2 H. C., § 266.]

See supra, § 1, jurisdiction of the supreme court.

See supra, § 15, jurisdiction of the superior court.

See supra, § 471, injunction to restrain proceedings to execute judgments.

See supra, §§ 623, 624, injunctions in proceedings supplemental to execution.

See infra, § 941, injunction to restrain waste by opposing claimant to public lands.

See infra, § 1316, injunction to restrain executor, etc., pending action to establish lost or destroyed will.

Nature and grounds in general: See 2 Remington's Digest, pp. 1495-1497, §§ 1-11.

That portion of this section as originally enacted providing for the granting of injunctions by judges of the supreme court is omitted as abrogated by § 4, article IV, of the Constitution.

The words "injunction" and "restraining order," as used in this chapter, are to be taken as substantially synonymous. The terms permit the court to put its order in the shape of a formal injunction, or it may issue simply an order restraining the acts

complained of: *State v. Lichtenberg*, 4 Wash. 407, 409.

Although the legislature may not, by express enactment, have declared the commission of certain acts illegal, a statute empowering the courts to restrain by injunction the commission of such acts would not be unconstitutional on that ground, inasmuch as a law authorizing the enjoining of an act is equivalent to declaring that such act is illegal: *Karasek v. Peier*, 22 Wash. 419.

§ 719. (5432.) When Granted.

When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatening [threatened], or is about to do, or is procuring or is suffering some act to be done, in violation of the plaintiff's rights respecting the subject of the action, tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment,—an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion. And where it appears, in the complaint, at the commencement of the action, or during the pendency thereof, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property. [L. '54, p. 152, § 112; Cd. '81, § 154; 2 H. C., § 267.]

See next section, mandatory injunctions in certain cases.

See infra, §§ 955-957, tender of taxes justly due, necessary when.

See infra, § 1716, subd. 3, appeal from temporary injunction.

See infra, §§ 1722, 1724, appeal from injunction order.

See notes to § 722, infra.

Cited in 18 Wash. 86; 43 Wash. 326.

Parties plaintiff: See 2 Remington's Digest, p. 1503, §§ 45, 46.

Jurisdiction to issue injunctions against state officers is in the superior courts: *Jones v. Reed*, 3 Wash. 57.

A state officer will not be restrained from misappropriating public funds at the suit of a mere citizen and taxpayer, as the attorney general is the proper party to institute such suits: *Jones v. Reed*, supra. See, also, *Tacoma v. Bridges*, 25 Wash. 221; *Birmingham v. Cheetham*, 19 Wash. 657.

Where the superior court, proceeding under § 68, supra, orders the sheriff to hire rooms for the court and court officers, the remedy of the county to prevent the payment of the expenses incurred, if unauthorized, is by injunction and not by prohibition: *State v. Hunter*, 4 Wash. 712.

A state officer cannot be enjoined from performing a statutory duty where some other remedy exists: *Wilkes v. Hunt*, 4 Wash. 100.

A private citizen cannot enjoin the acts of a public official without showing a special injury, different from that sustained by the general public: *Jones v. Reed*, supra; *Krieschel v. County Commissioners*, 12 Wash. 428; *Rand, McNally & Co. v. Hartranft*, 29 Wash. 591.

Pleadings: See 2 Remington's Digest, p. 1504, § 49.

If the facts pleaded fail to show irreparable injury, but, on the contrary, disclose a plain remedy at law, beyond the general conclusions alleged, injunctive relief cannot be granted: *Meeker v. Gilbert*, 3 W. T. 369, 377. See *Wash. Iron Works Co. v. Jensen*, 3 Wash. 584, 591.

In an action to enjoin trespasses on lands, the title to which lay in dispute between plaintiffs and defendants, and in which a temporary injunction had been granted plaintiff until the determination of an action to be instituted to try the question of title to the lands, the fact that plaintiff merely tendered an issue in an action brought by defendants against plaintiff involving the same subject matter will not justify the dismissal of the injunction suit: *Wilkinson Coal & Coke Co. v. Driver*, 9 Wash. 177.

A complaint in an action to enjoin trespasses upon land is defective, when the trespasses are pleaded in general allegations only: *Id.*; *Ross v. Howard*, 25 Wash. 1.

A party seeking injunctive relief should allege in positive language the facts upon which he bases his right thereto: *Woodcock v. Guy*, 33 Wash. 234.

See, further, *Spokane St. Ry. Co. v. Spokane*, 5 Wash. 634; *Colby v. Spokane*, 12 Wash. 690.

An action for the purpose of enjoining a public nuisance, in which no damages are alleged or sought, is of an equitable nature, in which a jury trial is not demandable as of right: *Smith v. Mitchell*, 21 Wash. 536.

Latitude must be allowed on cross-examination to show whether the plaintiffs came into equity with clean hands: *Lynn v. Waldron*, 38 Wash. 82.

Right to temporary injunction and grounds for denial: See 2 Remington's Digest, p. 1505, §§ 55-57.

A complaint in foreclosure of a lien on shingles alleges sufficient grounds for issuance of a temporary injunction when it avers that the debt is due; that defendants are insolvent and financially irresponsible; and that the only security for plaintiff's claim was the lien upon the shingles, which defendants were threatening to and were about to remove from the state: *Cady v. Case*, 11 Wash. 124.

The issuance of a temporary injunction pendente lite to preserve and make efficient a lien upon shingles is warranted when neither the amount sued for, nor the right to a lien, is disputed by defendants: *Id.*

If it appears from the pleadings that plaintiff's case depends upon the admission of parol evidence where the law does not allow it, it is error to grant his application for a temporary injunction: *Gordon v. Park & Lacy M. Co.*, 10 Wash. 18. See, further, *Rockford Watch Co. v. Rumpf*, 12 Wash. 647; *Hart v. Seattle*, 42 Wash. 113.

Certain allegations in a complaint for injunction held insufficient to negative the presumption that a city was proceeding in such a manner in the construction of a street improvement as not unreasonably to interfere with plaintiff's rights: *Spokane St. Ry. Co. v. Spokane*, 5 Wash. 634.

Where a motion to dissolve a temporary restraining order is practically a general demurrer to the complaint, and is sustained, it is proper to dismiss the action at the same time: See *Noerdlinger v. Huff*, 31 Wash. 360.

In an action to enjoin defendant from interfering with plaintiff's right to take gravel from defendant's land, defendant cannot counterclaim for damages committed by plaintiff to his land and growing crops, when such trespass had no connection with the taking of the gravel: *Corliss v. Dunning*, 8 Wash. 332.

A complaint asking for a temporary injunction verified upon belief is sufficient under § 281, supra: *Cady v. Case*, supra.

Defects as to parties defendant: See 2 Remington's Digest, p. 1503, § 47; *Stallcup v. Tacoma*, 13 Wash. 141; *State ex rel. Reed v. Gormley*, 40 Wash. 601; *Savage v. Sternberg*, 19 Wash. 679; *State ex rel. Victor Boom Co. v. Peterson*, 29 Wash. 571; *Foster v. Raznik*, 46 Wash. 692.

Injunction will not lie, when the threatened injuries are too remote or problematical: *Tacoma v. Bridges*, 25 Wash. 221; *Winsor v. Hanson*, 40 Wash. 423.

TAXES AND ASSESSMENTS: See 2 Remington's Digest, p. 1500, § 29.

The fact that a taxpayer is by statute given the right to defeat the collection of an illegal tax whenever suit for its collection is instituted will not prevent an ac-

tion in the meantime to enjoin its collection and remove the apparent lien which clouds his title: *Benn v. Chehalis Co.*, 11 Wash. 134.

The collection of the tax assessed upon the capital stock of a national bank will not be enjoined on the ground that the moneyed capital thereof is unjustly discriminated against, when the complaint fails to show that the moneyed capital of others is permitted to escape taxation: *National Bank v. Chehalis Co.*, 6 Wash. 64. See, also, *National Bank v. King Co.*, 9 Wash. 608.

Injunction is the proper remedy against assessors or boards of equalization, where they fraudulently, capriciously or tyrannically refuse to exercise their judgment by adopting a rule or system of tax valuation designed to operate unequally: *Andrews v. King Co.*, 1 Wash. 46.

Or against a county treasurer threatening to seize and sell property purchased in good faith from a party who was owing delinquent taxes: See *Phelan v. Smith*, 22 Wash. 397, 61 Pac. 31. See, also, *Coolidge v. Pierce County*, 28 Wash. 96.

MUNICIPAL CORPORATIONS: See 2 Remington's Digest, p. 1499, § 19.

Where a city council acts within the limits of the discretion conferred on it by law such action cannot be enjoined: *State v. Milligan*, 3 Wash. 144. See *Times Pub. Co. v. Everett*, 9 Wash. 518, 522.

But if through fraud or manifest error, outside the discretion conferred upon the agents of a municipal corporation, they are proceeding to contract so as to illegally cast upon taxpayers a substantially larger burden of expense than is necessary, injunction will lie to keep them within legal bounds: *Times Pub. Co. v. Everett*, supra.

The fact that the plaintiff, in an action to enjoin the letting of a contract for the county printing, has ulterior motives in prosecuting the suit, beyond his direct interest as a taxpayer, will not necessarily disqualify him as plaintiff: *Times Pub. Co. v. Everett*, supra; *Norton v. City of Roslyn*, 10 Wash. 45.

Where the proposed grading of a street will materially reduce both rental and selling value of an abutting owner's property, the grading may be enjoined unless damages be ascertained and compensation made before the work is done; and such owner has the right to have the damages ascertained by a jury: *Brown v. Seattle*, 5 Wash. 35, 43. See *Park v. Seattle*, 5 Wash. 1.

Injunction is a proper remedy to prevent threatened permanent injury by the grading of a street: *Brown v. Seattle*, supra.

Or for taking private property for a public use, without first making just compensation therefor: *State ex rel. Smith v. Superior Court*, 26 Wash. 278; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520;

Swope v. Seattle, 36 Wash. 113; *Olson v. Seattle*, 30 Wash. 687.

A party seeking to restrain the collection of a street assessment is excused from paying or tendering the portion which he should in equity pay, when the assessment is so false and unwarranted as to furnish no data of his just proportion of the cost of the proposed improvement: *Howell v. Tacoma*, 3 Wash. 711; followed in *Griggs v. Tacoma*, 3 Wash. 785; *Pierce v. Tacoma*, 3 Wash. 785.

In a suit by a lot owner to restrain the city by injunction from tearing down a building erected by plaintiff, damages for prospective profit, which he might have received had the erection been permitted, are too remote, and cannot be recovered: *Bingham v. Walla Walla*, 3 W. T. 68.

Where plaintiff seeks to enjoin a city from interfering with his erection of a building prohibited by ordinance, and the city, by cross-complaint, seeks to enjoin the erection, to which plaintiff replies, and trial had on such issues without objection, plaintiff cannot complain of an adverse decision, because affirmative relief was given the city: *Baxter v. Seattle*, 3 Wash. 352.

The creation of void indebtedness by a city subsequent to the lawful voting of bonds for the purpose of borrowing money is not ground for restraining the issuance of the bonds: *McBryde v. Montesano*, 7 Wash. 69.

If, subsequent to a municipal election for voting bonds for purchase of water-works, but prior to issuance, a new assessment becomes operative, reducing the valuation, the city may be enjoined from issuing bonds in excess of five per cent of the existing valuation: *Seymour v. Tacoma*, 6 Wash. 427.

Where an ordinance adopting a system of electric lighting recited its passage in pursuance of the act of March 26, 1890, as amended by act of March 9, 1891, when in fact it was passed in pursuance of the act of February 10, 1893, which act was a mere re-enactment of the former act, with an immaterial amendment, no ground for injunction exists against issuance of bonds thereunder: *Lewis v. Port Angeles*, 7 Wash. 190.

If the complaint, in an action to enjoin the issuance of school bonds, alleges that their issuance will increase the indebtedness beyond one and one-half per cent of the taxable property, it will be presumed, from the fact that a portion thereof is to pay outstanding indebtedness, that the one and one-half per cent limit will not be exceeded: *Luzader v. Sargeant*, 4 Wash. 299.

Plaintiff seeking to enjoin a city is bound by the affirmative relief granted such city on its cross-complaint for injunction: See *Baxter v. Seattle*, 3 Wash. 352.

A suit to enjoin a city from applying its sewerage fund to any purpose until the claims of plaintiff for construction of the sewerage system have been adjusted and paid, is a local action under § 204, *supra*: *North Yakima v. Superior Court*, 4 Wash. 655.

Payment of warrants will not be enjoined at suit of taxpayers for an improvement for which they had petitioned, even though the contract for the improvement be illegal, they having stood by and permitted the completion of the work: *Travis v. Ward*, 2 Wash. 30; *State ex rel. Reed v. Gormley*, 40 Wash. 601.

As to complaint held insufficient to enjoin the enforcement of an ordinance regulating the filing of plats, see *Hillman v. Seattle*, 33 Wash. 14.

In an action to enjoin the council and officers of a town from compromising and satisfying a judgment, a judgment enjoining the acts is irregular where it appears that the acts have already been performed; and the court should, on its appearing that the plaintiff is entitled to relief, give judgment setting aside the compromise and satisfaction, allowing the pleadings to be, or considering them, amended to conform to the proofs: *Farnsworth v. Wilbur*, 49 Wash. 416.

REMOVAL OF COUNTY SEAT: See 1 *Remington's Digest*, p. 693, § 8.

The superior court has no jurisdiction of the subject matter of an action which seeks to enjoin the removal of a county seat on the ground of fraud in the election therefor: *Parmeter v. Bourne*, 8 Wash. 45; distinguished in *Rickey v. Williams*, 8 Wash. 479, 486, 487.

But equity will enjoin the removal of a county seat for the fraud of the board of commissioners in canvassing the votes and declaring the result of the election: *Parmeter v. Bourne*, *supra*, distinguished; or for an illegal removal, at the instance of a resident taxpayer: *Krieschel v. Board of Commissioners*, 12 Wash. 428.

And it will also lie at the suit of a county officer to enjoin the removal of a county seat, where the board of county commissioners had never obtained jurisdiction to order the submission of the question to a popular vote: *Rickey v. Williams*, 8 Wash. 479. Where it appears that the commissioners have "received and compared" the returns and have properly certified to the facts as required by the statute, their decision is conclusive and injunction will not lie to prevent the removal: *Heffner v. County Commrs.*, 16 Wash. 273.

TIDE LANDS.—An upland owner is entitled to an injunction against mere trespassers who are attempting to occupy or interfere with the possession of his tide land frontage: *West Coast Imp. Co. v. Winsor*, 8 Wash. 490; distinguishing *Pierce v. Kennedy*, 2 Wash. 324; *Morse v. O'Connell*, 7 Wash. 117.

But a riparian proprietor cannot maintain an injunction against the owner of valuable improvements in actual use for commerce or trade, made on tide lands in front of his premises prior to March 26, 1890, since such owner may purchase the land improved within sixty days after appraisal: *Eisenbach v. Hatfield*, 2 Wash. 236.

An occupant of tide land, although possessing a preference right of purchase as an improver, cannot enjoin the occupation and use by another of tide lands in front of his improvements when his access to navigable water is not thereby materially disturbed: *Morse v. O'Connell*, *supra*.

The lessee of state tide lands may maintain an action to enjoin continuing trespasses by persons who go thereon at low tide to dig clams and destroy the clam beds, a judgment for damages not affording adequate compensation: *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127.

WATER RIGHTS.—The permanent diversion of the waters of a stream by a riparian owner for the purpose of supplying a neighboring town with water is unlawful, and may be enjoined by a lower riparian proprietor: *Rigney v. Tacoma L. & W. Co.*, 9 Wash. 576.

The fact that complainant, in a suit to restrain the diversion of a stream from its natural flow, has a right of action for damages, does not afford such an adequate and effectual relief at law as to bar recourse to a court of equity, when the diversion is a continuing one: *Id.*

The doctrine of laches or acquiescence cannot be invoked to defeat the application of a lower riparian proprietor for an injunction against the wrongful diversion of a stream against which he had protested but had instituted no legal proceedings, although the diversion had continued nine years: *Id.*

A tenant of lands may enjoin the threatened diversion of the waters of a stream running over his land, where the diversion is to some other locality, and is not made for the use of the proprietor above or below him: *Crook v. Hewitt*, 4 Wash. 749.

In an action to enjoin defendant from interfering with plaintiff's use of water of a certain stream, the evidence showing a prior appropriation by plaintiff, and defendant's use confined to a use for drinking purposes, injunction will be sustained: *Wold v. May*, 10 Wash. 157.

Where an injury to land caused by the discharge of water thereon is a continually recurring one, incapable of being compensated in damages, injunction is the proper remedy: *Peters v. Lewis*, 28 Wash. 366.

RESTRAINING FORECLOSURE PROCEEDINGS.—In the foreclosure by a wife of a fraudulent chattel mortgage given by her husband, an attaching creditor of the husband is entitled to an injunction to

protect his attachment lien: *Meacham Arms Co. v. Swarts*, 2 W. T. 412.

This right is accorded not only as a matter of equity jurisdiction, but also under § 1110, *infra*, relating to foreclosure of chattel mortgages: *Id.*

In an action to restrain the foreclosure sale of mortgaged personalty, the owner claiming the mortgage debt discharged in consideration of a conveyance of land to the mortgagee, evidence of the value of the land and price of subsequent sale is irrelevant: *Davis v. Hinchcliffe*, 7 Wash. 199.

The enforcement of a void judgment of foreclosure of a mechanic's lien may be enjoined, as, the decree being directed against specific property, a sale thereunder would constitute a cloud upon the title: *Quinby v. Slipper*, 7 Wash. 475.

COMMUNITY PROPERTY.—The levy of an execution upon community realty under judgment against husband on contract of suretyship may be enjoined at suit of wife: *Spinning v. Allen*, 10 Wash. 570.

If a judgment has been rendered against the husband alone for a community debt, the levy of an execution thereunder against the separate property of the husband or the community property cannot be enjoined: *Curry v. Catlin*, 9 Wash. 495.

Injunction will not lie to restrain the sale of community realty against which a decree of sale had been entered in a proceeding for the foreclosure of a mechanic's lien, to which the wife had not been made a party: *Turner v. Bellingham Bay L. & M. Co.*, 9 Wash. 48; distinguishing *Sagmeister v. Foss*, 4 Wash. 320; *L. & S. M. Co. v. Miller*, 3 Wash. 480. It will lie to prevent the husband's interest in community lands from being sold on execution to satisfy a judgment against him for his individual debt: *Stockand v. Bartlett*, 4 Wash. 730.

If a husband contracts to pay a commission for the sale of community lands, without authority from his wife, the wife may enjoin a sale thereof on a judgment against the husband alone on such contract: *McGlaulin v. Merriam*, 7 Wash. 111.

MISCELLANEOUS CASES.—A court of equity has power, and ought to interfere by injunction to control the action of a trustee during the pendency of the trust, when his acts are prejudicial to the interests of the cestui que trust: *Bingham v. Walla Walla*, 3 W. T. 68.

If injustice or surprise would result from an alleged false return of the sheriff, the court may protect a party by staying proceedings pending the determination thereof: *Wash. Mill Co. v. Kinnear*, 1 W. T. 99.

From the time a person enters into possession of public lands in pursuance of the pre-emption laws, whether surveyed or unsurveyed, he is entitled to the protection

of the court in his possession: *Colwell v. Smith*, 1 W. T. 92.

Injunction is authorized by § 941, *infra*, by one claimant to land, under the laws of the United States, against another claimant who is threatening waste which cannot be compensated in damages; the removal of trees is such an injury as is contemplated thereby: *Arment v. Hensel*, 5 Wash. 152.

If plaintiff, in violation of law, places and maintains his fence upon a public highway, injunction will not lie against a party destroying or threatening to destroy it: *Johnson v. Maxwell*, 2 Wash. 482. See, also, *Smith v. Mitchell*, 21 Wash. 536; *Lincoln County v. Fish*, 38 Wash. 105.

Injunction will not be granted to restrain the pumping of water from a lake when it is not shown that the owners of abutting property will suffer actual and material injury, but that the fear of threatened injury is theoretical merely, having little or no foundation in actual practical experiment: *Wintermute v. Tacoma L. & W. Co.*, 3 Wash. 727.

Where a lessee of school lands made improvements thereon, which were not appraised when the lands were sold by the state, his remedy to recover their value is not by injunction to prevent a delivery of the contract of sale, but to retain possession until compensated, or sue the purchaser therefor: *Wilkes v. Hunt*, 4 Wash. 100.

The grant to a water company of a right of way for pipe-line becomes fixed and certain when selection is made under deed and work upon the land is begun, and the grantor cannot thereafter interfere by injunction, unless actual abandonment occur: *McCue v. Bellingham Bay W. Co.*, 5 Wash. 156.

A plaintiff is entitled to injunctive relief where it appears that he would be compelled to part with an incident of title to one who has shown no right to obtain it: *Preston-Parton Mill Co. v. Dexter Horton & Co.*, 22 Wash. 236.

A license to fish is a franchise which entitles the holder to maintain an action for injunction against any infraction of his rights: *Walker v. Stone*, 17 Wash. 578.

Injunction will not lie to restrain the conducting of a saloon adjacent to a place of business in which a number of men are employed, whose sobriety is necessary to secure beneficial results: *Wilkeson Coal & Coke Co. v. Driver*, 9 Wash. 177.

Nor will it lie to restrain the sale of intoxicating liquors to plaintiff's employees on the ground that some of such employees become intoxicated, and are disqualified from rendering service to their employer: *N. P. Ry. Co. v. Whalen*, 3 W. T. 452; affirmed in same, 149 U. S. 157.

The act of the board of county commissioners from granting license for sale of

intoxicating liquors, which is exclusively within their jurisdiction, is quasi judicial; and, if erroneous, the remedy is by appeal or certiorari, and not by injunction: *Id.*

Where proof in replevin shows that defendant has merely a special interest in the property levied on, and does not show the amount, an erroneous judgment against plaintiff should be remedied by appeal and not by injunction: *Bowman v. McGregor*, 6 Wash. 118.

Prohibition will not lie to restrain courts having original jurisdiction in equity from issuing injunctions in excess of their jurisdiction, when an appeal furnishes a complete remedy from final judgments rendered therein: *State v. Jones*, 2 Wash. 662.

Upon a hearing after the issuance of a temporary injunction, an order that the injunction be continued pendente lite, and that "an injunction forthwith issue," as prayed for, does not require that another injunction be formally issued, as the order was intended to operate as an injunction upon the filing of the required bond, and to make the temporary order effective thereafter: *Collins v. Huffman*, 48 Wash. 184.

Acts punishable criminally may be enjoined at the suit of a party specially injured: See 2 Remington's Digest, p. 1496, § 9; *Walker v. Stone*, 17 Wash. 578; *Ingersoll v. Rousseau*, 35 Wash. 92.

As to extent, and effect, of enjoining action or proceedings in same court, see *Sibson v. Hamilton & Rourke Co.*, 21 Wash. 362.

A citizen of this state and domiciled here can be enjoined from prosecuting an action in another state against a citizen of this state, upon a proper showing of facts: *Rader v. Stubblefield*, 43 Wash. 334.

The right to hold a certain municipal office, as between two contestants therefor, cannot be litigated in an equitable action seeking an injunction against carrying into effect charter amendments whereby the plaintiff was legislated out of office: *Mullen v. Tacoma*, 16 Wash. 82.

The superior court has jurisdiction to restrain by injunction an interference with a de facto officer's possession of office by an adverse claimant, but cannot in such action determine the title to the office: *State ex rel. Fairbanks v. Superior Court*, 17 Wash. 12.

Maintenance of offensive slaughterhouse, enjoined: See *Wilcox v. Henry*, 35 Wash. 591.

Injunction against entering opposition business refused, where sale of business contained no provision as to goodwill: *MacMartin v. Stevens*, 37 Wash. 616.

As to enjoining boycotts, etc., see *Jensen v. Cooks' and Waiters' Union*, 39 Wash. 531.

The threatened negligent use of a stream for floatage purposes may be enjoined at the suit of a riparian owner who will

be damaged thereby: *Mitchell v. Lea Lum. Co.*, 43 Wash. 195. The granting of a temporary injunction against the removal of standing timber is discretionary, where the plaintiff contends that it is necessary to save the property from waste: *Seymour v. La Furgey*, 47 Wash. 450. It is error to grant an injunction against the abatement by a landlord of a nuisance on leased premises, where it appears that the tenant was maintaining a nuisance by the operation of heavy, noisy machinery in a storeroom of a hotel, which jarred the building and disturbed the guests of the hotel in a manner not contemplated by the lessor, the lease giving no such right, and the burden of proof being on the plaintiff to show authority for such operation: *Spokane Stamp Works v. Ridpath*, 48 Wash. 370. In an action of ejectment to recover land upon which there is a growing crop, it is not error to grant an injunction pendente lite to prevent the removal of the crop, on the allegation that the defendants in possession were trespassers threatening to remove the crop, where defendants made no showing to the contrary and they were permitted to remove the crop on the execution of a bond to the plaintiff: *O'Connor v. Oliver*, 45 Wash. 549.

APPEAL: See 1 Remington's Digest, p. 93, § 56.

An order granting or refusing a temporary injunction was not appealable under the organic act (U. S. Rev. Stats., § 1869): *Mahneke v. Tacoma*, 1 Wash. 18. See § 1716, appeals.

Nor would it lie from an order granting or modifying a temporary injunction under the Code of 1881: *N. P. Ry. Co. v. W. F. Co.*, 2 W. T. 303. An appeal cannot be taken from an order denying a temporary injunction unless the defendant is found to be insolvent: *State ex rel. Young v. Superior Court*, 43 Wash. 34.

An order sustaining a demurrer to a complaint for an injunction is a final order, and hence appealable, when the plaintiff refuses to plead further, though the effect of the court's ruling is the denial of a temporary injunction, since the matter determined is the sufficiency of the complaint, and not the necessity for the issuance of a restraining order: *Peters v. Lewis*, 28 Wash. 366.

In an injunction suit, where defendant moves to dissolve the temporary injunction granted plaintiff and also for an injunction against plaintiff, an order denying both branches of the motion without adjudicating plaintiff's prayer for a permanent injunction is not a final judgment, from which an appeal will lie: *Johnstone v. Eisenbeis*, 1 Wash. 259.

An order granting a temporary injunction cannot be suspended by an appeal therefrom: See 2 Remington's Digest, p. 1507, § 65; *State v. Stallcup*, 15 Wash. 263; *State ex rel. Byers v. Superior Court*,

28 Wash. 403; *State ex rel. Flaherty v. Superior Court*, 35 Wash. 200; *State ex rel. Gibson v. Superior Court*, 39 Wash. 115.

An appeal from a judgment denying an application for an injunction to prevent a county treasurer from paying a warrant will not be dismissed because of the act of the treasurer in making payment subsequent to appeal, but, if meritorious, judgment for costs will be awarded appellant: *Hartson v. Dale*, 9 Wash. 379.

If there is a substantial conflict over the facts upon which a temporary injunction has been granted, the appellate court will not disturb the action of the lower court: *West Coast Imp. Co. v. Winsor*, 8 Wash. 490. If no objection is raised at the trial as to variance, the pleading on appeal will be treated as amended: See *Olson v. Seattle*, 30 Wash. 687.

The cutting off of a water supply for an electric light plant, which the water company is bound under its franchise to furnish, may be enjoined, especially when there is no other supply of water available: *Jenkins v. Columbia Land etc. Co.*, 13 Wash. 502.

It will be presumed in aid of the jurisdiction to enjoin the cutting off of a water supply by a company having a franchise to supply water for the use of a city and its inhabitants, that no other company has such a franchise, even in the absence of an allegation to that effect: *Id.*

An order dissolving an injunction against the erection of a high trestle for street-car purposes upon the street in front of one's premises, on condition that the appropriator give bond to pay the owner all damages, is reviewable by writ of review: *State ex rel. Smith v. Superior Court*, 26 Wash. 278. Error of the court in granting and continuing a temporary injunction, dissolved on final hearing, cannot be reviewed on appeal: See *Watkins v. Dorris*, 24 Wash. 636.

Erroneous rulings vacating an injunction granted plaintiff and then granting defendant an injunction on the same facts will be reversed on appeal: See *De Mers v. Sand Spit Fish Co.*, 24 Wash. 582.

The court has inherent power to suspend the effect of a perpetual injunction pending appeal by the party against whom the same was granted, and a suspension of the judgment, pending appeal, upon the filing of a bond, to recover damages, does not violate Constitution, article 1, § 16: *State ex rel. Burrows v. Superior Court*, 43 Wash. 225.

An application for a temporary injunction against trespassing upon plaintiff's land should be denied when his allegation of ownership in the land has been traversed by defendant, and no proof has been submitted on the issue raised: *Colby v. Spokane*, 12 Wash. 690.

The refusal to grant a temporary injunction restraining a trespass on land is not erroneous, when it appears that the trespass was made by a city for the purpose of excavating for a pipe-line, that proceedings were under way for the condemnation of the land, with a view to the full compensation of the owner therefor, and there is no showing that the injury would be irreparable, that the defendant is insolvent or that the injunction is necessary to prevent a multiplicity of suits: *Id.*

In an action to rescind a contract of sale on the ground of fraud and recover possession of certain merchandise fraudulently conveyed, or the value of so much thereof as could not be recovered, the plaintiff is not entitled to a temporary injunction against a defendant to whom the debtor had conveyed real estate, when the complaint, unsupported by affidavits, alleges merely that the deed was without consideration and executed in furtherance of a conspiracy to cheat and defraud plaintiff, and that the grantee will dispose of same unless enjoined from so doing; and there is no allegation that the grantee is insolvent or is threatening or about to dispose of said real estate or any other property, and neither the cancellation of the deed nor any other relief than the injunction is sought against the grantee: *Rockford Watch Co. v. Rumpf*, 12 Wash. 647.

A temporary restraining order to prevent defendant from disposing of real property should not be granted, when a statutory proceeding, such as the filing of a *lis pendens*, will effect the object desired: *Id.*; *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 81.

Injunction will not lie where there is an adequate remedy at law: See 2 Remington's Digest, p. 1496; §§ 6, 7; *Wilkes v. Hunt*, 4 Wash. 100; *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 81; *Seattle Wharf Co. v. Callvert*, 42 Wash. 390.

Equity takes jurisdiction for injunctive relief, if it is more speedy and adequate than the remedy at law: *Phelan v. Smith*, 22 Wash. 397; *Grant v. Cole*, 23 Wash. 542.

Where the injury complained of can be compensated in damages, an injunction is not the proper remedy: *Lawrence v. Times Printing Co.*, 22 Wash. 482.

§ 720. (5433.) Injunction for Malicious Erection of Structures.

An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure, or annoy an adjoining proprietor. And where any owner or lessee of land has mali-

ciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal. [L. '93, p. 44, § 1; 2 H. C., § 268.]

See notes to last section.

See notes to § 944, mandatory injunctions in nuisance cases.

Cited in 22 Wash. 423; 31 Wash. 368. 419; Winsor v. German Sav. & L. Soc.,
Spite fences: See 2 Remington's Digest, 31 Wash. 365.
p. 1500, § 22; Karasek v. Peier, 22 Wash.

§ 721. (5434.) At What Time Granted.

The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment in that proceeding. [L. '54, p. 153, § 113; Cd. '81, § 155; 2 H. C., § 269.]

§ 722. (5435.) Notice—Emergency.

No injunction shall be granted until it shall appear to the court or judge granting it that some one or more of the opposite party concerned has had reasonable notice of the time and place of making application, except that in cases of emergency, to be shown in the complaint, the court may grant a restraining order until notice can be given and hearing had thereon. [L. '54, p. 153, § 114; Cd. '81, § 156; 2 H. C., § 270.]

Cited in 4 Wash. 410, 413; 11 Wash. 588; 12 Wash. 649; 14 Wash. 110; 22 Wash. 55; 43 Wash. 326; 45 Wash. 4.

See 2 Remington's Digest, p. 1506, § 59.

A restraining order issued without notice, on the ground of a temporary emergency, cannot be kept in force pending appeal, nor will delay in moving against it constitute an acquiescence in its permanency or amount to an estoppel from moving for its dissolution: Coleman v. Columbia etc. Ry. Co., 8 Wash. 227; Rockford Watch Co. v. Rumpf, 12 Wash. 647.

When a restraining order has been granted on the ground of emergency, without notice, and an order is made for the adverse party to show cause on a day certain why a temporary injunction should not be granted, but before the hearing thereof the court dismisses the case, such restraining order cannot be kept in force pending appeal from judgment of dismissal: State v. Lichtenberg, 4 Wash. 407.

An injunction granted without notice is void: State ex rel. Boardman v. Ball, 5 Wash. 387; In re Groen, 22 Wash. 53.

The fact that a temporary injunction was granted on motion of respondent, without notice to the appellant, as required by this section, cannot be urged by respondent to defeat the appeal taken from the order granting the motion: Rockford Watch Co. v. Rumpf, 12 Wash. 647. Compare State v. Lichtenberg, supra; Coleman v. Columbia etc. Ry. Co., supra.

An order granting an injunction, without notice to the defendant and without containing any provision limiting it to a day certain upon which a hearing should be had and an opportunity afforded the defendant to show cause why it should not thereafter be continued in force, is void: Larsen v. Winder, 14 Wash. 109; citing State v. Lichtenberg, supra. See, also, Hemen v. Rinehart, 45 Wash. 1; State v. Nicoll, 40 Wash. 517; Meier v. Fidelity Nat. Bank, 43 Wash. 324.

§ 723. (5436.) Affidavits on Hearing of Application.

On the hearing of an application for an injunction, each party may read affidavits. [L. '54, p. 153, § 115; Cd. '81, § 157; 2 H. C., § 271.]

§ 724. (5437.) Terms and Conditions Imposed.

Upon the granting or continuing an injunction, such terms and conditions may be imposed upon the party obtaining it as may be deemed equitable. [L. '54, p. 153, § 116; Cd. '81, § 158; 2 H. C., § 272.]

See 2 Remington's Digest, p. 1507, §§ 63, 64; Hathaway v. Yakima Water etc. Co., 14 Wash. 469; Everett Water Co. v. Powers, 37 Wash. 143; Davis v. Ford, 15 Wash. 107.

§ 725. (5438.) Bond for Injunction.

No injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such a sum as shall be fixed by the court or judge granting the order, with surety to the satisfaction of the clerk of the superior court, to the adverse party affected thereby, conditioned to pay all damages and costs which may accrue by reason of the injunction or restraining order. The sureties shall, if required by the clerk, justify in like manner as bail upon an arrest, and until they so justify, the clerk shall be responsible for their sufficiency. [L. '54, p. 153, § 117; Cd. '81, § 159; 2 H. C., § 273.]

See *infra*, § 781, no bond shall fail for defect of form.

Cited in 10 Wash. 421; 11 Wash. 588; 35 Wash. 77.

See 2 Remington's Digest, p. 1506, § 61; p. 1509, §§ 74-80.

A receiver must, in applying for a temporary restraining order against a stranger to the action in which the receiver had been appointed, give the injunction bond required by this section: *Cherry v. Western Wash. etc. Co.*, 11 Wash. 586; and it is error to grant a receiver an injunction without his complying with the statute. The receivership bond is not a sufficient protection to those whose acts he seeks to enjoin: *Keeler v. White*, 10 Wash. 420.

The fact that the owner of a mining claim sold it for a less sum after the dissolution of an injunction against his working it than he could have procured prior to the injunction does not entitle him to recover the difference, in the absence of allegation and proof that the claim was less valuable because of the injunction than it was before: *Donahue v. Johnson*, 9 Wash. 187.

As to measure of damages for wrongfully enjoining tenant from removing building, see *Ridpath v. Merriam*, 22 Wash. 311. See further, *Collins v. Huffman*, 48 Wash. 184.

If a prior mortgagee has been enjoined from foreclosing his chattel mortgage on certain goods and making sale thereof to satisfy his claim, and pending injunction the goods have been sold under foreclosure of a junior mortgage, the prior mortgagee may, upon dissolution of the injunction, recover as damages upon the injunction bond the full amount of his claim, if the value of the goods is equal to the amount: *White v. Brooke*, 11 Wash. 99.

The fact that the obligee in an injunction bond may have a remedy by action for conversion for disposing of goods upon which he has a mortgage lien, will not affect his recovery of damages when suing on the injunction bond: *Id.*

In an action upon such bond for damages, defendants cannot go behind the decree dissolving the injunction and assail the validity of the agreement upon which the decree was founded: *Id.*

In an action in which a temporary injunction had been granted, a judgment, after a hearing on the merits, that "de-

fendant is entitled to a dissolution of the restraining order heretofore issued against him and that he go hence with costs," is final and may be offered in proof in an action upon the injunction bond: *Donahue v. Johnson*, 9 Wash. 187.

Attorneys' fees are not recoverable in an action on an injunction bond, where the injunction is disposed of by a trial of the principal cause on the merits: *Id.* Nor where the refusal to dissolve was affirmed on appeal, though plaintiff afterward voluntarily dismissed the injunction: See *Thompson v. Benson*, 41 Wash. 70. See further, *White Pine Lum. Co. v. Aetna Indemnity Co.*, 42 Wash. 569.

Where a demurrer to an injunction in the federal court reached the injunction as effectively as a motion to dissolve would have done, attorney fees are recoverable for services rendered in the presentation of the demurrer: *Anderson v. Provident Life and Trust Co.*, 26 Wash. 192.

The mere acceptance of the statutory attorney's fee upon the dissolution of an injunction is not a waiver of the right to recover attorney's fees in an action upon the injunction bond: *Steel v. Gordon*, 14 Wash. 521.

The amount of the attorney's fee to be allowed plaintiff in an action on an injunction bond, on account of professional services in the matter of the injunction, is to be fixed by the jury and not by the court: *Id.* See *Seattle Crockery Co. v. Haley*, 6 Wash. 302; *Cowie v. Ahrenstedt*, 1 Wash. 416; *Proulx v. Stetson & Post M. Co.*, 6 Wash. 476.

That the order appointing a receiver of a corporation did not authorize him to make sale does not prevent recovery in an action by him on an injunction bond given prior to his appointment, for loss of profits occurring after his appointment by reason of the injunction against sales, as only the corporation, its stockholders and creditors, can question his authority to make sales: *Steel v. Gordon*, *supra*.

In an action on an injunction bond, the court is warranted in directing the jury that there can be no recovery for loss on sales while the injunction was in force, where it was habitually violated and no sales were in fact prevented thereby: *Id.*

An order made by the trial court, without notice to plaintiff, discharging a bond

which had been given by defendants to secure the vacation of a restraining order against the disposal of the property in controversy, is a nullity, and the plaintiff is

entitled to an order for the reinstatement of the bond without notice to the obligors: *Kleeb v. Bard*, 12 Wash. 140.

§ 726. (5439.) Second Bond When First Insufficient.

When an injunction is granted upon the hearing, after a temporary restraining order, the plaintiff shall not be required to enter into a second bond, unless the former shall be deemed insufficient, but the plaintiff and his surety shall remain liable upon his original bond. [L. '54, p. 153, § 118; Cd. '81, § 160; 2 H. C., § 274.]

See notes to last section.

Cited in 4 Wash. 409; 48 Wash. 428.

§ 727. (5440.) Copy of Order Sufficient Writ.

It shall not be necessary to issue a writ of injunction, but the clerk shall issue a copy of the order of injunction duly certified by him, which shall be forthwith served by delivering the same to the adverse party. [L. '54, p. 153, § 119; Cd. '81, § 161; 2 H. C., § 275.]

See *infra*, § 730, notice, when sufficient service.

§ 728. (5441.) Stay of Judgment—Release of Errors.

In application to stay proceedings after judgment, the plaintiff shall indorse upon his complaint a release of errors in the judgment whenever required to do so by the judge or court. [L. '54, p. 153, § 120; Cd. '81, § 162; 2 H. C., § 276.]

See *supra*, § 522, stay of execution.

§ 729. (5442.) Who Bound by.

An order of injunction shall bind every person and officer restrained from the time he is informed thereof. [L. '54, p. 153, § 121; Cd. '81, § 163; 2 H. C., § 277.]

See notes to § 722, *supra*.

See *infra*, §§ 732-734, proceedings for violation of writ.

Cited in 22 Wash. 382.

See 2 Remington's Digest, p. 1506, § 59.

An injunction restraining a corporation from doing business operates as against a receiver subsequently appointed: *Steel v. Gordon*, 14 Wash. 521.

A person not a party to a suit, or in privity with, or sustaining any relation to, the parties, is not bound by an injunction

issued therein: *Savage v. Sternberg*, 19 Wash. 679; *State ex rel. Victor Boom Co. v. Peterson*, 29 Wash. 571.

Where a restraining order has been served upon the city officers, enjoining the holding of an election, it is their duty to stop the election: *State v. Nicoll*, 40 Wash. 517. See *Jennings v. Mining Co.*, 29 Wash. 726.

§ 730. (5443.) Notice, When Sufficient Service.

When notice of the application for an injunction has been served upon the adverse party, it shall not be necessary to serve the order upon him, but he shall be bound by the injunction as soon as the bond required of the plaintiff is executed and delivered to the proper officer. [L. '54, p. 154, § 122; Cd. '81, § 164; 2 H. C., § 278.]

See *supra*, § 727, copy of order sufficient writ.

§ 731. (5444.) Money Collected on Enjoined Judgment to be Paid into Court.

Money collected upon a judgment afterward enjoined, remaining in the hands of the collecting officer, shall be paid to the clerk of the court granting

the injunction, subject to the order of the court. [L. '54, p. 154, § 123; Cd. '81, § 165; 2 H. C., § 279.]

§ 732. (5445.) Order Disobeyed—Contempt.

Whenever it shall appear to any court granting an order of injunction, or judge thereof, by affidavit, that any person has willfully disobeyed the order after notice thereof, such court or judge shall award an attachment for contempt against the party charged, or a rule to show cause why it should not issue. The attachment or rule shall be issued by the clerk of the court, and directed to the sheriff, and shall be served by him. [L. '54, p. 154, § 124; Cd. '81, § 166; 2 H. C., § 280.]

See *infra*, title 33, chapter 3, contempts and their punishment.

See notes to § 719, *supra*, and §§ 1716, 1722-1724, appeals.

§ 733. (5446.) Arrest and Indemnity.

The attachment for contempt shall be immediately served by arresting the party charged, and bringing him into court, if in session, to be dealt with as in other cases of contempt; and the court shall also take all necessary measures to secure and indemnify the plaintiff against damages in the premises. [L. '54, p. 154, § 125; Cd. '81, § 167; 2 H. C., § 281.]

§ 734. (5447.) Bond for Appearance.

If the court is not in session the officer making the arrest shall cause the person to enter into a bond, with surety, to be approved by the officer, conditioned that he personally appear in open court whenever his appearance shall be required, to answer such contempt, and that he will pay to the plaintiff all his damages and costs occasioned by the breach of the order; and in default thereof, he shall be committed to the jail of the county until he shall enter into such bond with surety, or be otherwise legally discharged. [Cf. L. '54, p. 154, § 126; Cd. '81, § 168; L. '91, p. 97, § 1; 2 H. C., § 282.]

§ 735. (5448.) Motion to Vacate or Modify.

Motions to dissolve or modify injunctions may be made in open court, or before a judge of the superior court, at any time after reasonable notice to the adverse party. [L. '54, p. 154, § 127; Cd. '81, § 169; L. '91, p. 74, § 1; 2 H. C., § 283.]

Cited in 12 Wash. 655.

§ 736. (5449.) Damages upon Dissolution of Injunction to Stay Proceedings.

When an injunction to stay proceedings after judgment for debt or damages shall be dissolved, the court shall award such damages, not exceeding ten per cent, on the judgment, as the court may deem right, against the party in whose favor the injunction issued. [L. '54, p. 154, § 128; Cd. '81, § 170; 2 H. C., § 284.]

See *supra*, § 522, stay of execution.

See next section for damages for waste or rents.

See *supra*, § 725, and notes, bond for injunction.

Concerning counsel fees as proper items of damages, see note to § 725, *supra*.

§ 737. (5450.) Damages for Waste and Rents, When.

If an injunction to stay proceedings after verdict or judgment in an action for the recovery of real estate, or the possession thereof, be dissolved,

the damages assessed against the party obtaining the injunction shall include the reasonable rents and profits of the lands recovered, and all waste committed after granting injunction. [L. '54, p. 154, § 129; Cd. '81, § 171; 2 H. C., § 285.]

See supra, § 725, and notes, bond for injunction.

§ 738. (5451.) Motion to Reinstate.

Upon an order being made dissolving or modifying an order of injunction, the plaintiff may move the court to reinstate the order, and the court may, in its discretion, allow the motion, and appoint a time for hearing the same before the court, or a time and place for hearing before some judge thereof, and upon the hearing, the parties may produce such additional affidavits or depositions as the court shall direct, and the order of injunction shall be dissolved, modified, or reinstated, as the court or judge may deem right. Until the hearing of the motion to reinstate the order of injunction, the order to dissolve or modify it shall be suspended. [L. '54, p. 154, § 130; Cd. '81, § 172; 2 H. C., § 286.]

See supra, § 719, notes, in what case injunction granted.

§ 739. (5452.) Power of Judge or Court.

The judge of the superior court shall have power to make every order which, by the provisions of this chapter, may be made by the court. [L. '69, p. 41, § 171; Cd. '81, § 173; 2 H. C., § 287.]

See supra, § 718, and notes, who shall grant injunction.

CHAPTER V.

RECEIVERS.

§ 740. (5455.) Receiver, Defined.

A receiver is a person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the court or officer may direct. [L. '91, p. 90, § 1; 2 H. C., § 325.]

Cited in 15 Wash. 151; 22 Wash. 376; 47 Wash. 184.

A receiver of a shingle company cannot be required to account for profits made by another corporation in a foreign market upon shingles sold by him to such corporation, although himself a stockholder therein, when, as receiver, he had not sufficient funds to enable him to ship his shingles to another market, but sold them for cash to his own corporation at the highest market price in the locality: *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89.

Where the court by which a receiver was appointed has fixed his compensation, after the hearing of testimony, and the allowance made is warranted by the testimony adduced, and appears to be reasonable, the exercise of the court's discretion will not be interfered with by the appellate court: *Id.*

Under this section, any person appointed by the court to take charge of mortgaged chattels during the pendency of foreclosure proceedings is a receiver: *Libert v. Unfried*, 47 Wash. 182.

§ 741. (5456.) In What Cases Appointed.

A receiver may be appointed by the court in the following cases:—

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim;
2. In an action between partners, or other persons jointly interested in any property or fund;

3. In all actions where it is shown that the property, fund, or rents and profits in controversy are in danger of being lost, removed, or materially injured;

4. In an action by a mortgagee for the foreclosure of a mortgage and the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed, or materially injured; [or when such property is insufficient to discharge the debt, to secure the application of the rents and profits accruing, before a sale can be had;]

5. When a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights;

6. And in such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties: Provided, that no party or attorney or other person interested in an action shall be appointed receiver therein. [L. '54, p. 162, §§ 171, 172; Cd. '81, § 193; 2 H. C., § 326.]

The last part of subdivision 4 in brackets held to be superseded by § 804, *infra*: *Norfor v. Busby*, 19 Wash. 450.

See *supra*, § 613 et seq., receivers in proceedings supplemental to executions.

See *supra*, § 661, receiver in attachments.

See notes to § 812, *infra*.

See *infra*, § 1101, sheriff not to be appointed receiver in insolvency cases.

See notes to § 1116, *infra*.

See *infra*, § 1173, sheriff as receiver in enforcement of loggers' liens.

See *infra*, § 1716, subd. 5, appeals from orders relating to receivers.

Cited in 3 Wash. 589; 4 Wash. 605; 15 Wash. 152, 675; 19 Wash. 452; 20 Wash. 15, 551; 28 Wash. 562; 31 Wash. 225; 33 Wash. 151; 47 Wash. 184; 50 Wash. 389; 51 Wash. 517, 518.

Nature and purpose of remedy: See 2 Remington's Digest, p. 2462, § 1.

The right to appoint receivers should only be exercised when it is clearly shown to be necessary to prevent the defeat of justice: *Roberts v. Washington Nat. Bank*, 9 Wash. 12, 15; *Whitehouse v. P. D. T. & E. Ry. Co.*, 9 Wash. 558, 561.

In order to secure the appointment of a receiver, the plaintiff must clearly establish by the proofs that a receiver is necessary to prevent fraud, protect the property from injury or preserve it from destruction, mere allegations of such facts being insufficient: *Brundage v. Home etc. Assn.*, 11 Wash. 277; *Wales v. Dennis*, 9 Wash. 308; *Sengfelder v. Hill*, 16 Wash. 355; *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 81; *Ridpath v. Sans Poil etc. Transp. Co.*, 26 Wash. 427.

Actions and proceedings in which receiver may be appointed: See 2 Remington's Digest, p. 2463, § 2; *Lammon v. Giles*, 3 W. T. 117; *Ewing v. Van Wageningen*, 6 Wash. 39; *P. S. Nat. Bank v. Levy*, 10 Wash. 499; *Sengfelder v. Hill*, 16 Wash. 355; *Norfor v. Busby*, 19 Wash. 450; *Balfour-Guthrie Ins. Co. v. Geiger*, 20 Wash. 579.

DISCRETION OF COURT: See 2 Remington's Digest, p. 2463, § 3; *Ridpath v. Sans Poil etc. Ins. Co.*, 26 Wash. 427; *Cameron v. Groveland Imp. Co.*, 20 Wash. 169; *Union Boom Co. v. Samish Boom Co.*, 33 Wash. 144.

Receiver appointed upon suit of a simple contract creditor: See *Davis v. Edwards*, 41 Wash. 480.

Property which may be subject of receivership: See *Cole v. Pain*, 22 Wash. 18.

APPOINTMENT, QUALIFICATION AND TENURE: See 2 Remington's Digest, pp. 2466-2469, §§ 14-30.

Jurisdiction and authority of court or judge: *State ex rel. Baum v. Superior Court*, 14 Wash. 324; *State ex rel. Amsterdamsch v. Superior Court*, 15 Wash. 668; *State ex rel. Strohl v. Superior Court*, 15 Wash. 668.

Subdivisions 3 and 6 of this section give the court power to appoint receivers in cases at law without the supplemental aid of any proceeding in equity: *Wash. Iron Works Co. v. Jensen*, 3 Wash. 584, 589.

Courts of equity have no jurisdiction of actions to collect a tax or to appoint a receiver for that purpose: *Pierce County v. Merrill*, 19 Wash. 175.

In the absence of special provisions regulating proceedings in foreclosure of liens on vessels, the court, under its chancery powers, may appoint a receiver to take charge of the property pending proceedings: *Wash. Iron Works Co. v. Jensen*, 3 Wash. 584. See *Lammon v. Giles*, 3 W. T. 117. See, also, *Davis v. Edwards*, 41 Wash. 484.

FORM AND REQUISITES OF APPLICATION.—A complaint by a judgment creditor asking the appointment of a receiver for an insolvent corporation is not open to the objection that it fails to allege that the judgment debtor has no other

property out of which plaintiff could satisfy his judgment, when it states that defendant is in failing circumstances, and that it has more judgments already rendered against it than it can pay: *Whitehouse v. P. D. T. & E. Ry. Co.*, 9 Wash. 558. It is error to appoint a receiver pending the litigation in an action for dissolution and accounting of a partnership, when the complaint does not allege the defendant's insolvency, and the answer shows solvency: *Wales v. Dennis*, 9 Wash. 308.

NOTICE OF APPLICATION.—An order appointing a receiver, made without notice to the adverse party, is void: *Larsen v. Winder*, 14 Wash. 109; citing *Brundage v. Home etc. Assn.*, 11 Wash. 278; *Roberts v. Wash. Nat. Bank*, 9 Wash. 12.

As to appointment of temporary receiver without notice, see *Cole v. Price*, 22 Wash. 18. See further, *Haggard v. Sanglin*, 31 Wash. 165.

An *ex parte* appointment of a receiver has no force after the day fixed for the hearing and a continuance or failure to appoint at that time has the effect of a discharge: *State ex rel. Washington Match Co. v. Superior Court*, 34 Wash. 123.

Upon an application for the appointment of a receiver, the moving party has no right to read affidavits upon the hearing, which have not first been served upon the adverse party: *Brundage v. Home etc. Assn.*, 11 Wash. 277.

When application for appointment is made before defendant has filed his answer, defendant has the right to be heard upon affidavits by way of defense to the application: *Whitehouse v. P. D. T. & E. Ry. Co.*, 9 Wash. 558.

Scope of inquiry and questions considered on application: See *Roberts v. Washington Nat. Bank*, 9 Wash. 12; *Smith v. Hopkins*, 10 Wash. 77; *Seattle Brew. & Malt. Co. v. Jensen*, 36 Wash. 462. The appointment of a receiver based upon a judgment entered without jurisdiction is also without jurisdiction: *French v. Ajax Oil & Development Co.*, 44 Wash. 305.

Collateral attack on appointment: See 2 *Remington's Digest*, p. 2468, § 29; *Elderkin v. Peterson*, 8 Wash. 674; *Smith v. Hopkins*, 10 Wash. 77; *Carroll v. Pac. Nat. Bank*, 19 Wash. 639; *Jones v. N. P. Fish & Oil Co.*, 42 Wash. 332.

GROUND FOR APPOINTMENT: See 2 *Remington's Digest*, pp. 2463-2465, §§ 6-13.

Right or interest requiring protection: See *Union Boom Co. v. Samish Boom Co.*, 33 Wash. 144.

A receiver is properly appointed at the suit of a partner where his copartner, conspiring with others, wrongfully excludes the plaintiff from participating in the partnership business: *Whipple v. Lee*, 46 Wash. 266.

FRAUD.—The transfer of notes held by one bank to another as collateral security for a loan is not such a fraud as to

justify the appointment of a receiver for the bank securing the note: *Roberts v. Wash. Nat. Bank*, 9 Wash. 12.

A receiver is properly appointed for an insolvent corporation, at the suit of creditors, and the complaint states a cause of action, where it appears that it was, from its inception, a fraudulent scheme on the part of its promoter, that it fraudulently assumed to make sales of property to the plaintiffs without having any title, and that it was without any assets and had conveyed to its promoter and chief stockholder all its property with intent to defraud its creditors: *Kelso v. American Investment & Improvement Co.*, 50 Wash. 381.

Where judgments are rendered against a vendor of a railway without notice to the purchaser, the latter may litigate their validity on the ground of fraud, but the judgment creditor cannot obtain a receiver for the purchasing corporation: *Whitehouse v. P. D. T. & E. Ry. Co.*, 9 Wash. 558.

PRESERVATION OF PROPERTY PENDING LITIGATION.—The fact that a mortgagee in possession of premises is committing waste will not authorize the appointment of a receiver in the absence of proof of the mortgagee's insolvency: *Brundage v. Home etc. Assn.*, 11 Wash. 277. See *Spokane v. Amsterdamsch K. T.*, 18 Wash. 81; *Euphrat v. Morrison*, 39 Wash. 311.

Where the mortgagee has secured possession of the mortgaged premises without fraud, and there is an indebtedness due under the terms of the mortgage, the mortgagee cannot be deprived of its possession by the appointment of a receiver: *Brundage v. Home etc. Assn.*, 11 Wash. 277.

The appointment of a receiver prior to the sale of real estate under levy of execution, but subsequent to the entry of judgment and the acquisition of a lien thereunder, will not affect the right of the judgment creditor to proceed to make his debt by execution, levy and sale of the debtor's property: *Cherry v. Western Washington etc. Co.*, 11 Wash. 586.

A receiver may be appointed in insolvency proceedings at the instance of the insolvent, with power to take possession of property mortgaged by the latter, and, in a proper case, he will be entitled to fees out of the property in his custody, but he should not be appointed where the property is insufficient to pay the debt secured upon it: *Lammon v. Giles*, 3 W. T. 117; *Ewing v. Van Wagenen*, 6 Wash. 39, 47.

Insolvency or misconduct of party: See 2 *Remington's Digest*, p. 2464, § 9; *Wales v. Dennis*, 9 Wash. 308; *Clay v. Selah Valley Irr. Co.*, 14 Wash. 543; *Spokane v. Amsterdamsch T. K.*, 18 Wash. 81; *Sibson v. Hamilton & Rourke Co.*, 21 Wash.

362; *Cole v. Price*, 22 Wash. 18; *Davis v. Edwards*, 41 Wash. 840.

Under subdivision 5 of this section the purpose of placing insolvent corporations in the possession of the court can only be that their assets may be ratably distributed to creditors: *Thompson v. Huron L. Co.*, 4 Wash. 600, 605.

A receiver appointed for an insolvent corporation is a trustee for the corporation and all its creditors, and a bona fide creditor to whom an illegal preference was attempted to be made is entitled to share in the funds on the same basis with other creditors: *Thompson v. Huron L. Co.*, 4 Wash. 600.

The appointment of a receiver in a suit between alleged partners in the publication of a book, upon the allegation that defendant denies the partnership and refuses to recognize the plaintiff or to account to him, is not warranted where it is not shown that the defendant was insolvent, and it appears that the book is not yet completed and cannot be without additional funds, that the partnership is without funds, and that the receivership would only result in failing to complete the book and realizing anything on the venture; since clear necessity must be shown for the appointment: *Smith v. Brown*, 50 Wash. 240.

Where it does not appear that the concern is insolvent, an action by a receiver of a corporation must be viewed as brought by the corporation, and a defense valid against the corporation is good against the receiver: *Shuey v. Holmes*, 20 Wash. 13.

APPEAL: See 2 Remington's Digest, p. 206, § 380.

After appeal has been perfected from an order appointing a receiver, the lower court has no authority to take any steps or make any order in regard to the receivership: *Brundage v. Home etc. Assn.*, 11 Wash. 278.

No appeal lies from an order removing one receiver and appointing another in his stead: *Tilton v. Superior Court*, 7 Wash. 74.

On an appeal from an order appointing a receiver, full examination is authorized into the law and facts as to whether the trial court abused its discretion: *Roberts v. Wash. Nat. Bank*, 9 Wash. 12. See further, *Davis v. Edwards*, 41 Wash. 180; *Seattle Brewing & Malting Co. v. Jensen*, 36 Wash. 462.

Error in appointment of a receiver at the instance of attaching creditors cannot be urged on appeal by a party who is not a judgment creditor: *Puget Sound Nat. Bank v. Levy*, 10 Wash. 499.

The making of a general assignment of its property for the benefit of creditors by an insolvent corporation can have no effect upon the power of a court, under this section, to appoint a receiver at the instance of a creditor of the corporation: *Oleson v. Bank of Tacoma*, 15 Wash. 148.

A deed of assignment by an insolvent corporation can be set aside by the court, upon the subsequent appointment of a receiver at the suit of a creditor of the corporation: *Id.*

A receiver having been appointed for an insolvent corporation, he is entitled to the possession of all of the assets of the corporation, as against an assignee holding under a prior voluntary assignment executed by the corporation while insolvent: *Id.* See further, *Radebaugh v. Tacoma & Puyallup R. Co.*, 8 Wash. 570; *Jones v. N. P. Fish Co.*, 42 Wash. 332; *Belding v. Wash. Cornice Co.*, 36 Wash. 549.

Invalid or irregular appointments, etc.: See 2 Remington's Digest, p. 2463, §§ 25-30.

Where the superior court of one county has appointed a receiver, it is error for such court of another county to appoint either the same or another receiver: See *Fernald v. Spokane & B. C. Tel. Co.*, 31 Wash. 219.

Creditors who have acquiesced in the appointment of a receiver are estopped from attacking the appointment as fraudulent: *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499.

As to removal of receiver and vacation of orders, see *Balfour-Guthrie Inv. Co. v. Geiger*, 20 Wash. 579; *Wooding v. Wooding & Co.*, 10 Wash. 531.

§ 742. (5457.) Oath and Bond.

Before entering upon his duties, the receiver must be sworn to perform them faithfully, and, with one or more sureties approved by the court, execute a bond to such person as the court may direct, conditioned that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein. [L. '54, p. 162, § 173; Cd. '81, § 194; 2 II. C., § 327.]

§ 743. (5458.) Powers of Receiver.

The receiver shall have power, under control of the court, to bring and defend actions, to take and keep possession of the property, to receive rents,

collect debts, and generally to do such acts respecting the property as the court may authorize. [L. '54, p. 163, § 177; Cd. '81, § 198; 2 H. C., § 331.]

See *supra*, § 741, and notes, in what cases appointed.

Cited in 15 Wash. 653; 22 Wash. 377.

POSSESSION: See 2 Remington's Digest, pp. 2469-2472, §§ 31-45. A receiver of an insolvent corporation takes no title to property in the actual custody of the sheriff under attachment lien when sheriff and lienor have not been made parties to the action in which the receiver was appointed: *State ex rel. Hunt v. Superior Court*, 8 Wash. 210; *State ex rel. Rice v. Superior Court*, 8 Wash. 659; *State v. Graham*, 9 Wash. 528. The fact that a party applying for a writ of assistance does so in his capacity as a receiver would not entitle him to the writ, if any other citizen, under the same circumstances, could not legally obtain it: *State ex rel. Baruch v. More*, 21 Wash. 628. See, also, *Kidder v. Beavers*, 33 Wash. 635.

The appointment of a receiver of a railroad corporation has the same effect in law as though the creditors had taken possession of the property under legal process, and the right of a mortgagee to possession thereof does not give him any priority over creditors when the right accrues subsequent to the receiver's appointment: *Radebaugh v. T. & P. Ry. Co.*, 8 Wash. 570.

An attaching creditor, whose application to intervene in a proceeding for the appointment of a receiver has no remedy by appeal, but may resort to prohibition to prevent the receiver from taking possession of the property attached: *State v. Superior Court*, 7 Wash. 77.

When the appointment of a receiver is unwarranted, his possession is wrongful, and he is not entitled to compensation for his personal services out of the trust funds in his hands, but he should be allowed the amount of his necessary and proper disbursements while in charge of the property, including reasonable compensation for attorney employed: *Brundage v. Home etc. Assn.*, 11 Wash. 288.

Prohibition will not lie to prevent the carrying into effect of an order of the superior court restraining the sale of the property of an insolvent corporation upon the execution levy of a judgment creditor and ordering the transfer of the property to the hands of the receiver, when such judgment creditor has been made a party to the injunction suit, and the order therein fully preserves and protects its rights: *State v. Superior Court*, 11 Wash. 63.

It is within the discretion of the court to permit claims against a receiver to be determined by petition in the original action in which he was appointed, or by an independent suit: *Blake v. State Sav. Bank*, 12 Wash. 619.

Property vesting in receiver: See 2 Remington's Digest, p. 2469, §§ 32-34; *Watterson v. Masterson*, 15 Wash. 511; *Degginger v. Seattle Brew & Malt Co.*, 41 Wash. 385; *Griffith v. Burlingame*, 18 Wash. 429.

Rights of action: *Cole v. Sastop R. Co.*, 9 Wash. 487; *Whitman v. Mast-Buford etc. Co.*, 11 Wash. 318.

Title or right acquired by receiver and time of vesting: See 2 Remington's Digest, p. 2470, §§ 36, 37; *Puget Sound Nat. Bank of Seattle v. Levy*, 10 Wash. 499; *Willamette Casket Co. v. Cross Undertaking Co.*, 12 Wash. 190; *Woodward v. Winehill*, 14 Wash. 394; *Steel v. Gordon*, 14 Wash. 521; *State ex rel. Kirsch v. Superior Court*, 36 Wash. 91.

After the appointment and qualification of a receiver in a state court, the appointment of a trustee in bankruptcy by the federal court does not deprive the state court of jurisdiction or the receiver of the right to possession of the property: *Springer v. Ayer*, 50 Wash. 642.

Failure to obey order to turn over property to receiver: See *State v. Denham*, 30 Wash. 643.

Supervision and instructions of court: See *Cannon v. Snipes*, 24 Wash. 166.

Sale and conveyance of property: See 2 Remington's Digest, p. 2474, §§ 56-61; *State ex rel. Sanglin v. Superior Court*, 30 Wash. 232; *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107; *Bidwell v. Rice*, 19 Wash. 146.

Confirmation of sale and receiver's certificates, see *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107.

Allowance and payment of claims: See 2 Remington's Digest, p. 2475, §§ 62-70; *Wash. Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165; *Cannon v. Snipes*, 24 Wash. 166; *Thompson v. Huron Lum. Co.*, 4 Wash. 600; *Biddle Purchasing Co. v. Port Townsend Steel etc. Co.*, 16 Wash. 681.

Priorities: See 2 Remington's Digest, p. 2475, § 66; *Bellingham Bay Imp. Co. v. Fairhaven etc. R. Co.*, 17 Wash. 371; *Davis v. Foster*, 29 Wash. 363; *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 19 Wash. 493; *Baker v. King County*, 17 Wash. 622; *Hewitt v. Traders' Bank*, 18 Wash. 326; *Bartlett v. Reichenecker*, 11 Wash. 692.

ACTIONS: See 2 Remington's Digest, p. 2478, §§ 78-84.

An application for permission to sue a receiver is addressed to the sound discretion of the court, and an order denying the application will be upheld unless this discretion has been abused: *Meeker v. Sprague*, 5 Wash. 242.

A receiver cannot be sued without leave of the court appointing him. Leave to sue

is jurisdictional, and cannot be waived, and the question may be raised at any stage of the proceedings: *Brown v. Rauch*, 1 Wash. 497. Distinguished in *Kidder v. Beaver*, 33 Wash. 641.

It is unnecessary to serve a receiver appointed in an action with notice of application to settle a statement of facts: *Tompson v. Huron L. Co.*, 5 Wash. 527.

The objection that leave to sue a receiver was not obtained by plaintiff is waived if not raised in the court below: *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16; *Payson v. Jacobs*, 38 Wash. 203. See, also, *Bennett v. Northern Pac. R. R. Co.*, 17 Wash. 534. Leave of the court appointing a receiver to sue is not necessary before instituting suits in matters connected with his trust: *Compton v. Schwabacher Bros. & Co.*, 15 Wash. 306; following *Hardin v. Sweeney*, 14 Wash. 129.

A receiver may sue in his own name upon causes of action existing in favor of the person or corporation for which he has been appointed. And failure to allege in his complaint that he is authorized to bring the action does not render the complaint obnoxious on general demurrer: *Hardin v. Sweeney*, 14 Wash. 129; *Allen v. Baxter*, 42 Wash. 434.

A receiver of an insolvent corporation may, in behalf of creditors, disaffirm acts of the corporation and maintain action to set aside transfers and conveyances of the corporate property made in fraud of their rights: *Washington Mill Co. v. Sprague Lum. Co.*, 19 Wash. 165.

The receiver of an insolvent corporation appointed in a proceeding prosecuted by creditors possesses the rights of the creditors and may maintain an action to enforce stock subscriptions: *Cole v. Satsop Ry. Co.*, 9 Wash. 487, 43 Am. St. Rep. 858; *Elderkin v. Peterson*, 8 Wash. 674.

And in such an action the defendant cannot question the regularity of his appointment, nor the judgment of the court as to the necessity for the action: *Elderkin v. Peterson*, *supra*. See, also, *Titlow v. Cascade Oat Meal Co.*, 15 Wash. 652.

Setoffs and counterclaims against receiver: See *Sheafe v. Hastie*, 16 Wash. 563.

As to right of action against receiver, see 2 *Remington's Digest*, p. 2477, §§ 75, 87; *Flynn v. Furth*, 25 Wash. 105; *Vasele v. Grant St. Elec. R. Co.*, 16 Wash. 602; *Casey v. Northern Pac. R. Co.*, 15 Wash. 450; *Casey v. Oakes*, 17 Wash. 409; *Meeker v. Sprague*, 5 Wash. 242; *Blake v. State Bank*, 12 Wash. 619; *Denny v. Cole*, 22 Wash. 372.

Joinder or intervention of receiver in actions by others: See 2 *Remington's Digest*, p. 2479, § 840; *Denton v. Merchants' Nat. Bank*, 18 Wash. 387; *Muhlenberg v. Tacoma*, 25 Wash. 36; *Childs v. Blethen*, 40 Wash. 340. Where an action is brought against the receiver of an insolvent, to

recover property of the insolvent, and the receiver defends for the benefit of creditors, a complaint in intervention on behalf of certain creditors is demurrable as showing no right to intervene, where it sets up the same claims made on their behalf by the receiver in an answer filed in their interest and in the interest of all creditors who file their claims, since the receiver represents the creditors: *Springer v. Ayer*, 50 Wash. 642.

Garnishment of property in hands of receiver: *Russell v. Millett*, 20 Wash. 212.

One partner cannot, subsequent to the appointment of a receiver in a suit for dissolution, by cross-complaint, bring in other parties alleged to be conspiring to defraud the partnership. The proper practice is for the receiver to institute the suit: *Capecci v. Alladio*, 8 Wash. 637.

The action of the court in placing an insolvent corporation in a receiver's hands, even if erroneous, cannot be attacked in an action by the receiver to recover certain property of the company, to the possession of which he, as receiver, was entitled: *Smith v. Hopkins*, 10 Wash. 77.

A judgment creditor, who is not a party, by intervention or otherwise, to an action in which a receiver for his debtor was appointed, cannot appear therein without leave and move to vacate the order of appointment: *Wooding v. Wooding*, 10 Wash. 531.

An order appointing a receiver pending suit is interlocutory and may be vacated: See *Balfour-Guthrie Inv. Co. v. Geiger*, 20 Wash. 579.

The fact that, subsequent to the commencement of a suit by a receiver to restrain an execution sale of the trust property, a judgment creditor acquires an attachment lien does not suffice to give such creditor priority over the receiver: *State v. Superior Court*, 11 Wash. 63; distinguished in *State v. Superior Court*, 7 Wash. 77; *State v. Superior Court*, 8 Wash. 210.

Collection of assets by receiver: See *Barto v. Nix*, 15 Wash. 563; *Childs v. Blethen*, 40 Wash. 340.

Distribution of pro rata share to creditor not *res judicata* where he was surety for insolvent corporation: See *Johnson v. Shuey*, 40 Wash. 22.

POWERS, ETC.: See 2 *Remington's Digest*, p. 2472, §§ 46 et seq. and §§ 71 et seq.

A receiver must, in applying for a temporary restraining order against a stranger to the action in which the receiver has been appointed, give the injunction bond required by § 725, *supra*: *Cherry v. Western Wash. etc. Co.*, 11 Wash. 586.

A receiver cannot, by petition in the receivership proceedings, make a stranger a party thereto for the purpose of determining his rights to property in dispute between them, when there is no allegation

in the petition that the stranger had taken the property from the possession of the receiver or hindered him in the discharge of his duties: *Id.*

A receiver who, without securing a modification of the decree which was inconsistent with the findings and conclusions of the court, has followed the court's conclusions and made payments of funds accordingly, can be compelled to pay a claimant a sum of money in excess of what is remaining in his hands, when this sum is due according to the decree as actually rendered: *Bartlett v. Reicheneker*, 11 Wash. 692.

The fact that a creditor of an insolvent corporation is a director and stockholder thereof does not prevent his participating in the funds in the receiver's hands: *Tompson v. Huron L. Co.*, 4 Wash. 600.

An order directing the distribution of funds paid into the registry of the court by a receiver is appealable: *State v. Superior Court*, 3 Wash. 696.

A deed from a corporation to a receiver for the creditors thereof can in no way affect the rights of a prior mortgagee of the corporate property: *Meeker v. Sprague*, 5 Wash. 242.

A receiver who sells the assets of the business for cash at their full value, to a firm of which he is manager, will not be called on to account for profits made by the latter firm, when it appears that the state was benefited thereby and the circumstances justified the sale: *Chandler v. Cushing-Young etc. Co.*, 13 Wash. 89.

But a sale by a receiver of the trust property to a corporation in which he is a stockholder, is voidable at the election of the beneficiaries, but a claim by the beneficiaries to the proceeds of the sale is a ratification of the sale: *Chandler v. Cushing-Young etc. Co.*, supra.

The receiver of a corporation may refuse to carry out a contract of the corporation, without being liable for its breach, as otherwise the liability of a corporation on executory contracts would constitute a preferred claim: *Scott v. Rainier Power etc. Co.*, 13 Wash. 108.

A receiver is not personally liable for loss resulting from the operation of the business, unless it resulted from some act of his which he was not authorized to perform: *Chandler v. Cushing-Young etc. Co.*, supra.

A final order confirming and approving the final account of a receiver is appealable: *Id.*

A sale by the receiver to himself of the trust property is not per se void, but voidable merely at the election of the cestui que trust, and where the beneficiary claims the proceeds he must be held as ratifying the sale: *Id.*

Payment of wages of employees of receiver: See *Oudin & Bergman Fire Clay Min. Co. v. Cole*, 35 Wash. 647.

A receiver appointed to conduct the business of a corporation pending an action is not liable as such receiver in an action for damages for his refusal to perform an executory contract of the corporation: *Scott v. Rainier Power & Ry. Co.*, 13 Wash. 108. And does not ratify a void lease by accepting rent when he is ignorant of the material facts: See *Groveland Imp. Co. v. Farmers' Supply Co.*, 25 Wash. 344.

The provisions of 24 U. S. Stats. at Large, 554, §§ 2, 3, providing that a receiver appointed to conduct the business of a corporation pending an action in a United States court shall manage the property according to the requirements of the valid laws of the state in which the property is situated, in the same manner as the owner would be bound to do, applies only to things occurring while the receiver is in possession, and does not make him responsible for liabilities growing out of contracts entered into before his appointment: *Id.*

A receiver who, without securing a modification of a decree which is inconsistent with the findings and conclusions of the court, has followed the court's conclusions and made payment of funds accordingly, can be compelled to pay a claimant a sum of money in excess of what is remaining in his hands, where this sum is due according to the decree as actually rendered: *Bartlett v. Reicheneker*, 11 Wash. 692.

In an action by a receiver, failure to introduce in evidence the order appointing him will not entitle defendant to a nonsuit, when the plaintiff testifies without objection that he is such receiver, and the action is instituted in the court which had appointed him receiver, and there is no showing of want of authority to bring suit: *Titlow v. Cascade Oat Meal Co.*, 15 Wash. 652.

FEES.—An allowance of \$100 to a receiver as compensation for attorneys employed to institute a suit for the collection of \$360 due for rent is excessive: *Brundage v. Home etc. Assn.*, 11 Wash. 288. See *Oudin & Bergman Fire Clay Min. Co. v. Cole*, 35 Wash. 647.

Although allowance of compensation to receivers rests largely in the court's discretion, yet such orders are generally subject to review: *Tompson v. Huron L. Co.*, 5 Wash. 527; but see *Chandler v. Cushing-Young etc. Co.*, 13 Wash. 89; *Hewitt v. Traders' Bank*, 18 Wash. 326; *Van Brocklin v. Queen City Print. Co.*, 21 Wash. 447.

In determining the amount of compensation to be allowed a receiver, the responsibility assumed, skill and labor expended, should be considered, and the remuneration fixed upon charges usually paid for similar services, in view of the facts of the particular case: *Tompson v. Huron L. Co.*, supra; cited in note to *Heffron v. Rice*, 41 Am. St. Rep. 277.

Liabilities of parties, property, or funds for compensation and expenses: See 2 Remington's Digest, p. 2481, § 95; Lammon v. Giles, 3 W. T. 117; Cannon v.

Snipes, 24 Wash. 166; Cannon v. Snipes, 32 Wash. 243.

Discharge of receiver: See State ex rel. Oudin v. Superior Court, 31 Wash. 481.

§ 744. (5459.) Order When Part of Claim Admitted.

When the answer of the defendant admits part of the plaintiff's claim to be just, the court, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order by execution or attachment. [L. '54, p. 153, § 178; Cd. '81, § 199; 2 H. C., § 332.]

CHAPTER VI.

DEPOSITS IN COURTS.

§ 745. (5460.) Deposits in Court.

When it is admitted by the pleading or examination of a party that he has in his possession, or under his control, any money, or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court. [L. '54, p. 163, § 174; Cd. '81, § 195; 2 H. C., § 328.]

Cited in 28 Wash. 406; 31 Wash. 103.

See 1 Remington's Digest, pp. 628, 629, §§ 1-3; State ex rel. Schwabacher Bros. v. Superior Court, 13 Wash. 638; Mansfield v. First Nat. Bank, 6 Wash. 603; Munroe v. Sedro Lbr. etc. Co., 16 Wash. 694; State ex rel. Grass v. White, 40 Wash. 560.

This section is inapplicable to property held by an officer by virtue of his office, such as money, books, and insignia of office, which are held by a tenure different from that of a mere trustee: State ex rel. Byers v. Superior Court, 28 Wash. 403.

§ 746. (5461.) Manner of Enforcing Order.

Whenever, in the exercise of its authority, a court shall have ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or thing, and deposit or deliver it, in conformity with the direction of the court. [L. '54, p. 163, § 175; Cd. '81, § 196; 2 H. C., § 329.]

See infra, § 1049 et seq., contempts and their punishment.

§ 747. (5462.) Custody of Money Deposited.

Money deposited or paid into a court in an action shall not be loaned out, unless with the consent of all parties having an interest in or making claim to the same. [L. '54, p. 163, § 176; Cd. '81, § 197; 2 H. C., § 330.]

CHAPTER VII.

ARREST AND BAIL.

§ 748. (5463.) No Arrest Except as Provided by Statute.

No person shall be arrested or held to bail in any civil action except upon the order of the court where the action is brought, or a judge of the supreme court. [L. '54, p. 145, § 73; Cd. '81, § 115; 2 H. C., § 228.]

The organization of the courts of the state, as effected by the constitution (Art. IV), and the prohibition of imprisonment for debt (Art. I, § 17), make it questionable whether this statute is in harmony with the constitution.

See notes to next section.

Arrest in civil actions: See 1 Remington's Digest, pp. 268, 269, §§ 1-5.

Payment of costs adjudged against a complaining witness in a suit maliciously instituted by him may be enforced by im-

prisonment: See *Colby v. Backus*, 19 Wash. 347.

A decree for alimony may be enforced by imprisonment without infringing Constitution, Article I, § 17: See *In re Cave*, 26 Wash. 213.

§ 749. (5464.) Defendant, When Subject to Arrest.

The defendant may be arrested in the following cases:—

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is a nonresident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property;

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or by an attorney, or by an officer or agent of a corporation in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office or in a professional employment;

3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff, and with intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof;

4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought;

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors;

6. When the action is to prevent threatened injury to or destruction of property, in which the party bringing the action has some right, interest, or title, which will be impaired or destroyed by such injury or destruction, and the danger is imminent that such property will be destroyed or its value impaired, to the injury of the plaintiff;

7. On the final judgment or order of any court in this state, while the same remains in force, when the defendant, having no property subject to execution, or not sufficient to satisfy such judgment, has money which he ought to apply in payment upon such judgment, which he refuses to apply, with intent to defraud the plaintiff, or when he refuses to comply with a legal order of the court, with intent to defraud the plaintiff; or when any one or more of the causes exist for which an arrest is allowed in the first class of cases mentioned in this section. [L. '54, p. 145, § 74; Cd. '81, § 116; 2 H. C., § 229.]

Cited in 3 Wash. 136.

If a defendant has been arrested and held to bail in a civil action, but the final judgment in the cause is for a money judgment alone, and does not carry forward the provisional remedy of arrest in any manner, the case stands as if the court below had vacated the order of arrest, and defendant is discharged of any claim to take his body in execution: *Bur-*

richter v. Cline, 3 Wash. 135; compare *Cline v. Burrichter*, 2 Wash. 165.

It seems that, under article I, § 17, of the Constitution, abolishing imprisonment for debt, except in case of absconding debtors, §§ 116, 117, Code of 1881 (§§ 749, 750 of this volume), have been rendered inoperative, and an arrest thereunder is illegal: *Burrichter v. Cline*, *supra*.

And to set forth in an affidavit that a defendant is about to depart from the state with intent to defraud his creditors, with other allegations of like conclusions, is not stating any fact upon which a court can be legally satisfied that an order of arrest should be made: *Id.*

§ 750. (5465.) Proof Required to Obtain Order.

The court or judge making the order of arrest shall first be satisfied, by the affidavit of the party, or his agent or attorney, and other proof under oath, exclusive of the complaint, that the case is one in which an arrest is provided for in section 749, and that one or more of the prescribed causes exist, which proof shall be in writing, and, together with the order, be filed with the clerk before he shall issue any warrant for the arrest. [Cf. L. '54, p. 145, § 75; Cd. '81, § 117; L. '88, p. 31, § 1; 2 H. C., § 230.]

An order of arrest in a civil action is not a special proceeding, but is a provisional remedy, merely ancillary to the action and consequently not appealable: *Cline v. Harmon*, 2 Wash. 155; *Cline v. Tacoma Stove Co.*, 2 Wash. 164; *Cline v. Burrichter*, 2 Wash. 165.

§ 751. (5466.) Court or Judge must Fix Bail.

The court or judge making the order shall, in all cases, specify therein the amount in which the defendant shall be held to bail, which shall, in no case, exceed the demand of the plaintiff, and one hundred dollars in addition thereto, which amount the clerk shall indorse upon the writ, and the court shall also, in the order, fix the amount of the bond to be given by the plaintiff, as provided in the next succeeding section, which amount shall in no case be less than one hundred dollars. [L. '54, p. 146, § 76; Cd. '81, § 118; 2 H. C., § 231.]

§ 752. (5467.) Bond Required of Plaintiff.

Before any clerk shall issue a warrant for the arrest of the defendant, he shall require the plaintiff to place on file in his office a copy of the order granting the warrant, unless the same was made in open court, and appears in the minutes, the original affidavit and proofs upon which the order was made, and a bond, on behalf of the plaintiff, in such an amount as the court or judge may have fixed in the order, with sureties to the satisfaction of the clerk, conditioned to pay to the defendant all damages which he shall suffer and all expenses he shall incur by reason of such arrest or imprisonment, if the order shall be vacated in the manner provided for in the next succeeding section, or if the plaintiff fail to recover in his action. [L. '54, p. 146, § 77; Cd. '81, § 119; 2 H. C., § 232.]

§ 753. (5468.) Defendant may Move to Vacate Order—Proceedings Thereon.

The defendant may, on motion, apply to the court to vacate the order of arrest, on the ground of insufficiency of the proof, or he may show that the facts alleged upon which the order issued are untrue, or he may apply to have the amount of bail reduced. If the court, upon any such motion, shall vacate the order, the defendant shall be discharged from the arrest, and any bond he may have given shall be canceled, but the action, unless dismissed for other cause, shall be conducted in the same manner as in cases where complaint and notice were duly served and filed. [L. '54, p. 146, § 78; Cd. '81, § 120; 2 H. C., § 233.]

COMPLAINT AND DAMAGES FOR MALICIOUS ARREST.—In the complaint for such an arrest in civil cases, it must be averred or shown that the proceedings in which the arrest was made had terminated favorably for the defendant: *Ferguson v. Tobey*, 1 W. T. 275. And the plaintiff cannot be asked, in an action for damages for malicious arrest and prosecu-

tion, to state the amount of damages he sustained by the alleged tort; the witness must state facts, and let the jury estimate the damages. In mitigation of damages for imprisonment, it may be shown that defendant refused to accept bail: *Id.*

Municipality not liable for arrest under void ordinance: *See Simpson v. Whatcom*, 33 Wash. 392.

§ 754. (5469.) Warrant must not Issue Till Complaint is Filed.

When an order of arrest is granted prior to the filing of the complaint, the warrant shall not issue until the complaint is filed with the clerk, and a copy of said complaint shall be served on the defendant with the warrant; but an order of arrest may be granted at any time after the action is commenced, and before judgment is satisfied, when the party seeking the order shall comply with the preceding provisions in regard to arrests. [L. '54, p. 146, § 79; Cd. '81, § 121; 2 H. C., § 234.]

§ 755. (5470.) Warrant must State Cause of Arrest.

The warrant shall, in all cases, contain a short statement of the alleged causes for which the order was granted, and also the amount for which bail is required. [L. '54, p. 146, § 83; Cd. '81, § 125; 2 H. C., § 235.]

§ 756. (5471.) Defendant Entitled to Copy of Warrant.

The warrant must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy thereof. [L. '54, p. 146, § 80; Cd. '81, § 122; 2 H. C., § 236.]

§ 757. (5472.) How Warrant Executed—Fees of Sheriff.

The sheriff shall execute the warrant by arresting the defendant, and keeping him in custody until discharged by law. And the plaintiff, in the first instance, shall be liable for the sheriff's fees, for the food and maintenance of any person under arrest, which, if required by the sheriff, shall be paid weekly in advance. And such fees so paid shall be added to the costs taxed or accruing in the case, and be collected as other costs. And if the plaintiff shall neglect to pay such fees for three days after a demand, in writing, upon the plaintiff or his attorney for payment, the sheriff may discharge defendant out of custody. [L. '54, p. 146, § 81; Cd. '81, § 123; 2 H. C., § 237.]

§ 758. (5473.) Conditions of Bail Bond.

The defendant may give bail by causing a bond to be executed by two or more sufficient sureties, stating their places of residence and occupations, conditioned that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment rendered therein; or if he be arrested for the cause mentioned in the third subdivision of section 749, it shall be further conditioned that the specific article of property, or instrument of writing which is the subject matter of the writ, shall be forthcoming, to abide any order which shall be made therein; or if he be arrested for the cause mentioned in the sixth subdivision of said section, it shall be further conditioned that he will not commit the injury or destruction alleged to be

threatened in the affidavit or proofs on which the arrest is ordered. [L. '54, p. 147, § 82; Cd. '81, § 124; 2 H. C., § 238.]

§ 759. (5474.) Surrender of Defendant.

At any time before a failure to comply with their bonds, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:—

1. A certified copy of the bail bond shall be delivered to the sheriff, who shall retain the defendant in his custody thereon as upon an order of arrest, and by a certificate in writing, acknowledge the surrender;

2. Upon the production of a copy of the bail bond and sheriff's certificate a judge of the superior court may, upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and the papers used on such application, they shall be exonerated accordingly. But this section does not apply to an arrest for the cause mentioned in the sixth subdivision of section 749. [L. '54, p. 147, § 84; Cd. '81, § 126; 2 H. C., § 239.]

§ 760. (5475.) Bail may Arrest Defendant, When.

For the purpose of surrendering the defendant, the bail, at any time or place before they are finally discharged, may themselves arrest him, or, by written authority indorsed upon a certified copy of the bond, may empower any person of suitable age and discretion to do so. [L. '54, p. 147, § 85; Cd. '81, § 127; 2 H. C., § 240.]

§ 761. (5476.) Proceeding Against Bail.

In case of failure to comply with the condition of the bond, the bail can be proceeded against by action only. [L. '54, p. 147, § 86; Cd. '81, § 128; 2 H. C., § 241.]

§ 762. (5477.) Exoneration of Bail.

The bail may be exonerated either by the death of the defendant, or his imprisonment in the penitentiary, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in exoneration thereof, within twenty days after commencement of the action against the bail, or within such further time as may be granted by the court. [L. '54, p. 148, § 87; Cd. '81, § 129; 2 H. C., § 242.]

§ 763. (5478.) Return of Sheriff—Exceptions to Bail.

Within the time limited for that purpose, the sheriff must deliver the order of arrest to the clerk, with his return indorsed thereon, and the bond of the bail, or a copy thereof. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he must be deemed to have accepted it, and the sheriff shall be exonerated from liability. [L. '54, p. 148, § 88; Cd. '81, § 130; 2 H. C., § 243.]

§ 764. (5479.) Notice of Justification.

On the receipt of notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or his attorney notice of the justification of the

same, or their bail (specifying the places of residences and occupations of the latter), before judgment [the judge] of the court or justice of the peace, at a specified time and place, the time to be not less than five days nor more than ten thereafter. In case other bail be given, there must be a new bond in the form prescribed in section 758. [L. '54, p. 148, § 89; Cd. '81, § 131; 2 H. C., § 244.]

§ 765. (5480.) Qualifications of Bail.

The qualifications of the bail shall be as follows:—

1. Each of them shall be a resident of the state; but no counselor or attorney at law, sheriff, clerk of the superior court, or other officer of such court, shall be permitted to become bail in any action;

2. Each of the bail shall be worth the amount specified in the order of arrest, or the amount to which the order may be reduced, as provided in this chapter, over and above all debts and liabilities, and exclusive of property exempt from execution; but the judge or justice, on justification, may allow more than two sureties to justify, severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail. [L. '54, p. 138, § 90; Cd. '81, § 132; 2 H. C., § 245.]

Cited in 16 Wash. 337.

§ 766. (5481.) Justification, How Made.

For the purpose of justification, each of the bail must attend before the judge or justice of the peace at the time and place mentioned in the notice, and may be examined on oath on the part of the plaintiff touching his sufficiency, in such manner as the judge or justice of the peace, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff. [L. '54, p. 148, § 91; Cd. '81, § 133; 2 H. C., § 246.]

§ 767. (5482.) Order When Bail Found Sufficient.

If the judge or justice find the bail sufficient, he shall indorse his allowance thereof on the bond, and cause it to be filed with the clerk, and the sheriff shall thereupon be exonerated from liability. [L. '54, p. 148, § 92; Cd. '81, § 134; 2 H. C., § 247.]

§ 768. (5483.) Deposit of Money Instead of Bail.

The defendant may at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff must thereupon give the defendant a certificate of deposit, and the defendant shall be discharged from custody. [L. '54, p. 148, § 93; Cd. '81, § 135; 2 H. C., § 248.]

§ 769. (5484.) Sheriff must Pay Bail Money into Court.

The sheriff shall, within ten days after the deposit, pay the same into court, and take from the officer receiving the same two certificates of such payment, the one of which he must deliver to the plaintiff and the other to the defendant. For any default in making such payment, the same proceeding may be had on the official bond of the sheriff to collect the sum deposited, as in case of delinquency. [L. '54, p. 149, § 94; Cd. '81, § 136; 2 H. C., § 249.]

§ 770. (5485.) Bail may be Substituted for Money.

If the money be deposited, as provided in the last two sections, bail may be given and justified, upon notice as hereinbefore provided, at any time before judgment; and thereupon the judge before whom justification is had shall direct in the order of allowance that the money deposited be refunded by the sheriff or clerk to the defendant, and it shall be refunded accordingly. [L. '54, p. 149, § 95; Cd. '81, § 137; 2 H. C., § 250.]

§ 771. (5486.) Disposition of Bail Money After Judgment.

When money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in the satisfaction thereof, and after satisfying judgment, refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied. [L. '54, p. 149, § 96; Cd. '81, § 138; 2 H. C., § 251.]

§ 772. (5487.) Liability of Sheriff for Escape.

If, after being arrested, the defendant escapes or be rescued, the sheriff himself shall be liable as bail; but he may discharge himself from such liability by giving bail at any time before judgment. [L. '54, p. 149, § 97; Cd. '81, § 139; 2 H. C., § 252.]

§ 773. (5488.) Judgment—Sheriff as Bail.

If the judgment be recovered against the sheriff upon his liability as bail, and an execution thereon be returned unsatisfied, the same proceedings may be had on the official bond of the sheriff to collect the deficiency as in other cases of delinquency. [L. '54, p. 149, § 98; Cd. '81, § 140; 2 H. C., § 253.]

§ 774. (5489.) Bail Liable to Sheriff, When.

The bail taken on arrest shall, unless they justify, or other bail be given or justified, be liable to the sheriff, by action, for the damages which he may sustain by reason of such omission. [L. '54, p. 149, § 99; Cd. '81, § 141; 2 H. C., § 254.]

§ 775. (5490.) Officer Authorized to Take Bail may Examine Surety.

Every court and officer authorized to take any bail or surety shall have power to examine on oath the person offering to become such bail or surety concerning his property and sufficiency as such bail or surety. [L. '54, p. 219, § 488; Cd. '81, § 748; 2 H. C., § 799.]

See *infra*, § 1077, writ of habeas corpus for purpose of bail.

§ 776. (5491.) Money may be Deposited for Bail.

Any person required to give bail may deposit with the clerk the amount of money for which he is required to give bail, and thereupon be discharged from arrest. [L. '54, p. 220, § 493; Cd. '81, § 750; 2 H. C., § 801.]

See *supra*, § 768, deposit of bail.

§ 777. (5492.) Bonds are not to Fail for Want of Form.

No bond required by law, and intended as such bond, shall be void for want of form or substance, recital, or condition; nor shall the principal or

surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond. [L. '54, p. 219, § 489; Cd. '81, § 749; 2 H. C., § 800.]

See notes to § 958, *infra*, construing this section.

See *infra*, § 1413, bonds not to fail for want of form.

See *infra*, § 8327, defective bonds, recovery on.

Cited in 5 Wash. 587; 11 Wash. 166; 31 Wash. 492.

CHAPTER VIII.

NE EXEAT.

§ 778. (5493.) **Affidavit for Writ.**

Action may be commenced upon any agreement in writing before the time for the performance of the contract expires, when the plaintiff or his agent shall make and file an affidavit with the clerk of the proper court that the defendant is about to leave the state without performing or making provisions for the performance of the contract, taking with him property, moneys, credits, or effects subject to execution, with intent to defraud plaintiff. [L. '54, p. 209, § 418; Cd. '81, § 636; 2 H. C., § 747.]

See Const., Art. I, § 17.

See *supra*, § 748, notes.

§ 779. (5494.) **Complaint—Bond—Order of Arrest.**

At the time of filing the affidavit the plaintiff shall also file his complaint in the action, and thenceforth the action shall proceed as other actions at law, except as otherwise provided in this chapter. Upon such affidavit and complaint being filed, the clerk shall issue an order of arrest and bail, directed to the sheriff, which shall be issued, served, and returned in all respects as such orders in other cases; before such order shall issue, the plaintiff shall file in the office of the clerk a bond, with sufficient surety, to be approved by the clerk, conditioned that the plaintiff will pay the defendant such damages and costs as he shall wrongfully sustain by reason of the action, which sureties shall justify as bail upon an arrest. [Cf. L. '54, p. 209, § 419; Cd. '81, § 637; L. '91, p. 81, §§ 1, 2; 2 H. C., §§ 748, 749.]

§ 780. (5495.) **Recognizance—Commitment—Discharge.**

The sheriff shall require the defendant to enter into a bond, with sufficient surety, personally to appear within the time allowed by law for answering the complaint, and to abide the order of the court; and in default thereof the defendant shall be committed to prison until discharged in due course of law; such special bail shall be liable for the principal, and shall have a right to arrest and deliver him up, as in other cases, and the defendant may give other bail. Instead of giving special bail, as above provided, the defendant shall be entitled to his discharge from custody if he will secure the performance of the contract to the satisfaction of the plaintiff. [Cf. L. '54, pp. 209, 210, §§ 420, 421; Cd. '81, §§ 638, 639; L. '91, p. 81, § 3; 2 H. C., §§ 750, 751.]

§ 781. (5496.) Who may have Writ.

This proceeding may be had in favor of any surety or other person jointly bound with the defendant. It may also be prosecuted by the person in whose favor the contract exists, against any one or more of the persons bound thereby, upon filing such affidavit, when the co-contractors are nonresidents or probably insolvent, or at the request of any of them when they are residents and solvent. [L. '54, p. 210, § 422; Cd. '81, § 640; 2 H. C., § 752.]

A writ of ne exeat preventing an appellant in a divorce case from leaving the state pending the appeal will not be granted, in the absence of a sufficient showing that he is about to do so, and

where he has given a supersedeas bond on appeal, and much of the property involved is real estate which cannot be conveyed without consent of the wife: *Holcomb v. Holcomb*, 49 Wash. 498.

§ 782. (5497.) Habeas Corpus.

The defendant may have the same remedy by writ of habeas corpus as in other cases of arrest and bail. [L. '54, p. 210, § 423; Cd. '81, § 641; 2 H. C., § 753.]

§ 783. (5498.) Before Justices.

The proceedings provided for in this chapter may be had before justices of the peace in all cases within their jurisdiction. [Cf. L. '54, p. 210, § 424; Cd. '81, § 642; L. '91, p. 82, § 4; 2 H. C., § 754.]

As to use of term "proceedings," see *State v. Gordon*, 8 Wash. 488, 490; *Windt v. Banniza*, 2 Wash. 147.

§ 784. (5499.) Venue.

The affidavit and bond may be filed and proceedings had in any county where the defendants may be found. [L. '54, p. 210, § 425; Cd. '81, § 643; 2 H. C., § 755.]

Cited in 23 Wash. 578.

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CHAPTER I.

ACTIONS FOR POSSESSION OF AND QUIETING TITLE TO REAL PROPERTY.

§ 785. (5500.) Who may Maintain.

Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title; and in all actions, under this section, to quiet or remove a cloud from the title to real property, if the defendant be absent or a nonresident of this state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, service may be made upon such defendant by publication of summons as provided by law; and the court may appoint a trustee for such absent or nonresident defendant, to make or cancel any deed or conveyance of whatsoever nature, or do any other act to carry into effect the judgment or the decree of the court. [Cf. L. '54, p. 205, § 398; L. '79, p. 134, § 1; Cd. '81, § 536; L. '90, p. 72, § 1; 2 H. C., § 529.]

See supra, § 156, statute of limitations.

See supra, § 605 et seq., commissioners to convey real estate.

See infra, § 792, substitution of landlord for tenant.

See infra, § 804, mortgagee cannot maintain.

See infra, §§ 808, 809, rule of decision, etc., between adverse claimants.

See infra, § 1535, actions by administrator.

Cited in 9 Wash. 157; 10 Wash. 359, 664; 11 Wash. 537; 12 Wash. 696; 19 Wash. 401; 20 Wash. 31; 21 Wash. 679; 22 Wash. 10; 25 Wash. 570; 26 Wash. 130, 670; 29 Wash. 112; 32 Wash. 456; 34 Wash. 179, 292, 309, 546; 37 Wash. 601; 38 Wash. 222; 39 Wash. 556; 46 Wash. 466; 47 Wash. 20, 617.

EJECTMENT, REMEDY BY: See 1 Remington's Digest, p. 992, § 1 et seq.

The action contemplated in this and the following sections is the common-law action of ejectment, with the added incident of determining the paramount legal or equitable title, and with the departure of permitting it to be brought against one claiming title or interest in land and not in possession thereof: *Smith v. Wingard*, 3 W. T. 291.

The primary object of this statute is to determine the question of title to lands: *Id.*

In such action every question affecting title and right of possession may be determined and possession thereof recovered by the owner with damages: *Green v. Tacoma*, 51 Fed. 622, 623.

The determination of title in this action is res adjudicata: *Smith v. Wingard*, supra, 298.

The action is not one to try merely the abstract legal fee to the soil, but to determine who is entitled to the possession and, therefore, the holder of the naked fee may not recover if by his acts the equitable title be in the adverse party: See 1 Remington's Digest, p. 995, § 16; *Burmeister v. Howard*, 1 W. T. 207.

As to other equitable defenses, see *Ryan v. Ferguson*, 3 Wash. 356; *Peterson v. Philadelphia Mtg. etc. Co.*, 33 Wash. 464; *Moore v. Brownsfield*, 10 Wash. 439; *Riverside Land Co. v. Pietsch*, 35 Wash. 210.

The owner of land entitled to the immediate possession thereof has a right of action against any person in possession holding the same against his will, or claiming title thereto, or an interest in, said land adversely to him: *Green v. Tacoma*, 51 Fed. 622.

The action cannot be maintained by one in possession against one not in possession but who claims title to or interests therein: *Smith v. Wingard*, supra, 297.

Laches as a defense: See 1 Remington's Digest, p. 996, § 20; *Scott v. McNeal*, 5 Wash. 309 (overruled in *Id.*, 154 U. S. 34); *Hoffmeister v. Renton Coal Co.*, 40 Wash. 48.

In an action to recover the possession of premises for the breach of a condition subsequent, it is not necessary to make a demand or entry, in view of this section: *Lewiston Water etc. Co. v. Brown*, 42 Wash. 555.

If plaintiff is not, and defendant is, in possession of land claimed by the former, the proper form of remedy is ejectment: *Catholic Bishop v. Gibbon*, 1 Wash. 592.

The holder of a final receipt for entry upon lands, in force and uncanceled, may maintain ejectment to protect his possession: See 1 Remington's Digest, p. 993, § 8; *Pierce v. Frace*, 2 Wash. 81; *Hays v. Parker*, 2 W. T. 198, distinguished; followed in *Orchard v. Alexander*, 2 Wash. 108. See *Pierce v. Frace*, 157 U. S. 372; *Orchard v. Alexander*, 157 U. S. 372, affirmed on writ of error.

A railroad company being out of possession, and claiming title under act of Congress of July 2, 1864, to the odd-numbered sections within certain limits and upon certain conditions, may maintain ejectment against a subsequent patentee from the government: *Northern Pac. R. Co. v. Miller*, 20 Wash. 21.

The littoral proprietor of land bordering on tide waters cannot maintain ejectment against persons in possession of, erecting buildings on and occupying tide lands in front thereof within the corporate limits of a city, and when he has acquired no right thereto by lease from the state: *Pierce v. Kennedy*, 2 Wash. 324.

A devisee of lands under a foreign will, admitted to probate in the county where the lands are situated, cannot maintain ejectment therefor, since under § 1449, infra, the legal representative is alone entitled to possession pending administration: See 1 Remington's Digest, p. 994, § 10; *Dunn v. Peterson*, 4 Wash. 170. But see § 1366, infra.

A city may maintain an action of ejectment to recover possession of a portion of

a public street, under the statute giving it the control thereof: *Port Townsend v. Lewis*, 34 Wash. 413.

From the time a person enters into possession of public lands, under the pre-emption laws of the United States, whether surveyed or not, he is entitled to the protection of the courts in his possession. In such case his possessory right may be protected from waste or irreparable injury by injunction: *Colwell v. Smith*, 1 W. T. 92; *Ward v. Moorey*, 1 W. T. 104. See §§ 808, 809, infra.

One in possession of land under color of title, residing thereon in good faith, is entitled on being ejected therefrom to recover taxes and local assessments paid by him, when the owner stood by and received the benefits without asserting his title, and under § 796, infra, may set off the value of improvements against the rental value: *McInerney v. Beck*, 10 Wash. 515.

A tenant in common is, as against any person but his cotenant, entitled to every part of the common land, and may recover possession thereof in ejectment against a stranger to the common title: *Allen v. Higgins*, 9 Wash. 446, 43 Am. St. Rep. 847.

And a tenant in common can maintain ejectment against a cotenant in possession who disputes his right: *Mable v. Whitaker*, 10 Wash. 656.

Where a city appropriates private lands for a public use without the consent or acquiescence of the owner, ejectment may be maintained for the recovery thereof: *Green v. Tacoma*, 51 Fed. 622.

Ejectment will lie to recover tide lands patented by the United States prior to the admission of the state into the Union: *Scurry v. Jones*, 4 Wash. 468.

Or to recover possession of a railroad right of way in use where proceedings are stayed and the only effect of the judgment is to compel the company to make compensation for the property taken: *Slaght v. Northern Pac. R. Co.*, 39 Wash. 576. Also upon condemnation without making a known owner a party: *Owen v. St. Paul & M. R. Co.*, 12 Wash. 313.

Ejectment may be maintained by the grantee of the patentee of land acquired under the United States homestead laws which have been sold under execution for a debt of the patentee antedating his patent, although he was not occupying the same at the time of the execution sale: *Jean v. Dee*, 5 Wash. 580.

Where land is conveyed upon condition that the grantee will construct and perpetually maintain a ditch for drainage of adjoining land of the grantor, which condition is "made a part of the consideration of the transfer," the failure of the grantee to perform the contract will not warrant an action for damages, but the remedy is in ejectment to recover the land and for a forfeiture of the estate granted:

Mills v. Seattle etc. Ry. Co., 10 Wash. 520.

In an action of ejectment defendant may, under a general denial, introduce any equitable as well as legal defense when the complaint fails to set out the source of plaintiff's title: Parker v. Dacres, 1 Wash. 190; Riverside Land Co. v. Pietsch, 35 Wash. 210.

Title to support action: See 1 Remington's Digest, p. 992, § 6; Balch v. Smith, 4 Wash. 497; Lawrence v. B. B. & B. C. R. Co., 4 Wash. 664; Bracka v. Fish, 23 Wash. 646; State v. Johansen, 26 Wash. 668; Helm v. Johnson, 40 Wash. 420; Brummett v. Campbell, 32 Wash. 358; Harris v. Halversen, 23 Wash. 779.

In an action to recover the possession of real property, the plaintiff cannot recover upon the weakness of defendant's title, and if without title himself the action fails: Hughes v. South Bay School District, 32 Wash. 678; George v. Columbia & Puget S. R. Co., 38 Wash. 480; Helm v. Johnson, 40 Wash. 420; Humphries v. Sorenson, 33 Wash. 563; Wright v. Jessup, 44 Wash. 618; Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works, 48 Wash. 574.

Equitable title to support action: See 1 Remington's Digest, p. 993, § 9; Johnston v. Gerry, 34 Wash. 524; State v. Johansen, 20 Wash. 668; Sengfelder v. Hill, 21 Wash. 371; Snyder v. Parker, 19 Wash. 276; Carlsen v. Curren, 48 Wash. 249.

In an action of ejectment, where neither party had title, the plaintiff does not make out a case of prima facie title by prior possession by showing that defendants obtained permission of the plaintiff to continue an occupancy, when it appears that defendants had possession prior to the making of an unwarranted claim to the land by the plaintiff, who never had any possession: Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works, 48 Wash. 574.

QUIETING TITLE: See 2 Remington's Digest, p. 2417 et seq.

Under this section an action will lie to recover possession of realty and at the same time to remove a cloud from its title: Reichenbach v. Washington etc. Ry. Co., 10 Wash. 357; Krutz v. Isaacs, 25 Wash. 566; Povah v. Lee, 29 Wash. 108.

And the same is the proper remedy to attack a government patent, issued to other parties after the grant to plaintiff: Nor. Pac. R. Co. v. Miller, 20 Wash. 21.

A lis pendens notice against realty of a person who has no interest therein is no cloud on the title of the actual owner, and violates no covenant of his deed that the same is free from liens and encumbrances: Kley v. Geiger, 4 Wash. 484. But see Washington Dredging & Imp. Co. v. Kinnear, 24 Wash. 405; King v. Brancheid, 32 Wash. 634.

An action to quiet title against a fraudulent conveyance of land is not an action for relief on the ground of fraud, and does not subject it to the statutory limitation imposed by § 159, subdivision 4, or by § 165: Wagner v. Law, 3 Wash. 500.

Where copartners dissolved partnership and formed a corporation, agreeing to convey all their real estate to it in consideration of stock, but in the conveyance a certain tract was omitted because of pending negotiations for its sale or trade to a third party, which however was never consummated, the corporation is entitled to have its title quieted as against such third person and a retiring partner who had made a quitclaim deed thereof to such third party with full knowledge of the facts; and the fact that the copartners, upon dissolving partnership and transferring the interest of one to the other, had agreed upon stipulated damages for breach of the terms of their dissolution agreement, would have no effect upon the corporation's right to relief: Thompson-Spencer Co. v. Thompson, 49 Wash. 170.

Title of plaintiff, necessity: See 2 Remington's Digest, p. 2419, § 10.

An action to quiet title may be maintained by persons having merely an equitable title to lands: Jackson v. Tatebo, 3 Wash. 456; Bloomingdale v. Weil, 29 Wash. 611.

And by a purchaser at a mortgage foreclosure sale, upon receiving a certificate of sale: See McManus v. Morgan, 38 Wash. 528.

Or by a principal as against the wife of a deceased agent: See Pansing v. Warner, 43 Wash. 531.

An execution plaintiff who levies upon and purchases real property which his debtor had previously conveyed by an absolute deed, intended as security, but with power of sale, acquires no greater right than his debtor had; viz., the right of redemption or the right to the surplus after a sale; and therefore an innocent purchaser for value, from the party holding the record title, may maintain an action to quiet his title as against such an execution sale, under this section: White v. McSorley, 47 Wash. 18.

In a particular action to quiet title, action dismissed on the ground of estoppel as to all heirs who had elected to take under the will: Lewis v. Lichty, 3 Wash. 213.

As to necessity of title of plaintiff, see Hazelton v. Bogardus, 8 Wash. 102; Shelton Log. Co. v. Gosser, 26 Wash. 126; Bird v. Winyer, 24 Wash. 269.

Necessity of possession by plaintiff: See 2 Remington's Digest, p. 2419, § 11.

An action to quiet title should be dismissed for want of equity when there is no proof that plaintiff is in possession of the land or that it is unoccupied: Spithill v. Jones, 3 Wash. 290.

There is no presumption that because land was at a former time unoccupied that it remains the same: *Id.*

The rule that an action to quiet title cannot be maintained by one out of possession applies only where plaintiff has a complete remedy at law: *Dolan v. Jones*, 37 Wash. 176.

Sufficiency of possession: See *Bigelow v. Brewer*, 29 Wash. 670.

Waiver of objection that plaintiff is not in possession: See 2 Remington's Digest, p. 2421, § 13; *Bates v. Drake*, 28 Wash. 447; *McKinley v. Morgan*, 36 Wash. 561; *Moran & Co. v. Palmer*, 36 Wash. 684; *Weatherwax Lum. Co. v. Ray*, 38 Wash. 545; *Schmidt v. Olympia Light etc. Co.*, 40 Wash. 131.

In an action to quiet title to lands purchased at execution sale, proof of the sale made by the sheriff under a valid judgment and execution and the confirmation thereof, will establish the prima facie presumption that the sale was regularly made: *Tacoma Grocery Co. v. Draham*, 8 Wash. 263.

A distribution in probate proceedings of the property of the deceased to his heirs is some evidence of title, without deraignment of title from the government, and sufficient to support a judgment removing the cloud of tax foreclosure proceedings against land assessed to the deceased, as to parties claiming through the same source: *Preston v. Cox*, 50 Wash. 451.

In an action to cancel a deed, fraudulently procured, plaintiff is not bound to prove title in his grantor where defendants claim title from the same source. A warranty deed may also be canceled, although conveying nothing because of defective description: *Jackson v. Tatebo*, 3 Wash. 456.

In such an action, where the evidence shows that plaintiff is an ignorant Indian, with limited knowledge of the English language, and ignorant of legal transactions, the burden of proof is shifted to plaintiff to show that the import of the deed was understood by plaintiff at the time of its execution: *Id.*

Admissibility, weight, and sufficiency of evidence: See 2 Remington's Digest, p. 2425, §§ 30, 31.

As to admissibility, see *Kalb v. German Sav. & L. Soc.*, 25 Wash. 349; *Lilly v. Eklund*, 37 Wash. 532; *Lambert v. Gillette*, 24 Wash. 726; *Bigelow v. Brewer*, 29 Wash. 670; *Turner v. Ladd*, 42 Wash. 274; *Clapp v. Ervay*, 46 Wash. 290.

Trial and hearing: See *Rohrer v. Snyder*, 29 Wash. 199; *Maggs v. Morgan*, 30 Wash. 604.

In an action to quiet title, the plaintiffs are not entitled to any decree where they fail to show any actual conflict between their claims and those of the defendants: *Mason v. Long*, 49 Wash. 18.

A judgment creditor may bring an action to quiet title to lands purchased by him at execution sale, which have been fraudulently conveyed by his debtor, and may also set aside such fraudulent conveyance: *Wagner v. Law*, 3 Wash. 500.

A trustee under a will, charged with the duty of administering the estate until the majority of minor heirs, may maintain the action as to the interest of a devisee sold under execution against him: See *Christofferson v. Pfennig*, 16 Wash. 491.

An action to quiet title cannot be maintained by an heir until after the close of the administration upon his ancestor's estate: *Hazelton v. Bogardus*, 8 Wash. 102; see *Dunn v. Peterson*, 4 Wash. 170; *Balsh v. Smith*, 4 Wash. 497; *Tucker v. Brown*, 9 Wash. 357.

But where no necessity for administration exists, the rule is to the contrary: *Tucker v. Brown*, 9 Wash. 357; *Balsh v. Smith*, 4 Wash. 497; *Hill v. Young*, 7 Wash. 33.

A vendee cannot maintain an action to quiet title against the community claim of the vendor's wife without tendering the balance of the unpaid purchase money: *Littlejohn v. Miller*, 5 Wash. 399.

But tender is not necessary where the claim causing the cloud is barred by the statute of limitation: See *Kinsman v. Spokane*, 20 Wash. 118.

Where city assessments have been declared barred by the statute of limitations, the owners of the property are entitled to have their title quieted by a decree requiring the city officers to enter cancellation of the liens on the records of the city, not as though paid, but as canceled by order of the court: *Cushing v. Spokane*, 45 Wash. 193.

A complaint in an action to quiet title alleging "that plaintiff and its grantors have been in the actual, open possession of the property in controversy, continuously since the twenty-eighth day of March, 1862, under color and claim of title; that neither the defendant, nor his ancestors, or predecessors have been seised of the premises in question, or any part or parcel thereof, within more than ten years before the date of the commencement of this suit," is sufficient to admit testimony tending to prove adverse possession: *Bellingham Bay L. Co. v. Dibble*, 4 Wash. 764.

Pleading—The complaint: See 2 Remington's Digest, p. 2423, §§ 24, 25.

Sufficiency: See *Wagner v. Law*, 3 Wash. 500; *Damon v. Leque*, 14 Wash. 253; *Krutz v. Isaacs*, 25 Wash. 568; *Long v. Eisenbeis*, 23 Wash. 556; *Maggs v. Morgan*, 30 Wash. 604; *Boyer v. Robison*, 43 Wash. 97.

Allegations as to title and possession: See *Spithill v. Jones*, 3 Wash. 290; *Jackson v. Tatebo*, 3 Wash. 456; *Lemon v. Waterman*, 2 W. T. 485; *Wagner v. Law*,

3 Wash. 500; *Watson v. Glover*, 21 Wash. 677; *Kalb v. Ger. Sav. & Loan Soc.*, 25 Wash. 349; *Miller v. Lake Irr. Co.*, 27 Wash. 447; *Davies v. Cheadle*, 31 Wash. 168; *McKinley v. Morgan*, 36 Wash. 561.

The failure of the plaintiff in an action to quiet title to prove that he was in possession or that the land was vacant and unoccupied, is not ground for dismissing the action: *Vietzen v. Otis*, 46 Wash. 402.

An objection that an action to quiet title could not be maintained by one out of possession who failed to allege that the land was vacant and unoccupied, is waived by trial of the issue as to title, raised by answer asking that the title be quieted in the defendants, although a demurrer *o* *tenuis* was interposed at the trial: *Brown v. Baldwin*, 46 Wash. 106.

Amended and supplemental pleadings: See *Newman v. Buzard*, 24 Wash. 225; *Lemon v. Waterman*, 2 W. T. 485.

Proof of title acquired by adverse possession under color of title is admissible under an allegation of ownership in fee, in an action to quiet title: *Rogers v. Miller*, 13 Wash. 82.

In an action to quiet title, a finding by the court that the premises had been sold under execution upon a judgment in an action in which jurisdiction of the person of the defendant had been duly acquired, is sufficient to warrant a decree in favor of the grantees of the purchaser at such execution sale, when such finding had not been excepted to, although in fact the record in the original action does not disclose jurisdiction: *Irwin v. Olympia Water Works*, 12 Wash. 112.

In such an action a finding of adverse possession for the full period for the acquisition of title by prescription in the defendants and their grantors is sufficient to warrant a decree in their favor, although there may be no evidence of such facts, when no exceptions have been taken to the findings of the lower court in that regard: *Id.*

Where land has been platted into lots by actually staking it out on the face of the earth, a deed purporting to convey certain of the lots is sufficient to constitute color of title for a bona fide entry,

although the recorded plat of the lands may not include such lots within the bounds of the platted tract as described therein: *Flint v. Long*, 12 Wash. 342.

The fact that an entry has been made upon city lots under color of title, the land cleared, fenced and planted to shrubbery, and a house built thereon which had been occupied by the claimant and his tenants is sufficient to constitute adverse possession: *Id.*

Limitations and laches: See 2 Remington's Digest, p. 2422, § 22. See *Chezum v. McBride*, 21 Wash. 558; *Jones v. Her- rick*, 35 Wash. 434; *Ferrell v. Lord*, 43 Wash. 667; *Brodack v. Morsbach*, 38 Wash. 72; *Krutz v. Isaacs*, 25 Wash. 566; *May- nard v. P. S. Nat. Bank*, 24 Wash. 455; *Vietzen v. Otis*, 46 Wash. 102.

Parties to the action: See 2 Remington's Digest, p. 2422, § 23; *Utterback v. Meeker*, 16 Wash. 185; *Larson v. Allen*, 34 Wash. 113; *McNamara v. Crystal Min. Co.*, 23 Wash. 26; *James v. James*, 35 Wash. 655; *Carlsen v. Curren*, 48 Wash. 249.

Under this section, authorizing any person having a valid subsisting interest in real property to maintain an action to quiet title thereto, the action may be maintained by any or all of the tenants in common: *Hannegan v. Roth*, 12 Wash. 695.

The fact that the mortgagee goes into possession of mortgaged premises under an agreement with the mortgagor which the mortgagee failed to sign, but which it recognized and acted under and placed upon record, makes it a binding and valid agreement on both parties: *Brundage v. Home etc. Assn.*, 11 Wash. 277.

A mortgagee in possession cannot be dispossessed by an action in ejectment, so long as there is any question whether the mortgage debt has been paid in full: *Id.*

Where a party to a contract has acted under it and received benefits from it, he is estopped from denying its existence and force: *Id.*

Although an action may be termed a suit to remove a cloud and under allegations of fraud in obtaining a deed, equity will grant relief and cancel the deed in a proper case: *Jackson v. Tatebo*, *supra*.

But the court cannot quiet a title obtained under a void judicial sale: See *Bjmerland v. Eley*, 15 Wash. 101.

§ 786. (5501.) Limitation for Bringing Actions, Seven Years.

All actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual, open and notorious possession for seven successive years, having a connected title in law or equity deducible of record from this state or the United States, or from any public officer, or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution or under any order, judgment or decree of any court of record, shall be brought within seven years next after

possession being taken as aforesaid, but when the possessor shall acquire title after taking such possession, the limitation shall begin to run from the time of acquiring title. [L. '93, p. 20, § 1.]

Cited in 25 Wash. 571, 572; 43 Wash. 672; 49 Wash. 337; 50 Wash. 336, 337.

This section operates to bar an action by minors to recover an interest in property sold under mortgage foreclosure execution, although the minors were necessary parties to the foreclosure and were not joined, and the foreclosure did not affect their interests, and the purchaser

was only their tenant in common, where the purchaser understood he was buying the entire property and maintained adverse possession for seven years for his own exclusive benefit; since the sale was "authorized" if directed by a judgment, whether the judgment was subject to attack or not: *Schlarb v. Castaing*, 50 Wash. 331.

§ 787. (5502.) Rights of Heirs, etc.

The heirs, devisees and assigns of the person having such title and possession shall have the same benefit of the preceding section as the person from whom the possession is derived. [L. '93, p. 20, § 2.]

§ 788. (5503.) Legal Owner, Defined.

Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section. [L. '93, p. 20, § 3.]

Cited in 4 Wash. 6; 32 Wash. 461; 34 Wash. 419; 35 Wash. 17; 36 Wash. 215, 216; 38 Wash. 18, 73, 74; 39 Wash. 76; 41 Wash. 612; 44 Wash. 178; 50 Wash. 117-119, 693; 52 Wash. 55, 56.

As to what constitutes color of title, see 1 Remington's Digest, pp. 51, 52; *Philadelphia Mtg. and Trust Co. v. Palmer*, 32 Wash. 455; *Olson v. Howard*, 38 Wash. 15; *May v. Sutherland*, 41 Wash. 609; *Cox v. Tompkinson*, 39 Wash. 70; *Columbia etc. R. Co. v. Seattle*, 33 Wash. 513; *Port Townsend v. Lewis*, 34 Wash. 413; *Hamilton v. Witner*, 50 Wash. 689; *Johnson v. Bartlett*, 50 Wash. 114; *Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works*, 48 Wash. 574.

As to claim of right, see 1 Remington's Digest, p. 51, § 27; *Noyes v. Douglas*, 39 Wash. 314; *Unzelman v. Snohomish*, 40 Wash. 588; *George v. Columbia etc. R. Co.*, 38 Wash. 480; *Hesser v. Siepmann*, 35 Wash. 14; *McMillan v. Walker*, 48 Wash. 342; *Calhoun v. Nelson*, 47 Wash. 617.

Necessity of good faith: See 1 Remington's Digest, p. 53, § 34; *Biggart v. Evans*, 36 Wash. 212; *Brodack v. Morsbach*, 38 Wash. 72; *Lohse v. Burch*, 42 Wash. 156; *Hesser v. Siepmann*, 35 Wash. 14; *Miller v. O'Leary*, 44 Wash. 172.

Duration and continuity of payment of taxes: See *Philadelphia Mtg. etc. Co. v. Palmer*, 32 Wash. 455.

Under this section, the prerequisites to obtain title by adverse possession and payment of taxes are, (1) claim and color of title made in good faith, (2) actual notorious possession for seven successive years, and (3) payment of all taxes assessed during that time: *Lara v. Sandell*, 52 Wash. 53.

This section does not require the lapse of seven years after the first payment of taxes, but only the payment of all taxes assessed during the period of adverse possession: *Id.*

§ 789. (5504.) Vacant and Unoccupied Lands.

Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven suc-

cessive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. All persons holding under such taxpayer, by purchase, devise or descent, before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of said taxes for the term aforesaid, shall be entitled to the benefit of this section: Provided, however, if any person having a better paper title to said vacant and unoccupied land shall, during the said term of seven years, pay the taxes as assessed on said land for any one or more years of said term of seven years, then and in that case such taxpayer, his heirs or assigns, shall not be entitled to the benefit of this section. [L. '93, p. 21, § 4.]

Cited in 32 Wash. 461; 35 Wash. 17, 438; 39 Wash. 76; 44 Wash. 178; 46 Wash. 138, 139; 48 Wash. 450; 52 Wash. 56.

This and the preceding section are not applicable unless payment of taxes is supported by actual paper title: See *Hesser v. Siepmann*, 35 Wash. 14.

This section requires that seven years shall elapse between the date of the first payment of taxes and the commencement of the suit; and one who in 1902 redeems a tax certificate for previous years, since 1897, and pays subsequent taxes covering

eight years in all, cannot maintain the action in 1906, four years after his first payment, if his redemption can be considered a payment of taxes: *Tremmel v. Mess*, 46 Wash. 137.

In an action to quiet title, the payment by defendant of seven years' taxes on the property is not a defense, when the last payment was made a few days prior to the commencement of the action: *Vietzen v. Otis*, 46 Wash. 402. See, also, *Johnson v. Conner*, 48 Wash. 431.

§ 790. (5505.) Public Lands and Adverse Title in Infants, etc.—Except.

The two preceding sections shall not extend to lands or tenements owned by the United States or this state, nor to school lands, nor to lands held for any public purpose. Nor shall they extend to lands or tenements when there shall be an adverse title to such lands or tenements, and the holder of such adverse title is an infant or person under legal age, or insane: Provided, such persons as aforesaid shall commence an action to recover such lands or tenements so possessed as aforesaid, within three years after the several disabilities herein enumerated shall cease to exist, and shall prosecute such action to judgment, or in case of vacant and unoccupied land shall, within the time last aforesaid, pay to the person or persons who have paid the same for his or her betterments, and the taxes, with interest on said taxes at the legal rate per annum that have been paid on said vacant and unimproved land. [L. '93, p. 21, § 5.]

Cited in 36 Wash. 216; 41 Wash. 612; 48 Wash. 450, 579.

Adverse possession of the bed or shores of a navigable lake below the line of high water does not run against the state, in view of the fact that, after the state's constitutional assertion of title thereto, the legislature passed laws uniformly recognizing the rights of the many persons

in possession of such shore lands at the time of the adoption of the constitution, giving them the preference right to purchase the same when the land shall be put on the market, or requiring the purchaser to pay for the value of the improvement thereon; since the possession thereby became permissive: *Brace & Hergert Mill Co v. State*, 49 Wash. 326.

§ 791. (5506.) Construction.

The provisions of sections 786, 787, 788, 789 and 790 shall be liberally construed for the purposes set forth therein. [L. '93, p. 21, § 6.]

Cited in 48 Wash. 450.

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§ 792. (5507.) Substitution of Landlord in Action Against Tenant.

A defendant who is in actual possession may, for answer, plead that he is in possession only as a tenant of another, naming him and his place of residence, and thereupon the landlord, if he apply therefor, shall be made defendant in place of the tenant, and the action shall proceed in all respects as if originally commenced against him. If the landlord do not apply to be made defendant within the time the tenant is allowed to answer, thereafter he shall not be allowed to, but he shall be made defendant if the plaintiff require it. If the landlord be made defendant on motion of the plaintiff, he shall be required to appear and answer within ten days from notice of the pendency of the action and the order making him defendant, or such further notice as the court, or judge thereof, may prescribe. [L. '69, p. 128, § 489; Cd. '81, § 537; 2 H. C., § 530.]

See *infra*, § 794, judgment against landlord.

Cited in 9 Wash. 157.

This section provides how a landlord may be brought into the action; it is the only one we have which changes the com-

mon-law rule requiring only defendant in possession to be made defendant: *Raymond v. Morrison*, 9 Wash. 156.

§ 793. (5508.) Pleadings—Superior Title Prevails.

The plaintiff in such action shall set forth in his complaint the nature of his estate, claim, or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and the superior title whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had. [Cf. L. '69, p. 128, § 490; L. '79, p. 134, § 2; Cd. '81, § 538; 2 H. C., § 531.]

See *supra*, § 785, and notes, who may maintain ejectment.

See last section, substitution of landlord as defendant.

See notes to next section.

Cited in 10 Wash. 262, 664; 20 Wash. 31; 26 Wash. 670; 28 Wash. 243; 29 Wash. 112, 634; 34 Wash. 322; 52 Wash. 520.

PARTIES: See 1 Remington's Digest, p. 996, §§ 21-23; and 2 Remington's Digest, p. 2422, § 23. See notes to § 785, *supra*.

It is not error to refuse to try the rights of property of strangers to the suit: *Ward v. Moorey*, 1 W. T. 104.

A tenant in possession is the only necessary party defendant in an action of ejectment; and plaintiff cannot be compelled to bring in tenants in common with him, although he may set up that there are such and ask that they be made parties: *Raymond v. Morrison*, 9 Wash. 156.

Joinder of parties plaintiff: See *Snyder v. Harding*, 34 Wash. 286.

This section as regards parties is a statutory exception to the rule prescribed in § 189, *supra*: *Id.*

The wife is a proper party defendant in ejectment by vendor of land the possession of which the vendee and his wife had entered into under contract of sale, which vendor had since declared forfeited: *Reddish v. Smith*, 10 Wash. 178.

Nonresident heirs whose consent cannot be procured are proper but not necessary

defendants: See *Johnston v. Gerry*, 34 Wash. 524.

COMPLAINT: See 1 Remington's Digest, p. 996, § 24 et seq. See notes to § 785, *supra*.

Plaintiff should so frame his complaint as to compel defendant to fully disclose his defense in his answer: *Parker v. Dacres*, 1 Wash. 190, 194.

In an action for the recovery of real estate under this section, an allegation in the complaint that plaintiffs are the owners and entitled to the possession of the premises is sufficient without deraigning their title: *Shannon v. Grindstaff*, 11 Wash. 536.

A complaint to quiet title by the cancellation of a sheriff's deed cannot be sustained as a claim of title by adverse possession on the simple allegation that plaintiffs entered into and had since held possession, where it is not alleged to have been adverse, open or notorious: *Carroll v. Hill Tract Improvement Co.*, 44 Wash. 569.

That the complaint in an action to quiet title does not show that the plaintiff was in possession or that the land was unoccupied is not ground for objection, if it

states facts entitling the plaintiff to any relief: *Dueber v. Wolfe*, 47 Wash. 634.

A complaint to quiet title is sufficient which shows that plaintiff has a valid interest in the land, without alleging the same specifically, or his right to the possession thereof: *Wagner v. Law*, 3 Wash. 500.

But a complaint to quiet title to lands purchased by plaintiff at execution sale, after an alleged fraudulent conveyance thereof by the judgment debtor, is insufficient which omits to allege that there was no other property of the judgment debtor at the time of conveyance out of which the creditor could satisfy his judgment: *Wagner v. Law*, supra; *Scott v. McNeal*, 5 Wash. 309, overruled in 154 U. S. 34.

An allegation in a complaint in ejectment that plaintiff's ancestor died seised and possessed of the property is a sufficient allegation of plaintiff's possession, since seisin once shown will be presumed to continue until proof of adverse possession in another: *Balch v. Smith*, 4 Wash. 497.

But the intervention of the probate court and an adjudication thereunder is essential to pass title of a decedent to his heirs: *Id.* See supra, § 785, and notes on this point.

A city need not allege ownership as to a street where it is alleged that it is a public street: *See Port Townsend v. Lewis*, 34 Wash. 413.

Plaintiff need not anticipate an issue as to a transaction presumed to be in good faith: *See Malloy v. Benway*, 34 Wash. 315.

A complaint averring that defendant has put a division fence upon plaintiff's land and withholds the portion inclosed by such fence, and thereby obstructs plaintiff in reaching other portions of his farm, states a cause of action: *Meeker v. Gilbert*, 3 W. T. 369.

In an action to recover possession of real estate, a complaint alleging possession in the defendant, and asking possessory relief, admits that such possession was adverse: *Northern Pac. R. Co. v. Spokane*, 45 Wash. 229.

In an action of ejectment the complaint states a sufficient cause of action when it alleges that the plaintiff is the owner of the land described therein, subject to the right of redemption of the defendant, setting forth that plaintiff became such owner by virtue of a sale under execution, describing the court, and alleging that the execution was for the purpose of satisfying a valid judgment entered in the cause, properly describing and setting forth a copy of the sheriff's certificate of sale, together with an allegation that the sale had been confirmed: *Belles v. Miller*, 10 Wash. 259.

The purchaser of premises sold under execution is not required, under this sec-

tion, to plead all the proceedings authorizing the sale: *Belles v. Miller*, supra.

One in possession of a mortgage cannot acquire an outstanding tax title and set up the same as against the title of the mortgagor: *Shepard v. Vincent*, 38 Wash. 493.

Necessity and requisites of replication or reply: See 1 Remington's Digest, p. 998, § 29 et seq.; *Raymond v. Morrison*, 9 Wash. 156; *Kline v. Stein*, 38 Wash. 124.

It is not error to allow plaintiff upon the trial to amend his complaint so as to show that the land in controversy is community property: *Owen v. St. Paul etc. Ry. Co.*, 12 Wash. 313.

As against a mortgagee lawfully in possession it is not error to refuse to allow an amendment setting up the statute of limitations as a defense to the mortgage: *See Peterson v. Philadelphia Mtg. etc. Co.*, 33 Wash. 464.

Where a plaintiff has brought an action of ejectment based upon his right of possession under a sheriff's sale, and during its pendency his title ripens into a better title by reason of the expiration of the time of redemption, it is not error to allow him to file a supplemental complaint demanding additional relief that he be adjudged the owner of the fee, as the nature of the action is not thereby changed so as to constitute a different cause of action: *Belles v. Miller*, 10 Wash. 260.

If the complaint is insufficient in ejectment under this statute, but states a case in equity, an order overruling a demurrer thereto will be sustained, although the parties and counsel may insist that the action is one at law: *Smith v. Wingard*, 3 W. T. 291.

DEFENSES: See 1 Remington's Digest, p. 994, §§ 13-18.

See notes to § 785, supra.

In an action of ejectment defendant may, under a general denial, introduce evidence of equitable estoppel, where the complaint fails to state the source of plaintiff's title: *Parker v. Dacres*, 1 Wash. 190; see *Isham v. Parker*, 3 Wash. 761.

Under the reform procedure an equitable estoppel may be pleaded as a defense to an action of ejectment: *Moore v. Brownfield*, 10 Wash. 439; *Riverside Land Co. v. Pietsch*, 35 Wash. 210.

If plaintiff in ejectment fails to require an election by defendant, when he has pleaded an affirmative defense inconsistent with his denials, the defect cannot be taken advantage of by way of an instruction to the effect that the burden of proof was upon the defendant to show want of title in plaintiff: *Lynch v. Richter*, 10 Wash. 486.

In ejectment, a decree in condemnation proceedings awarding the land to defendant for right of way is no defense when it appears that plaintiff was the owner of the land and had not been made a

party to the condemnation proceedings: *Owen v. St. Paul etc. Ry. Co.*, 12 Wash. 313.

In an action of ejectment for certain land which plaintiffs claimed belonged to them by reliction, a defense that the land was an island, public domain of the United States, upon which defendant had settled, although the facts setting up the same are combined in the answer with the defense of estoppel pleaded therein, will warrant the introduction of proofs establishing such facts, and where such proof has not been contradicted it is error to direct a verdict in plaintiffs' favor: *Moore v. Brownfield*, 10 Wash. 439.

Insufficiency of defendants' answer immaterial if plaintiff not entitled to recover: See *George v. Columbia R. Co.*, 38 Wash. 480.

As to defense of adverse possession, see *Phinney v. Campbell*, 16 Wash. 203; *Northern Pacific Railway Co. v. Ely*, 25 Wash. 384; *Olson v. Howard*, 38 Wash. 15.

Equitable defenses: See *Burmeister v. Howard*, 1 W. T. 207; *Ryan v. Fergusson*, 3 Wash. 356; *Peterson v. Phila. Mtg. Co.*, 33 Wash. 464.

EVIDENCE IN EJECTMENT: See 1 *Remington's Digest*, p. 998, §§ 32-40; *Id.*, p. 54, §§ 37-41.

Issues, proof and variance: See *Snyder v. Harding*, 34 Wash. 286; *Moore v. Brownfield*, 10 Wash. 439; *Riverside Land Co. v. Pietsch*, 35 Wash. 10; *Rogers v. Miller*, 13 Wash. 82; *Chrast v. O'Connor*, 41 Wash. 360; *Northern Counties Investment Trust Co. v. Enyard*, 24 Wash. 366; *Wasmund v. Harm*, 36 Wash. 170.

Presumptions and burden of proof: See *Lynch v. Richter*, 10 Wash. 486; *Bracka v. Fish*, 23 Wash. 646.

Admissibility—Identity and description of property: See *Phinney v. Campbell*, 16 Wash. 203; *Murray v. Briggs*, 29 Wash. 245; *Simmons v. Jamieson*, 32 Wash. 619.

Title and right to possession: See *Smith v. Taylor*, 2 Wash. 422; *Murray v. Briggs*, 29 Wash. 245; *Kline v. Stein*, 30 Wash. 189.

Weight and sufficiency of evidence: See 1 *Remington's Digest*, p. 1000, §§ 39, 40; *Id.*, p. 54, § 41; *Russell v. Gay*, 33 Wash. 83; *Horr v. Hollis*, 20 Wash. 424; *Wood v. Earles*, 39 Wash. 21; *Johnson v. Brown*, 33 Wash. 588; *George v. Columbia & Puget S. R. Co.*, 38 Wash. 480; *Erickson v. Murlin*, 39 Wash. 43; *Wasmund v. Harm*, 36 Wash. 170; *Lohse v. Burch*, 42 Wash. 156; *White v. McSorley*, 47 Wash. 18.

Evidence as to color of title: See 1 *Remington's Digest*, pp. 51-54.

Although defendant has been allowed to open and close the proofs, in an action of ejectment, without objection on plaintiff's part, plaintiff is not entitled to an instruction that the burden of proof is upon the defendant to show want of title

in plaintiff: *Lynch v. Richter*, 10 Wash. 486.

An equitable title in lands is sufficient to sustain a defense to the action of ejectment: *Ryan v. Ferguson*, 3 Wash. 356.

One in possession of public lands at the sufferance of the government has a superior title as against a mere intruder: *Roberts v. Lucas*, 1 W. T. 205.

Proof by plaintiff in ejectment showing title in her husband, that he was dead, that she was his wife, that he had no surviving heirs, and that there were no unpaid debts, is sufficient to establish title in herself: *McInerney v. Beck*, 10 Wash. 515.

A void tax deed under which the grantee has entered and held possession of the land in controversy constitutes such color of title as will sustain the bar of the statute of limitations provided for actions relating to tax deeds: *Ward v. Huggins*, 7 Wash. 617.

If the grantor has title, a quitclaim deed is as effective as a warranty deed in conveying it: *McInerney v. Beck*, 10 Wash. 515.

But a tax deed executed to a decedent's estate is void for want of a grantee: *Id.*

Adverse possession cannot be established by general understanding in the community that the property was reputed to belong to claimant or to his grantors, in the absence of testimony showing that claimant had ever exercised acts of ownership over it: *McInerney v. Beck*, 10 Wash. 516.

It is not necessary that there should be actual residence or actual inclosure: *Dennis v. Northern Pac. R. Co.*, 20 Wash. 320.

The possession must be known to the owner: *Bowers v. Ledgerwood*, 25 Wash. 14.

In an action to quiet title, testimony on the part of plaintiff tending to prove adverse possession is admissible under an allegation that "the plaintiff and its grantors have been in actual, open and notorious possession of the said property continuously since the twenty-eighth day of March, 1862, under color and claim of title; that neither defendant nor his ancestors or predecessors have been seised or possessed of the same for any part or parcel thereof within ten years prior to commencement of suit": *Bellingham B. L. Co. v. Dibble*, 4 Wash. 764.

The facts of this case held sufficient to show that possession adverse to plaintiff was established: *Id.*

If during the trial in ejectment it appears that at the time of the commencement of the action the claims of the parties to the land in dispute were pending in the interior department undetermined, the action should be dismissed at plaintiff's cost: *Hays v. Parker*, 2 W. T. 198.

Distinct and exclusive possession: See 1 Remington's Digest, p. 48, § 10½; Ferrell v. Lord, 43 Wash. 667; Lohse v. Burch, 42 Wash. 156; Wasmund v. Harm, 36 Wash. 170; Columbia etc. R. Co. v. Seattle, 33 Wash. 513; Northern Counties Investment Trust v. Enyard, 24 Wash. 366. But see Northern Pac. R. Co. v. Hasse, 28 Wash. 353; Miller v. O'Leary, 44 Wash. 172.

Duration and continuity of possession: See 1 Remington's Digest, p. 49, §§ 13-21; McAuliff v. Parker, 10 Wash. 141; Thornley v. Andrews, 40 Wash. 580; Port Townsend v. Lewis, 34 Wash. 413; Turner v. Ladd, 42 Wash. 274; George v. Columbia etc. R. Co., 38 Wash. 480; Columbia etc. R. Co. v. Seattle, 33 Wash. 513; Shell v. Poulson, 23 Wash. 535; Shepard v. Vincent, 38 Wash. 493; Johnson v. Brown, 33 Wash. 588; Noyes v. Douglas, 39 Wash. 314.

Hostile character of possession: See 1 Remington's Digest, p. 50, § 22 et seq.; Hesser v. Siepmann, 35 Wash. 14; Blake v. Shriver, 27 Wash. 593; Northern Pac. R. Co. v. Ely, 25 Wash. 384; Yesler's Estate v. Holmes, 39 Wash. 34; Thornely v. Andrews, 45 Wash. 413; Phinney v. Campbell, 16 Wash. 203; Bowers v. Ledgerwood, 25 Wash. 14; Wilcox v. Smith, 38 Wash. 585; Lechman v. Mills, 46 Wash. 624; Morgan v. Nor. Pac. R. Co., 50 Wash. 480.

ESTOPPEL.—One who in good faith induces another to settle on his land, believing and representing it to be government land, when in fact the title is in himself, is, nevertheless, estopped from asserting title against the person relying upon such representations, who has gone into possession thereof and improved it: Moore v. Brownfield, 10 Wash. 439.

The owners are estopped in ejectment from denying the validity of a power of attorney purporting to be executed by the owners to their son, when they fail to disavow the act when it becomes known to them, but allow the grantee thereunder to remain in possession for several years and making valuable improvements: Lynch v. Richter, 10 Wash. 486.

As to evidence necessary to establish defense of equitable estoppel: See Riverside Land Co. v. Pietsch, 35 Wash. 10.

Dismissal as to part of defendants not estoppel as to others where they could have been sued separately: See Johnston v. Gerry, 34 Wash. 524.

STATUTE OF LIMITATIONS.—In an action at law to recover possession of land sold for taxes, after the purchaser's title has, by the statute of limitations, become

indefeasible, plaintiff cannot invoke equity on the ground that he offered to pay all back taxes and redeem the land at the beginning of the controversy: Ward v. Huggins, 7 Wash. 617.

Adverse possession from August, 1878, to April, 1890, will not bar an action to quiet title, whether under the Law of 1863 imposing a twenty-year limitation, or under the Code of 1881, reducing the time from twenty to ten years: Baer v. Choir, 7 Wash. 631.

Section 760 of the Code of 1881, providing that no right accrued is affected by the provisions thereof, cannot be interpreted as preserving the right to bring actions for the possession of lands to a period of twenty years after the right of action accrues, as was provided prior to the enactment of the code when it reduced the limitation from twenty to ten years: Raymond v. Morrison, 9 Wash. 156.

If, before the statute bar has become complete, the statutory period is changed, and no mention is made of existing claims, it is generally held that the old law is not modified by the new, so as to give both statutes a proportional effect; but that the time past is effaced and the new law governs: Packscher v. Fuller, 6 Wash. 534, 537.

Instructions as to possession for statutory period: See Kline v. Stein, 30 Wash. 189.

Upon an issue as to the adverse possession of land along a boundary line, it is not an invasion of the province of the jury to instruct that one acquires no title by laying his fence by mistake if he makes no claim to the lands up to the fence, but only to the true boundary as it may be subsequently established: Stangair v. Roads, 46 Wash. 613.

As to adverse possession of railroad right of way: See 1 Remington's Digest, p. 246, §§ 4, 5; Northern Pac. R. Co. v. Ely, 25 Wash. 384; Northern Pac. R. Co. v. Hasse, 28 Wash. 353; Slaughter v. Northern Pac. R. Co., 39 Wash. 576; Northern Pac. R. Co. v. Spokane, 45 Wash. 229.

The statute does not run against a city: See West Seattle v. West Seattle Land etc. Co., 38 Wash. 359; Rapp v. Stratton, 41 Wash. 263.

Under this and the next section, the offer in evidence at the trial of a deed not pleaded, nor recorded when the suit was commenced, comes too late, and the court may refuse to allow an amendment; and judgment quieting title has the effect to vacate the deed recorded after action brought: Garvey v. Garvey, 52 Wash. 516.

§ 794. (5509.) Defendant must Plead Title—Judgment Against Landlord.

The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession

thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license or right to the possession shall be set forth with the certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend. In an action against a tenant, the judgment shall be conclusive against a landlord who has been made defendant in place of the tenant, to the same extent as if the action had been originally commenced against him. [L. '69, p. 129, § 491; Cd. '81, § 539; 2 H. C., § 532.]

See notes to last section.

See supra, § 792, substitution of landlord as defendant.

Cited in 9 Wash. 160, 447; 29 Wash. 115, 252; 52 Wash. 520.

See 1 Remington's Digest, p. 997, §§ 26-28; Id., p. 2425, § 26.

When plaintiff pleads title by virtue of a certificate of purchase from United States receiver, the defendant may plead by way of inducement a state of facts by reason of which the commissioner of the general land office caused such certificate to be canceled: *Hays v. Parker*, 2 W. T. 198.

Under the requirement that the defendant must plead the estate or license whereby he holds possession, a general denial will raise no issue; and where plaintiff in such action pleads and proves any legal right to the premises he thereby establishes a prima facie case: *Allen v. Higgins*, 9 Wash. 446.

An answer setting up title, praying that defendant's title be adjudicated, waives the objection that the plaintiffs are not in possession where they have not alleged possession in their complaint: *Bates v. Drake*, 28 Wash. 447.

The fact that defendants in a suit to quiet title by one out of possession plead their own title as required by this section, would not constitute a waiver of their right to object that plaintiff had mistaken her remedy, when they do not ask for any affirmative relief in their answer: *Povah v. Lee*, 29 Wash. 108.

An answer, in an action to quiet title, pleading title by adverse possession, is not demurrable for failure to allege "color of title," where it is averred that defendant held under a warranty deed from the owner: *Jones v. Herrick*, 35 Wash. 434. See, also, *Carkeek v. National Bank*, 16 Wash. 399.

§ 795. (5510.) Verdict.

The jury by their verdict shall find as follows:—

1. If the verdict be for the plaintiff, that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be;

2. If the verdict be for the defendant, that the plaintiff is not entitled to the possession of the property described in the complaint, or to such part thereof as the defendant defends for, and the estate in such property, or part thereof, or license, or right to the possession of either, established on the trial by the defendant, if any, in effect as the same is required to be pleaded. [L. '69, p. 129; Cd. '81, § 540; 2 H. C., § 533.]

Cited in 28 Wash. 667; 32 Wash. 622.
General verdict for defendant proper where he denies that he is in possession

and admits plaintiff is the owner: See *Simmons v. Jamieson*, 32 Wash. 619.

§ 796. (5511.) Damages—Limitation—Use of Improvements.

The plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and for any period that may elapse from such commencement to the time of giving a verdict therein, exclusive of the use of permanent im-

provements made by the defendant. [L. '69, p. 129, § 493; Cd. '81, § 541; 2 H. C., § 534.]

The last part of this section is omitted as included in the next section.

See supra, § 785, notes, who may maintain ejectment.

Cited in 2 Wash. 263; 10 Wash. 519, 665; 13 Wash. 222; 14 Wash. 479; 21 Wash. 389; 34 Wash. 314.

See 1 Remington's Digest, p. 1002, §§ 47-50; Sengfelder v. Hill, 21 Wash. 371; Ward v. Huggins, 16 Wash. 530; Merritt v. Corey, 22 Wash. 444.

A mere intruder, having had the use of property held by plaintiff under color of title, is liable to plaintiff for such use; the fact that plaintiff's title is defective

is no defense: Blumberg v. McNear, 1 W. T. 141; Meeker v. Gardella, 1 Wash. 139.

Although an action for the recovery of damages for the detention of premises may be in form one for trespass, rental value is provable as an element of damages, since, under § 296 and this section, such an action is treated as if it were one of contract: Columbia etc. Ry. Co. v. Histogenetic etc. Co., 14 Wash. 475.

Measure of damages: See Lownsdale v. Gray's Harbor Boom Co., 36 Wash. 198.

§ 797. Betterments—Counterclaim for—Taxes and Improvements.

In an action for the recovery of real property upon which permanent improvements have been made or general or special taxes or local assessments have been paid by a defendant, or those under whom he claims, holding in good faith under color or claim of title adversely to the claim of plaintiff, the value of such improvements and the amount of such taxes or assessments with interest thereon from date of payment must be allowed as a counterclaim to the defendant. [L. '03, p. 262, § 1; see historical references to last section.]

This and the two following sections have no retrospective effect: See Investment Co. v. Hambach, 37 Wash. 628; Barton v. Wickizer, 41 Wash. 293; Monk v. Duell, 41 Wash. 403. See further, Ball v. Clothier, 34 Wash. 299.

In ejectment the judgment as to improvements made and taxes paid by the defendant must conform to this section: Bullock v. Wallace, 47 Wash. 690.

§ 798. Pleading, Issue, and Trial on Counterclaim.

The counterclaim shall set forth the value of the land apart from the improvements, and the nature and value of the improvements apart from the land and the amount of said taxes and assessment so paid, and the date of payment. Issues shall be joined and tried as in other actions, and the value of the land and the amount of said taxes and assessments apart from the improvements, and the value of the improvements apart from the land must be specifically found by the verdict of the jury, report of the referee, or findings of the court as the case may be. [L. '03, p. 262, § 2.]

§ 799. Judgment on Counterclaim—Payment.

If the judgment be in favor of the plaintiff for the recovery of the realty, and of the defendant upon the counterclaim, the plaintiff shall be entitled to recover such damages as he may be found to have suffered through the withholding of the premises and waste committed thereupon by the defendant or those under whom he claims, but against this recovery shall be offset pro tanto the value of the permanent improvements and the amount of said taxes and assessments with interest found as above provided. Should the value of improvements or taxes or assessments with interest exceed the recovery for damages, the plaintiff, shall, within two months, pay to the defendant the difference between the two sums and upon proof, after notice, to the defendant, that this has been done, the court shall make an order declaring

that fact, and that title to the improvements is vested in him. Should the plaintiff fail to make such payment, the defendant may at any time within two months after the time limited for such payment to be made, pay to the plaintiff the value of the land apart from the improvements, and the amount of the damages awarded against him, and he thereupon shall be vested with title to the land, and, after notice to the plaintiff, the court shall make an order reciting the fact and adjudging title to be in him. Should neither party make the payment above provided, within the specified time, they shall be deemed to be tenants in common of the premises, including the improvements, each holding an interest proportionate to the value of his property determined in the manner specified in section 798; Provided, that the interest of the owner of the improvements shall be the difference between the value of the improvements and the amount of damages recovered against him by the plaintiff. [L. '03, p. 262, § 3.]

§ 800. (5512.) Verdict When Right of Possession has Expired.

If the right of the plaintiff to the possession of the property expire after the commencement of the action, and before the trial, the verdict shall be given according to the fact, and judgment shall be given only for the damages. [L. '69, p. 130, § 494; Cd. '81, § 542; 2 H. C., § 535.]

§ 801. (5513.) Order for Survey.

The court, or judge thereof, on motion, and after notice to the adverse party, may, for cause shown, grant an order allowing the party applying therefor to enter upon the property in controversy and make survey and admeasurement thereof for the purposes of the action. [L. '69, p. 130, § 495; Cd. '81, § 543; 2 H. C., § 536.]

§ 802. (5514.) Contents, Service, and Effect of Order.

The order shall describe the property, and a copy thereof shall be served upon the defendant, and thereupon the party may enter upon the property and make such survey and admeasurement; but if any unnecessary injury be done to the premises, he shall be liable therefor. [L. '69, p. 130, § 496; Cd. '81, § 544; 2 H. C., § 537.]

§ 803. (5515.) Alienation Pendente Lite.

An action for the recovery of the possession of real property against a person in possession cannot be prejudiced by any alienation made by such person either before or after the commencement of the action; but if such alienation be made after the commencement of the action, and the defendant do not satisfy the judgment recovered for damages for withholding the possession, such damages may be recovered by action against the purchaser. [L. '69, p. 130, § 497; Cd. '81, § 545; 2 H. C., § 538.]

Cited in 41 Wash. 613.

Lis pendens notice held not necessary

under this section: *May v. Sutherlin*, 41 Wash. 609. But see § 806, *infra*.

§ 804. (5516.) Mortgagee cannot Maintain Ejectment.

A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law. [L. '69, p. 130, § 498; Cd. '81, § 546; 2 H. C., § 539.]

See *infra*, § 1116 et seq., foreclosure of mortgages.

Cited in 19 Wash. 278; 40 Wash. 584; 51 Wash. 519.

Deed absolute on its face will be treated as a mortgage when it is clearly shown that such was the intention of the parties: *Miller v. Ausenig*, 2 W. T. 22. A mortgage of real estate is only a lien: *Parker v. Dacres*, 2 W. T. 439; *Stevens v. Ferry*, 48 Fed. 7, 9.

A mortgagee in possession cannot be dispossessed by an action in ejectment so

long as there is any question whether the mortgage debt has been paid in full: *Brundage v. Home etc. Assn.*, 11 Wash. 277. See *Norfor v. Busby*, 19 Wash. 450.

This section, repealing § 741, supra, in so far as it authorizes the appointment of a receiver for mortgaged property for insufficiency of the security, does not repeal by implication the other provisions for the appointment of a receiver to save waste: *Collins v. Gross*, 51 Wash. 516.

§ 805. (5517.) Actions Between Cotenants.

In an action by a tenant in common or a joint tenant of real property against his cotenant, the plaintiff must show, in addition to his evidence of right, that the defendant either denied the plaintiff's right or did some act amounting to such denial. [L. '69, p. 130, § 499; Cd. '81, § 547; 2 H. C., § 504.]

There is no sufficient evidence of a holding of real estate by a husband adversely to his divorced wife, so as to make the same separate instead of community property, where it appears that in his action for a divorce no mention was made of the property, the wife having at that time on file her community property claim to

the same, to the knowledge of the husband; since the decree of divorce left them tenants in common, and possession and receipt of rents and payment of taxes by him thereafter for ten years, without communication with his cotenant, will not constitute adverse possession: *Graves v. Graves*, 48 Wash. 664.

§ 806. (5518.*) Judgment, Conclusiveness of.

In an action to recover possession of real property, the judgment rendered therein shall be conclusive as to the estate in such property and the right of possession thereof, so far as the same is thereby determined, upon all persons claiming by, through, or under the party against whom the judgment is rendered, by title or interest passing after the commencement of the action, if the party in whose favor the judgment is rendered shall have filed a notice of the pendency of the action as required by section 243, supra. When service of the notice is made by publication, and judgment is given for failure to answer, at any time within two years from the entry thereof, the defendant or his successor in interest as to the whole or any part of the property, shall, upon application to the court or judge thereof, be entitled to an order, vacating the judgment and granting him a new trial, upon the payment of the costs of the action. [L. '09, p. 55, § 1. Cf. L. '69, p. 131, § 501; Cd. '81, § 549; 2 H. C., § 541.]

See supra, § 804.

Cited in 39 Wash. 374, 375; 41 Wash. 613; 44 Wash. 107.

Judgment in former action to quiet title, held res judicata: See *Lauman v. Hooper*, 37 Wash. 382.

This section has no application to a judgment in an action to set aside conveyances for fraud and subject land to

the lien of judgments: *Jordan v. Hutchinson*, 39 Wash. 373.

An action to have a lost corner established by survey is not an action for the recovery of real property, within the meaning of this section: *Strunz v. Hood*, 44 Wash. 99.

§ 807. (5519.) Possession not Affected by Vacating Judgment.

If the plaintiff has taken possession of the property before the judgment is set aside and a new trial granted, as provided in the preceding section, such possession shall not be thereby affected in any way; and if judgment be given for defendant in the new trial, he shall be entitled to restitution by

execution in the same manner as if he were plaintiff. [L. '69, p. 131, § 502; Cd. '81, § 550; 2 H. C., § 542.]

§ 808. (5520.) Conflicting Claimants Under Donation Law.

In an action at law for the recovery of the possession of real property, if either party claim the property as a donee of the United States, and under the act of Congress approved September twenty-seventh, eighteen hundred and fifty, commonly called the donation law, or the acts amendatory thereof, such party, from the date of his settlement thereon, as provided in said act, shall be deemed to have a legal estate in fee in such property, to continue upon condition that he perform the conditions required by such acts, which estate is unconditional and indefeasible after the performance of such conditions. In such action, if both plaintiff and defendant claim title to the same real property, by virtue of settlement, under such acts, such settlement and performance of the subsequent condition shall be *prima facie* presumed in favor of the party having or claiming under the elder certificate or patent, as the case may be, unless it appears upon the face of such certificate or patent that the same is absolutely void. [Cf. L. '69, p. 132, § 504; L. '77, p. 116, § 556; Cd. '81, § 551; 2 H. C., § 543.]

Cited in 10 Wash. 360; 25 Wash. 358.

Possession of donation claim under what purports to be a quitclaim deed, but executed before the expiration of necessary four years' residence required by the act, is possession under a contract prohibited by law, and gives no color of title: *Bullene v. Garrison*, 1 W. T. 587.

When selection, residence upon, and cultivation of land under the donation law are completed, the transaction is closed; nothing remains except for donee to furnish proof of these acts, and for government to furnish proof of title; these acts complied with, affect the transfer of

title, and not the patent; the latter only evidences title and relates back to the acts: *Brazee v. Schofield et al.*, 2 W. T. 209.

Title to land under donation law was acquired by compliance with the requirements of the act on the part of claimant; and the residence upon and cultivation of claim under that act by a man after having been legally divorced was that of a single man only; the divorced wife can make no claim for one-half: *Maynard et al. v. Hill et al.*, 2 W. T. 321; reaffirming *Maynard v. Valentine*, 2 W. T. 3; *Bullene v. Garrison*, 1 W. T. 587.

§ 809. (5521.) Conflicting Claims to Real Property Generally.

Any person in possession, by himself or his tenant, of real property, and any private or municipal corporation in possession, by itself or its tenant, of any real property, or when such real property is not in the actual possession of any one, any person, or private or municipal corporation, claiming title to any real property under a patent from the United States, or during his or its claim of title to such real property under a patent from the United States for such real estate, may maintain a civil action against any person or persons, corporations or associations, claiming an interest in said real property, or any part thereof, or any right thereto, adverse to him, them, or it, for the purpose of determining such claim, estate, or interest; and where several persons, or private or municipal corporations, are in possession of, or claim as aforesaid, separate parcels of real property, and an adverse interest is claimed, or claim made in or to any such parcels, by any other person, persons, corporations, or associations, arising out of a question, conveyance, statute, grant, or other matter common to all such parcels of real estate, all or any portion of such persons or corporations so in possession or claiming such parcel of real property may unite as plaintiffs in such suit to determine such adverse claim

or interest against all persons, corporations, or associations claiming such adverse interest. [L. '77, p. 116, § 556; Cd. '81, § 551; 2 H. C., § 544.]

This section is for the most part superseded by § 785, *supra*.

See § 785, and notes.

Cited in 10 Wash. 359; 12 Wash. 696; 20 Wash. 126; 21 Wash. 679; 24 Wash. 276; 26 Wash. 130; 29 Wash. 112, 203, 675; 32 Wash. 638; 52 Wash. 344.

Cloud caused by lis pendens notice filed in an action between other parties may be removed under this section: *King v. Brancheid*, 32 Wash. 634.

Quieting title to vacant and unoccupied lands: See 2 Remington's Digest, p. 2420,

§ 14; *Rohrer v. Snyder*, 29 Wash. 199; *Ferrell v. Lord*, 43 Wash. 667.

See, also, *Bird v. Winyer*, 24 Wash. 269; *Bigelow v. Brewer*, 29 Wash. 670.

Hostile assertion of title to a parcel of land, formerly an alley which had been vacated, by the former owner of abutting lots, constitutes a cloud on the title which may be quieted under this section: *Norton v. Gross*, 52 Wash. 341.

CHAPTER II.

FORCIBLE ENTRY AND DETAINER.

§ 810. (5525.) Forcible Entry, Defined.

Every person is guilty of a forcible entry who either,—

1. By breaking open windows, doors, or other parts of a house, or by fraud, intimidation, or stealth, or by any kind of violence or circumstances of terror, enters upon or into any real property; or

2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct the party in actual possession. [Cf. L. '90, p. 73, § 1; L. '91, p. 179, § 1; 2 H. C., § 547.]

See *infra*, § 2821 et seq., offense of forcible entry and detainer.

Cited in 6 Wash. 325; 8 Wash. 358, 535, 561; 28 Wash. 665; 31 Wash. 487; 539; 12 Wash. 685; 14 Wash. 395; 19 43 Wash. 369, 371; 45 Wash. 453.

§ 811. (5526.) Forcible Detainer, Defined.

Every person is guilty of a forcible detainer who either,—

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or

2. Who in the night-time, or during the absence of the occupant of any real property [unlawfully] enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who, for the five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property. [Cf. L. '90, p. 73, § 2; L. '91, p. 179, § 2; 2 H. C., § 548.]

See notes to § 810.

Cited in 33 Wash. 336; 42 Wash. 562, 563; 44 Wash. 590, 591; 45 Wash. 453.

A landlord cannot maintain the action against one who wrongfully enters upon lands occupied by a tenant, although the tenant refuses to prosecute and surrenders up his lease to the landlord: *Chezum v. Campbell*, 42 Wash. 560.

Under this section, a complaint in forcible entry and detainer is sufficient when it states that, while plaintiff was in actual possession of the premises, the defendants broke open the inclosures during plaintiff's absence, and by force and violence continue to occupy and refuse to surrender the same: *Gore v. Altice*, 33 Wash. 335.

§ 812. (5527.*) Unlawful Detainer, Defined.

A tenant of real property for a term less than life is guilty of unlawful detainer either,—

(1) When he holds over or continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him. In all cases where real property is leased for a specified term or period by express or implied contract, whether written or by parol, the tenancy shall be terminated without notice at the expiration of such specified term or period; or

(2) When he having leased real property for an indefinite time, with monthly or other periodic rent reserved continues in possession thereof, in person or by subtenant, after the end of any such month or period, in cases where the landlord, more than twenty days prior to the end of such month or period, shall have served notice (in manner in this act provided), requiring him to quit the premises at the expiration of such month or period.

(3) When he continues in possession in person or by subtenant after a default in the payment of any rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner hereafter in this act provided) in behalf of the person entitled to the rent upon the person owning the same, shall have remained uncomplied with for the period of three days after service thereof. Such notice may be served at any time after the rent becomes due; or

(4) When he continues in possession in person or by subtenant after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than one for the payment of rent, and after notice in writing requiring in the alternative the performance of such condition or covenant or the surrender of the property, served (in the manner provided in this act) upon him, and if there be a subtenant in actual possession of the premises, also upon such subtenant, shall remain uncomplied with for ten days after service thereof. Within ten days after the service of such notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform such condition or covenant and thereby save the lease from such forfeiture; or

(5) When he commits or permits waste upon the demised premises, or when he sets up or carries on therein or thereon any unlawful business, or when he erects, suffers, permits or maintains on or about said premises any nuisance, and remains in possession after service (in manner in this act provided) of three days notice to quit upon him.

(6) Any person who shall, without the permission of the owner and without having any color of title thereto, enter upon the land of another and who shall fail or refuse to remove therefrom after three days notice, in writing, to be served in the manner provided in this act. [L. '05, p. 173, § 1. Cf. L. '91, p. 180, § 3; 2 H. C., § 549; see L. '90, p. 73, § 3.]

See L. '69, p. 130, § 500, and Code of '81, § 548, query as to whether the same is repealed in toto.

Section 2056, Code of 1881, is omitted as superseded by this section.

See *infra*, § 834, unlawful detainer of certain lands defined.

See *infra*, § 8802 et seq., and notes, statutory provisions regarding leases and tenancies.

See *infra*, §§ 817, 823, 825, and notes, as to pleadings and practice in such actions.

Cited in 8 Wash. 359, 533; 21 Wash. 282; 22 Wash. 270; 24 Wash. 485; 25 Wash. 491, 665; 26 Wash. 565; 28 Wash. 76, 77; 29 Wash. 265; 30 Wash. 526; 33 Wash. 457, 458; 35 Wash. 673, 674; 44 Wash. 592, 593.

LANDLORD AND TENANT.—The relation of landlord and tenant is established where the owner of premises permits another to go into possession thereof for any determinate period: *McLennan v. Grant*, 8 Wash. 603.

Neither tenants in possession nor their assigns, under a contract of lease, can repudiate it because of uncertainty of description: *Id.*

Where a tenant enters into community lands under a lease executed by a husband alone, without knowledge of their community character, he cannot avoid performance on his part without first demanding a valid lease, and surrendering possession in case of refusal to give him one: *Isaacs v. Holland*, 4 Wash. 54; *Colcord v. Leddy*, 4 Wash. 791; *Hunt v. Stearns*, 5 Wash. 167; *Dietz v. Winehill*, 6 Wash. 109; *Tyron v. Davis*, 8 Wash. 106.

If a tenant remains in possession and pays rent, he cannot claim that acts of the landlord interfering with his enjoyment of the premises during occupancy amount to eviction: *Ralph v. Lomer*, 3 Wash. 401.

The lessees of tide lands from one in possession thereof cannot, in unlawful detainer, dispute the title of their landlord on the ground that, under the tide land act of 1890, page 431, they are "improvers," and, title never having been in the landlord, they are not bound or estopped by the terms of the lease: *Hall & P. F. Co. v. Wilbur*, 4 Wash. 644; followed in *Collins v. Hall*, 5 Wash. 367; *Columbia etc. Ry. Co. v. Braillard*, 5 Wash. 492; *Clancy v. Reis*, 5 Wash. 372; *Seattle Operating Co. v. Cavanaugh*, 6 Wash. 326.

The occupant of premises under a lease from a corporation cannot question the authority or power of the corporation to execute it: *Hall & P. F. Co. v. Wilbur*, *supra*.

In an action brought under § 785, *supra*, to recover real property, there being no evidence tending to show relationship of landlord and tenant between the parties, defendant is not entitled to a nonsuit on the ground that there is no proof of services of notice to quit: *Shannon v. Grindstaff*, 11 Wash. 536.

The summary action of unlawful detainer, authorized by this and the following sections, for the recovery of the possession of leased premises, cannot be maintained unless the conventional relation of

landlord and tenant exists between the parties: *Meyer v. Beyer*, 43 Wash. 368.

Holding over after termination of tenancy: See *Yesler's Estate v. Orth*, 24 Wash. 483.

As to defenses and grounds of opposition: See 2 *Remington's Digest*, p. 1692, § 104; *Carmack v. Drum*, 27 Wash. 382; *Morris v. Healy Lumber Co.*, 33 Wash. 451; *Bond v. Chapman*, 34 Wash. 606; *Teater v. King*, 35 Wash. 138; *Tipton v. Roberts*, 48 Wash. 391.

As to setoff and counterclaim: See 2 *Remington's Digest*, p. 1692, § 105; *Phillips v. Pt. Townsend Lodge*, 8 Wash. 529; *Owens v. Swanton*, 25 Wash. 112; *Ralph v. Lomer*, 3 Wash. 401.

ASSIGNMENT OF LEASE—SUBTENANTS: See 2 *Remington's Digest*, p. 1677, §§ 23-29.

There is a marked distinction between an assignment of a lease and a sublease. By an assignment the lessor parts with his whole interest in the estate, whereas by a sublease he grants an interest less than his own, reserving to himself a reversion: *Shannon v. Grindstaff*, 11 Wash. 536, 539.

The assignee of a lease may rid himself of liability thereon by a reassignment thereof to another, and without notice to the lessor: *Tibbals v. Island*, 10 Wash. 451.

The statute does not require the recording of assignments of leases: *Id.*

A married man may make a valid assignment of a lease without his wife's consent: *Id.*

If a lessee sublet the premises for a shorter term than that for which they are to him granted, or if he sublet a part only of the premises, the original lessor cannot maintain an action for rent against the sublessee: *Shannon v. Grindstaff*, 11 Wash. 536, 539.

The land, however, is not discharged by such subletting from the claims of the original lessor: *Id.*

Any conveyance by a lessee of his whole interest in demised premises, leaving no reversionary interest in himself, operates as an assignment regardless of the form of the instrument of transfer; and a purchaser entering under such conveyance becomes a tenant of the lessor, although he may have had no notice that his grantor had merely a leasehold interest: *McLennan v. Grant*, *supra*.

A subtenant cannot defeat the owner's right of possession by assertion of a contract between himself and the tenant, when the rights of the tenant have been terminated by the terms of the lease under which he held: *Shannon v. Grindstaff*, *supra*.

An assignment of a lease is ineffectual when made without consideration and without the knowledge or consent of the assignee: *Frye v. Hill*, 14 Wash. 83.

As to what constitutes breach of covenants and conditions as to assignments or subletting: See *Spencer v. Commercial Co.*, 30 Wash. 520; *Cuschner v. Westlake*, 43 Wash. 690.

NOTICE TO QUIT.—Under subdivision 3 of this section a notice to quit, signed by a joint owner of premises in his own name, and as one of the executors and as attorney in fact of the other executor of the estate, which holds the remaining interest, is sufficient: *Gilmore v. The H. W. Baker Co.*, 12 Wash. 468, 470.

The lessor does not waive his right to forfeit a lease for nonpayment of rent by collecting rents subsequent to notice to quit, which fell due prior to the one upon which forfeiture is claimed: *Carraher v. Bell*, 7 Wash. 81.

A tenant under a lease, reserving a monthly rental payable in advance on the first of the month, is entitled to the second day of the month to make payment, where the first day falls on Sunday: *Byers v. Rothschild*, 11 Wash. 296.

The act of March 7, 1891, imposing certain penalties upon any tenant who wrongfully continues in possession of premises after a violation on his part of the terms of a lease, is applicable to contracts entered into before its passage, although the penalties are increased by the later law, as it comes under the rule that a change in the remedy incident to existing contracts may be made without affecting rights thereunder: *Woodward v. Winehill*, 14 Wash. 394.

The fact that a receiver had been appointed in a suit brought to foreclose a mortgage against the lessee would not deprive the lessor of the right to obtain possession of the premises by a proceeding under the forcible entry and detainer act, even if the lessor had been made a party to the foreclosure suit: *Id.*

Notice to a receiver for the lessee of premises to surrender possession is unnecessary when notice was served upon the lessee prior to the appointment of the receiver: *Id.*

The appointment of a receiver in a foreclosure suit for the purpose of looking after the rights of the lessee of premises and his creditors does not authorize such receiver to represent the rights of the lessor: *Id.*

A lease of a water lot with the appurtenances, containing a provision that all docks, wharves, buildings and improve-

ments whatsoever which shall be erected by the lessee shall become the property of the lessor at the expiration of the lease, will cover a wharf erected by the lessee in connection with the lot, so that at the expiration of the lease the wharf and buildings will revert to the lessor, although the wharf extends beyond the limits of the lessor's lot and upon tide lands not owned by him: *Brown v. Carkeek*, 14 Wash. 443.

Under § 2056, Code of 1881, a notice informing the tenant that certain rent is due, and unless paid within ten days from date of service thereof the tenancy will be forfeited, as provided by statute, is sufficient, though not in the statutory language and not specifying the exact amount due: *Ralph v. Lomer*, 3 Wash. 401.

Necessity and sufficiency of notice to quit and demand of possession: See 2 Remington's Digest, p. 1693, §§ 106, 107; *Woodward v. Winehill*, 14 Wash. 394; *Stanford Land Co. v. Steidle*, 28 Wash. 72; *Mounts v. Goranson*, 29 Wash. 261; *Morris v. Healy Lumber Co.*, 33 Wash. 451; *Bond v. Chapman*, 34 Wash. 606; *Byrkett v. Gardner*, 35 Wash. 668; *McLennan v. Grant*, 8 Wash. 603.

As to time of service, and waiver of notice: See 2 Remington's Digest, p. 1694, §§ 108, 109; *Harris v. Halverson*, 23 Wash. 779; *Ferguson v. Hashi*, 25 Wash. 664; *McGinnis v. Genns*, 25 Wash. 490; *Mounts v. Goranson*, 29 Wash. 261; *Teater v. King*, 35 Wash. 138; *Yesler's Estate v. Orth*, 24 Wash. 483; *Lowman v. West*, 8 Wash. 355; *Mitchell v. Matheson*, 23 Wash. 723.

Parties—Who may maintain action: See 2 Remington's Digest, p. 1694, § 111; *Roderick v. Swanson*, 6 Wash. 222; *Capital Brewing Co. v. Crosbie*, 22 Wash. 269; *Harris v. Halverson*, 23 Wash. 779; *Schreiner v. Stanton*, 26 Wash. 563.

As to general construction and operation of this section, see *Columbia & P. S. R. Co. v. Moss*, 44 Wash. 589.

Under subdivision 6 of this section, the action may be maintained by a lessee entitled to possession against one who was in possession as a subtenant of such lessee from month to month, and who paid rent to such lessee; the word "owner" not being restricted to the record or title owner of the land: *Stahl Brewing & Malting Co. v. Van Buren*, 45 Wash. 451.

Under this section, an action of unlawful detainer for nonpayment of rent may be maintained against the original lessee where his subtenant was in possession and in default: *Agen v. Nelson*, 51 Wash. 431.

§ 813. (5528.) Tenancy upon Agricultural Lands—Effect of Holding Over.

In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expira-

tion of his term, without any demand or notice to quit by his landlord or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of his landlord or the successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year. [Cf. L. '90, p. 74, § 3; L. '91, p. 181, § 4; 2 H. C., § 550.]

Cited in 29 Wash. 266; 38 Wash. 672; 51 Wash. 433.

§ 814. (5529.*) Service of Notice.

Any notice provided for in this act shall be served either (1) by delivering a copy personally to the person entitled thereto; or (2) if he be absent from the premises unlawfully held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his place of residence; or (3) if the person to be notified be a tenant, or an unlawful holder of premises, and his place of residence is not known, or if a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated. Service upon a subtenant may be made in the same manner: Provided, that in cases where the tenant, or unlawful occupant, shall be conducting a hotel, inn, lodging-house, boarding-house, or shall be renting rooms while still retaining control of the premises as a whole, that the guest, lodgers, boarders or persons renting such rooms shall not be considered as subtenants within the meaning of this act, but all such persons may be served by affixing a copy of the notice to be served on two conspicuous places upon the premises unlawfully held; and such persons shall not be necessary parties defendant in an action to recover possession of said premises. Service of any notice provided for in this act may be had upon a corporation by delivering a copy thereof to any officer, agent or person having charge of the business of such corporation, at the premises unlawfully held, and in case no such officer, agent or person can be found upon such premises, then service may be had by affixing a copy of such notice in a conspicuous place upon said premises and by sending a copy through the mail addressed to such corporation at the place where said premises are situated. Proof of any service under this section may be made by the affidavit of the person making the same in like manner and with like effect as the proof of service of summons in civil actions. [L. '05, p. 174, § 2. Cf. L. '90, p. 75, § 4; L. '91, p. 181, § 5; 2 H. C., § 551.]

See note to § 812.

§ 815. (5530.) Venue.

The superior court of the county in which the property or some part of it is situated shall have jurisdiction of proceedings under this chapter. [L. '90, p. 75, § 5; L. '91, p. 182, § 6; 2 H. C., § 552.]

§ 816. (5531.) Parties Defendant—Judgment.

No person other than the tenant of the premises, and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in any proceeding under this chapter, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made party defendant; but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him. In case a person has become a subtenant of the premises in controversy after the service of any notice in this chapter provided for, the fact that such notice was not served on such subtenant shall constitute no defense to the action. All persons who enter the premises under the tenant, after the commencement of the action hereunder, shall be bound by the judgment the same as if they had been made parties to the action. [L. '90, p. 75, § 6; L. '91, p. 182, § 7; 2 H. C., § 553.]

See *supra*, § 189, parties to actions.

§ 817. (5532.) Complaint—When Summons must Issue.

The plaintiff in his complaint, which shall be in writing, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence, which may have accompanied the said forcible entry, or forcible or unlawful detainer, and claim damages therefor, or compensation for the occupation of the premises, or both; in case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. Upon filing the complaint a summons must be issued thereon as in other cases, returnable at a day designated therein, which shall not be less than six nor more than twelve days from its date, except in cases where the publication of summons is necessary, in which case the court or judge thereof may order that the summons be made returnable at such time as may be deemed proper, and the summons shall specify the return day so fixed. [Cf. L. '90, p. 76, § 7; L. '91, p. 182, § 8; 2 H. C., § 554.]

See *supra*, § 812, and notes, definition of unlawful detainer.

See *infra*, §§ 823, 825, and notes, pleadings and proof.

Cited in 27 Wash. 247; 31 Wash. 486; 33 Wash. 455; 44 Wash. 592, 593.

This chapter, providing a summary remedy for the possession of land wrongfully held, being a special act, the provisions therein that defendant shall answer on a designated day, not less than six nor more than twelve days from date of summons, is not affected by the practice act of 1893, *supra*, chapter 6, title 28, providing for twenty days in which to answer: *State v. Parker*, 12 Wash. 685; but a summons in forcible entry and detainer must be issued in the manner prescribed by the practice act at the time it is issued; the special act referring to the general law in this particular: *Id.*; *Security Savings & Trust Co. v. Hackett*, 27 Wash. 247; *McGrew v. Lamb*, 31 Wash. 485.

An action of unlawful detainer is a special and summary proceeding, in which the power of the court to render an affirmative judgment depends upon the existence

of certain statutory facts: *Lowman v. West*, 8 Wash. 355.

Conclusions of law have a less appropriate place in a complaint of this kind than anywhere under civil pleading: *Id.*

A complaint in unlawful detainer which alleges mere conclusions of law is not in compliance with the provisions of this section requiring plaintiff to "set forth the facts on which he seeks to recover": *Id.*

A complaint in unlawful detainer which sets out a written lease and acceptance of it by the lessees and entry under it is sufficient without alleging plaintiff's title: *Hall & P. F. Co. v. Wilbur*, 4 Wash. 644; followed in *Collins v. Hall*, 5 Wash. 367; *Clancy v. Reis*, 5 Wash. 372; *Columbia etc. Ry. Co. v. Braillard*, 5 Wash. 492; *Seattle Operating Co. v. Cavanaugh*, 6 Wash. 326.

Where it appears in the complaint that plaintiff, by an instrument in writing not witnessed or acknowledged, leased prem-

ises to defendant for at least one year and probably for a longer period, and that defendant went into possession; that plaintiff had the option of terminating the tenancy at the end of the year on one month's notice; that such notice was given, but that defendant refused to vacate, the complaint is sufficient without the formal averment that the premises are withheld by force: *Chambers v. Hoover*, 3 W. T. 107.

The fact that defendants by answer in effect dispute their landlord's title will not forfeit their right to notice to surrender the premises, nor excuse the plaintiff pleading and proving its service: *Lowman v. West*, 8 Wash. 355.

In an action of unlawful detainer a finding of the court, that the defendants became the successors and assignees of the original lessee "previous to the facts complained of in this action," is sufficient under an allegation in the complaint that the defendants "have at all times mentioned in this complaint after the first day of January, 1893, and for a long time previous thereto, been entitled to and subject to all the right, interest, title and conditions arising from said lease and contract as

such party of the second part thereto": *Gaffney v. Megrath*, 11 Wash. 456.

In an action for damages for the detention of property to which plaintiff claimed the right of possession under the terms of a lease, the complaint is sufficient when it gives a specific description of the property, showing the state and county where situated and alleging that the building on the property is the one covered by the lease set out in the complaint, possession of which had been taken under such lease, although the lease itself gives no indication of the county in which the property is located, other than the name of the town, of whose location the court would take judicial notice, and the file-mark for record of the lease, which shows that it had been recorded in a certain county: *Squires v. Zumwalt*, 12 Wash. 241.

See 2 Remington's Digest, pp. 1695, 1696, §§ 113-116.

As to the complaint, see further, *Chambers v. Hoover*, 3 W. T. 107; *Stanford Land Co. v. Steidle*, 28 Wash. 72; *Quandt v. Smith*, 28 Wash. 664; *State v. Pittenger*, 37 Wash. 384; *Harris v. Halverson*, 23 Wash. 779.

§ 818. (5533.) **Summons, Form and Service.**

The summons must state the names of the parties to the proceeding, the court in which the same is brought, the nature of the action, in concise terms, and the relief sought, and also the return day; and must notify the defendant to appear and answer within the time designated or that the relief sought will be taken against him. The summons must be directed to the defendant, and in case of summons by publication, be served at least five days before the return day designated therein. The summons must be served and returned in the same manner as summons in other actions is served and returned. Upon the return of any summons issued under this chapter, when the same has not for any reason been served, or has not been served in time, the plaintiff may have a new summons issued the same as if no previous summons had been issued. [Cf. L. '90, p. 76, § 8; L. '91, p. 183, § 9; 2 H. C., § 555.]

See notes to § 812.

Cited in 27 Wash. 249.

§ 819. (5534.) **Writ of Restitution.**

The plaintiff, at the time of commencing an action of forcible entry or forcible detainer or unlawful detainer, or at any time afterwards, may apply to the judge of the court in which the action is pending for a writ of restitution restoring to the plaintiff the property in the complaint described, and the judge shall order a writ of restitution to issue. The writ shall be issued by the clerk of the superior court in which the action is pending, and be returnable in twenty days after its date; but before any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond in such a sum as the court or judge may order, with two or more sureties, to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the writ of

restitution having been issued, should the same be wrongfully sued out. [Cf. L. '90, p. 77, § 9; L. '91, p. 183, § 10; 2 H. C., § 556.]

Cited in 18 Wash. 235; 19 Wash. 337; 49 Wash. 205.

The provisions of this section authorizing restitution of realty on giving bond is not unconstitutional: See *State ex rel. German Saving & Loan Society v. Baker*, 19 Wash. 336; *Morris v. Healy Lumber Co.*, 33 Wash. 451.

§ 820. (5535.*) Service of Writ—Bond.

The sheriff shall, upon receiving the writ of restitution, forthwith serve a copy thereof upon the defendant, his agent or attorney, or a person in possession of the premises, and shall not execute the same for three days thereafter, within which time the defendant, or those in possession of the premises, may execute to the plaintiff a bond to be filed with and approved by the clerk of the court in such sum as may be fixed by the judge, with two or more sureties to be approved by the clerk of said court, conditioned that they will pay to the plaintiff such sum as the plaintiff may recover for the use and occupation of the said premises, or any rent found due, together with all damages the plaintiff may sustain by reason of the defendant occupying or keeping possession of said premises, and also all the costs of the action. The plaintiff, his agent or attorneys, shall have notice of the time and place where the court or judge thereof shall fix the amount of the defendant's bond, and shall have notice and a reasonable opportunity to examine into the qualification and sufficiency of the sureties upon said bond before said bond shall be approved by the clerk. The writ may be served by the sheriff, in the event he shall be unable to find the defendant, an agent or attorney, or a person in possession of the demised premises, by affixing a copy of said writ in a conspicuous place upon the demised premises. [L. '05, p. 175, § 3. Cf. L. '90, p. 77, § 10; L. '91, p. 183, § 11; 2 H. C., § 551.]

Cited in 18 Wash. 235; 44 Wash. 591; 45 Wash. 458.

If, in order to stay a writ of restitution, defendant gives bond with sureties, conditioned to pay plaintiff such sum of money as he may recover for use and occupation of the premises, and all damages plaintiff may sustain by reason thereof, and all costs, the sureties are not discharged by

reason of a stipulation between their principal and the obligee, providing that trial be deferred pending appeal of another action involving the same questions, and should be determined by the decision rendered on such appeal: *Hall & P. F. Co. v. Schmidt*, 7 Wash. 606. See *Lowman v. West*, 18 Wash. 233.

§ 821. (5536.*) Modification of Amount of Bond.

The plaintiff or defendant at any time, upon two days' notice to the adverse party, may apply to the court or any judge thereof for an order raising or lowering the amount of any bond in this act provided for. Either party may, upon like notice, apply to the court or any judge thereof for an order requiring additional or other surety or sureties upon any such bond. Upon the hearing or [of] any application made under the provisions of this section evidence may be given. The judge after hearing any such application shall make such an order as shall be just in the premises. The bondsmen may be required to be present at such hearing if so required in the notice thereof, and shall answer under oath all questions that may be asked them touching their qualifications as bondsmen, and in the event the bondsmen shall fail or refuse to appear at such hearing and so answer such questions the bond shall be stricken. In the event the court shall order a new or additional bond to be furnished by defendant, and the same shall not be given within twenty-four hours, the court shall order the sheriff to forthwith execute the writ. In the

event the defendant shall file a second or additional bond and it shall also be found insufficient after hearing, as above provided, the right to retain the premises by bond shall be lost and the sheriff shall forthwith put the plaintiff in possession of the premises. [L. '05, p. 176, § 4. Cf. L. '90, p. 78, § 11; L. '91, p. 184, § 12; 2 H. C., § 558.]

See notes to § 812.

Cited in 18 Wash. 238; 25 Wash. 116. See *Lowman v. West*, 18 Wash. 233.

§ 822. (5537.) Judgment by Default.

If at the time appointed in the summons the defendant do not appear and defend, the court must render judgment in favor of the plaintiff as prayed for in the complaint. [Cf. L. '90, p. 78, § 13; L. '91, p. 184, § 13; 2 H. C., § 559.]

§ 823. (5538.) Pleading by Defendant.

On or before the day fixed for his appearance the defendant may appear and answer or demur. [L. '90, p. 78, § 14; L. '91, p. 184, § 14; 2 H. C., § 560.]

See *supra*, §§ 812, 817, and notes, definition of unlawful detainer.

See *infra*, § 834, and notes, proof.

Cited in 27 Wash. 385.

See 1 Remington's Digest, p. 1260, § 7;
2 *Id.*, p. 1696, § 116.

The defendant cannot in unlawful detainer set up a counterclaim for damages for loss of business, depreciation in value of furniture, and for repairs, alleged as the result of the landlord's acts: *Ralph v. Lomer*, 3 Wash. 401.

An answer in unlawful detainer setting up a counterclaim on account of repairs made by defendant which it was the duty of the landlord to make is demurrable since counterclaims and offsets are not available in such proceedings: *Phillips v. Port Townsend Lodge*, 8 Wash. 529.

An answer alleging that it was conceded by the parties that the lease was void, that defendants surrendered the premises to plaintiff, that a new agreement was made for occupancy at a fair and reasonable rental, and that defendant re-entered thereunder, is sufficient, against a demurrer, but the frivolous, redundant and uncertain matter therein can only be reached by motions: *Isaacs v. Holland*, 4 Wash. 54. But where the answer of defendant in such case fails to allege (when community lease void for want of wife's signature) a demand for a lease executed by both spouses, it is insufficient: *Tryon v. Davis*, 8 Wash. 106.

It seems that defendant cannot interpose an answer alleging that in drawing up a lease certain terms were omitted by mutual mistake, and asking a reformation of the lease to express the contract of the parties: *Phillips v. Port Townsend Lodge*, 8 Wash. 529.

An answer alleging that defendant had been in quiet possession of the premises for more than one year preceding the filing of complaint, but which fails to allege that defendant's estate in the premises had not ended, held, insufficient under the provisions of § 1836 of the Code of 1881, Justice Practice Act: *Bellingham Bay etc. Ry. Co. v. Strand*, 1 Wash. 133.

In an action for breach of covenant of a lease against making alterations without lessor's consent, it is error to strike from the answer allegations that plaintiff had full knowledge of the alteration when made, and thereafter received accruing rentals without objection to the alterations: *Pettygrove v. Rothchild*, 2 Wash. 6.

A plea of tender for rent due by defendant is insufficient, under § 548, Code of 1881, unless it alleges that defendant offered to pay interest on the rent in arrears, with interest and costs of action: *Ralph v. Lomer*, 3 Wash. 401.

In unlawful detainer, when defendant sets up a defense that he had parted with his interest in the premises, the refusal of the court to make a distinct finding on that issue is not error, when such issue is determined by a finding that the defendants "are now in possession of the said premises": *Gaffney v. Megrath*, 11 Wash. 456.

In an action of unlawful detainer, the admission, by defendant, in his answer, of the issuance of a United States patent to plaintiff's grantor, but pleading that such patent was null and void, is not a plea of confession and avoidance: *Roberts v. Center*, 26 Wash. 435.

§ 824. (5539.) Trial by Jury.

Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending, and in all cases actions under this chapter shall take precedence of all other civil actions. [Cf. L. '90, p. 78, § 15; L. '91, p. 184, § 15; 2 H. C., § 561.]

See supra, § 316, waiver of trial by jury.

Cited in 19 Wash. 340.

§ 825. (5540.) Proof Required by Plaintiff.

On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to a forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry; or in addition to a forcible detainer complained of, that he was entitled to the possession at the time of the forcible detainer. [Cf. L. '90, p. 78, § 16; L. '91, p. 184, § 16; 2 H. C., § 562.]

See supra, § 812, and notes, definition of unlawful detainer.

See supra, § 817, complaint and summons.

See supra, § 823, pleadings.

Cited in 33 Wash. 337.

See 2 Remington's Digest, p. 1696, § 118; 1 Id., p. 1261, §§ 9-11.

In an action to recover rent plaintiff's allegation of possession is prima facie established by the introduction of the lease, and the burden of alleging and proving his want of possession at the time of its execution is upon defendant: *Collins v. Hall*, 5 Wash. 366. See, also, *Hall & P. F. Co. v. Wilbur*, 4 Wash. 644; *Clancy v. Williams*, 5 Wash. 492; *Clancy v. Reis*, 5 Wash. 371.

If parties to an action for rent rely on an express contract, evidence as to the reasonable rental value of the premises is inadmissible: *Gilmore v. The H. W. Baker Co.*, 12 Wash. 468, 473.

Where plaintiff proved his quiet and lawful possession for a long time prior to and up to the time of the alleged forcible entry, and defendant offered no evidence of right to possession, and none in contravention of plaintiff's proof, while its answer admitted that it was in possession of the premises at the commencement of the action, a verdict in favor of plaintiff will be sustained: *Bellingham Bay etc. Ry. Co. v. Strand*, 1 Wash. 133.

If no question of title is involved, it is not error to exclude evidence that defendant had paid taxes on the premises in controversy for two years last past, no other proof of possession or right thereto being offered: *Id.*

Evidence "that during the two years last past, defendant had been in the actual, open and notorious possession of large portions of the said tract of several hundred acres of land which originally included the land in controversy": Held, irrelevant to the issue: *Id.*; *Gore v. Altice*, 33 Wash. 335.

Proof required on behalf of plaintiff:

See *Schreiner v. Stanton*, 26 Wash. 563.

The title to property cannot be tried in an action of forcible entry and detainer: *Meyer v. Beyer*, 43 Wash. 368.

Allegation of ownership is not supported by the admission of deeds where deed to plaintiff's grantor was in fact a mortgage: See *McGrew v. Lamb*, 31 Wash. 485.

Weight and sufficiency of the evidence: See 2 Remington's Digest, p. 1696, § 118; *Seattle Operating Co. v. Cavanaugh*, 6 Wash. 325; *Teater v. King*, 35 Wash. 138; *Stahl Brewing and Malting Co. v. Van Buren*, 45 Wash. 151.

Admissibility of evidence: See 2 Remington's Digest, p. 1696, § 117; *Harris v. Halverson*, 23 Wash. 779; *Owens v. Stanton*, 25 Wash. 112; *Roberts v. Center*, 26 Wash. 435; *McMillan v. Walker*, 48 Wash. 342.

In an action of unlawful detainer against the assignee of a tenant, it is error to admit proof that plaintiff made no claim to the premises while defendants were in possession prior to the expiration of the term: *McLennan v. Grant*, 8 Wash. 603.

If both parties requested the court to order the jury to view the premises, and the court, on refusing, states that he cannot prevent them from viewing the premises if they so desire, to which no exception is taken, error cannot be urged on the ground that two jurors viewing the premises of their own accord have an advantage over the others: *Gilmore v. The H. W. Baker Co.*, 12 Wash. 468.

An instruction that subtenants were not entitled to notice to quit, held harmless error, when the admissions of defendants show that a written demand for possession was served upon the husband at the house

of defendants on the premises, which they refused to surrender unless paid a certain sum for so doing, although served upon the husband alone, which notice was not signed and did not fully describe the premises: *Shannon v. Grindstaff*, 11 Wash. 530.

An instruction to find for plaintiff if the notice to quit served was such "as the law required, as the court has indicated to you," and was not complied with, will not be held reversible error, if the notice was in fact legal: *Gilmore v. The H. W. Baker Co.*, 12 Wash. 474.

Under the liberal provisions relating to the construction of pleadings, § 285, *supra*, a complaint in a particular case, held sufficient without a formal averment to the

effect that defendant withholds the premises by force: *Chambers v. Hoover*, 3 W. T. 107.

Plaintiff cannot by amendment change the character of his action from one in ejectment to one of unlawful detainer: *Roderick v. Swanson*, 6 Wash. 222, 224.

In an action for use and occupation the measure of damages where defendant holds under color of title adverse to plaintiff is the fair rental value of the premises, together with interest thereon to the time of trial, and it is error to admit evidence of the highest market value of the produce of a farm during the year for that purpose: *Meeker v. Gardella*, 1 Wash. 139.

§ 826. (5541.) Amendment of Complaint—Continuance.

When upon the trial of any proceeding under this chapter it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, in respect of the premises described in the complaint, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs; such amendment must be made without any imposition of terms. No continuance shall be permitted on account of such amendment unless the defendant shows to the satisfaction of the court good cause therefor. [Cf. L. '90, p. 78, § 17; L. '91, p. 185, § 17; 2 H. C., § 653.]

See *infra*, § 828, amendments.

§ 827. (5542.) Verdict and Judgment.

If upon the trial the verdict of the jury, or if the case be tried without a jury the finding of the court, be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of a lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease, agreement, or tenancy. The jury, or the court if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer, or unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due. When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant or any subtenant, or any mortgagee of the term or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied and the tenant restored to his estate; but if payment, as herein provided, be not made within five days, the judgment may be enforced for its

full amount and for the possession of the premises. In all other cases the judgment may be enforced immediately. If the writ of restitution shall have been executed prior to judgment, no further writ or execution for the premises shall be required. [Cf. L. '90, p. 79, § 18; L. '91, p. 185, § 18; 2 H. C., § 564.]

Cited in 11 Wash. 459; 19 Wash. 564; 28 Wash. 667; 34 Wash. 609; 45 Wash. 430.

See 2 Remington's Digest, p. 1696, §§ 119-121.

The verdict of a jury for defendant will not be disturbed where the relation of landlord and tenant is not clearly established by the evidence: *Seattle Operating Co. v. Cavanaugh*, 6 Wash. 325.

A mere intruder, having had the use of property held by plaintiff under color of title, is liable to plaintiff for such use. The fact that plaintiff's title is defective is no defense: *Blumberg v. McNear*, 1 W. T. 141.

In unlawful detainer the plaintiff is not entitled to double damages, unless he specifically claims the same in his complaint: *Gaffney v. Megrath*, 11 Wash. 456. If the prayer of the complaint in unlawful detainer is for the stipulated rent due it is error to give judgment for twice that sum; the statute authorizing such judgment is directory merely: *Hall & P. F. Co. v. Wilbur*, 4 Wash. 644.

As to double damages, see, also, *Hart v. Pratt*, 19 Wash. 560; *Quandt v. Smith*, 28 Wash. 664; *Bond v. Chapman*, 34 Wash. 606; *Hinckley v. Casey*, 45 Wash. 430.

The fact that judgment in an action brought under the forcible entry and detainer act declares a forfeiture of the lease is harmless error, since the lessee could, under that act, by performance of the conditions of the judgment, be restored to his rights under the lease, whether or not a forfeiture had been adjudged: *Woodward v. Winehill*, 14 Wash. 394.

Sufficiency of findings in unlawful detainer: See 2 Remington's Digest, p. 1697, § 121; *Mitchell v. Matheson*, 23 Wash. 723; *Teater v. King*, 41 Wash. 134; *Fowler v. Ohuick*, 45 Wash. 44; *Brown Nat. Bank v. So. Ins. Co.*, 22 Wash. 379.

Damages and amount of recovery: See 2 Remington's Digest, p. 1696, § 119; *Cutler v. Co-operative Brotherhood*, 31 Wash. 680; *State v. Pittenger*, 37 Wash. 384; *Stevens v. Jones*, 40 Wash. 484.

§ 828. (5543.) Amendments Allowed, When.

Amendments may be allowed by the court at any time before final judgment, upon such terms as to the court may appear just, in the same cases and manner and to the same extent as in civil actions. [Cf. L. '90, p. 80, § 20; L. '91, p. 186, § 19; 2 H. C., § 565.]

See supra, § 826, amendment of complaint.

§ 829. (5544.) Practice—General Provisions Applicable.

Except as otherwise provided in this chapter, the provisions of the laws of this state with reference to practice in civil actions are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter; and the provisions of such laws relative to new trials and appeals, except so far as they are inconsistent with the provisions of this chapter, shall be held to apply to the proceedings mentioned in this chapter. [Cf. L. '90, p. 80; § 21; L. '91, p. 186, § 20; 2 H. C., § 566.]

Cited in 27 Wash. 219.

§ 830. (5545.) Forfeiture, Relief Against.

The court may relieve a tenant against a forfeiture of a lease and restore him to his former estate, as in other cases provided by law, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court, as provided in this chapter. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the

applicant. Notice of the application, with a copy of the petition, must be served on the plaintiff in the judgment, who may appear and contest the application. In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions of covenants stipulated, so far as the same is practicable, be first made. [Cf. L. '90, p. 80, § 22; L. '91, p. 186, § 21; 2 H. C., § 567.]

§ 831. (5546.) Appeal—Bond.

If either party feels aggrieved by the judgment he may appeal to the supreme court, as in other civil actions: Provided, that if the defendant appealing desires a stay of proceedings pending such appeal, he shall execute and file a bond, with two or more sufficient sureties to be approved by the judge, conditioned to abide the order of the court on such appeal, and to pay all rents and other damages justly accruing to the plaintiff during the pendency of the appeal. [Cf. L. '90, p. 80, § 23; L. '91, p. 187, § 22; 2 H. C., § 568.]

Cited in 14 Wash. 53; 17 Wash. 99; 21 Wash. 582.

§ 832. (5547.) Stay of Proceedings Pending Appeal.

When the defendant shall appeal, and shall file a bond as provided in the preceding section, all further proceedings in the case shall be stayed until the determination of said appeal, and the same has been remanded to the superior court for further proceedings therein. [Cf. L. '90, p. 80, § 24; L. '91, p. 187, § 23; 2 H. C., § 569.]

The bond given by defendants in an action of unlawful detainer, for the purpose of staying the execution of a provisional writ of restitution against them, is not superseded and rendered nugatory

by a subsequent supersedeas bond given by defendants on appeal from a judgment against them: *Lowman v. West*, 18 Wash. 233.

§ 833. (5548.) Appeal Suspends Writ of Restitution.

If a writ of restitution has been issued previous to the taking of an appeal by the defendant, and said defendant shall execute and file a bond as provided in this chapter, the clerk of the court, under the direction of the judge, shall forthwith give the appellant a certificate of the allowance of such appeal; and upon the service of such certificate upon the officer having such writ of restitution the said officer shall forthwith cease all further proceedings by virtue of such writ; and if such writ has been completely executed, the defendant shall be restored to the possession of the premises, and shall remain in possession thereof until the appeal is determined. [Cf. L. '90, p. 81, § 25; L. '91, p. 187, § 24; 2 H. C., § 570.]

By § 25 of the act of March 3, 1891, all previous acts on the subject except criminal statutes are repealed, but express provision is made saving vested rights and guarding abatement of actions commenced under previous acts.

Cited in 21 Wash. 582.

§ 834. (5549.) Unlawful Detainer of Certain Lands—What Constitutes.

Any person who shall, without the permission of the owner and without having any color of title thereto, enter upon the lands of another, and shall refuse to remove therefrom after three days' notice, shall be deemed guilty of

unlawful detainer and may be removed from such lands. [L. '91, p. 212, § 1; 2 H. C., § 571.]

See *supra*, § 812, unlawful detainer defined.

Cited in 5 Wash 790; 26 Wash. 436; 31 Wash. 487; 44 Wash. 591, 593, 48 Wash. 343.

§ 835. (5550.) Complaint and Answer.

The complaint in all cases under the provisions of the last section shall be upon oath, and then [there] shall be embodied therein or amended [appended] thereto an abstract of the plaintiff's title, and the defendant shall, in his answer, state whether he makes any claim of title to the lands described in the complaint, and if he makes no claim to the legal title, but does claim a right to the possession of such lands, he shall state upon what grounds he claims a right to such possession. [L. '91, p. 212, § 2; 2 H. C., § 572.]

Cited in 44 Wash. 592.

In an action under §§ 834-836, a reply is unnecessary to affirmative matter in the answer: *Fife v. Olson*, 5 Wash. 789. And where the stipulated facts upon which the cause is tried admit title in plaintiff, his failure to reply to defendant's allegations of title and color of title is immaterial: *Id.*

A complaint alleging entrance without

right and by force is insufficient where it fails to embody an abstract of plaintiff's title: See *McGrew v. Lamb*, 31 Wash. 485.

In an action for unlawful detainer, under §§ 834-836, where plaintiff's title is in issue, plaintiff should be nonsuited where his only evidence is a sheriff's deed, and a certified abstract of title: *Roberts v. Center*, 26 Wash. 435.

§ 836. (5551.) Proof Required by Plaintiff—Trial.

It shall not be necessary for the plaintiff, in proceedings under sections 834-837, to allege or prove that the said lands were, at any time, actually occupied prior to the defendant's entry thereupon, but it shall be sufficient to allege that he is the legal owner and entitled to the immediate possession thereof: Provided, that if the defendant shall, by his answer, deny such ownership, and shall state facts showing that he has a lawful claim to the possession thereof, the cause shall thereupon be entered for trial upon the docket of the court in all respects as if the action were brought under the provisions of chapter XLVI of the code of eighteen hundred and eighty-one [chapter I, of this title]. [L. '91, p. 212, § 3; 2 H. C., § 573.]

Cited in 44 Wash. 592.

§ 837. (5552.) Proof—Parties Defendant—Trial of Separate Issues.

All persons in actual possession of any portion of the several subdivisions of any section of land, according to the government surveys thereof, may be made defendants in one action: Provided, that they may, in their discretion, make separate answers to the complaint, and if separate issues are joined thereupon, the same shall nevertheless be tried as one action, but the verdict, if tried by jury, shall find separately upon the issues so joined, and judgment shall be rendered according thereto. [L. '91, p. 213, § 4; 2 H. C., § 574.]

CHAPTER III.

PARTITION.

§ 838. (5557.) Who may Bring Actions for.

When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be maintained by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners. [L. '69, p. 133, § 505; Cd. '81, § 552; 2 H. C., § 577.]

See *infra*, § 1579, partition of estates of decedents.

Cited in 7 Wash. 36.

See 2 Remington's Digest, p. 2208, § 5 et seq.

A tenant in common, under this chapter, against cotenant in possession under adverse claim of title may maintain a suit for partition, without the institution of a prior action at law for the trial of title: *Hill v. Young*, 7 Wash. 33; affirmed in *Chapman v. Allen*, 11 Wash. 627, 630.

Where it was within the contemplation of the joint owners of land that the lots would be sold within a reasonable time and plaintiffs thereby receive reimbursement for moneys advanced, and there having been no sales of the lots for a long time, plaintiffs were entitled to partition thereof, and also to a lien against defendant's share of the land after partition for the purpose of reimbursement of advances made: *Griggs v. Gower*, 29 Wash. 80.

A parol partition, consummated by possession and dominion in severalty, confirmed by long-continued acquiescence and changes of title, will not be disturbed in equity: *Brazee v. Schofield*, 2 W. T. 209; affirmed in *Brazee v. Schofield*, 124 U. S. 495.

When two parties enter into a written agreement for the acquisition of lands, one of the parties furnishing the purchase money and taking title in his name, the lands to be sold and the profits to be equally divided, partition thereof cannot be maintained unless the party holding the legal title had so acted toward the other or to the property as to show his abandonment of the contract or a denial of the rights of the other party in relation thereto: *Houghton v. Callahan*, 3 Wash. 158.

An action for the partition of real estate cannot be maintained where it appears that neither plaintiff nor his ancestor, predecessor, or grantor was seised or possessed of the premises at any time within ten years prior to the commencement of the action: *Hyde v. Britton*, 41 Wash. 277.

Certain facts held not to show laches, in bringing suit for partition: *McGowan v. Smith*, 22 Wash. 625.

An action by a divorced wife for partition of community property, in possession of the husband as a tenant in common, is not barred by laches, where the husband had collected rents and paid taxes for thirteen years, and there had been no accounting and no improvements made since the divorce: *Graves v. Graves*, 48 Wash. 664.

A cotenant who has in good faith, under the belief that she was the owner of the entire title, placed improvements on the land, is entitled on partition to be allotted the land upon which such improvements were placed, if capable of such partition without any diminution of the proportionate shares of the other cotenants, and in case of sale, the value of the improvements in such case should be awarded out of the proceeds to the cotenant making them: *Leake v. Hayes*, 13 Wash. 213.

A tenant in common who enters upon the common estate which yields no profits, and so improves it as to make it productive, is entitled to all the profits produced by means of such improvements, and no allowance should be made against him for the increase in value of the land occasioned by such improvements: *Id.*

A tenant in common in exclusive possession cannot be rendered liable for use and occupation, or rents and profits, until after demand therefor by his cotenant: *Id.*

A tenant in common in possession of property under a claim of ownership is entitled on partition to recover such portion of the taxes paid by her as inured to the benefit of the other owners: *Id.*, citing *McInerney v. Beck*, 10 Wash. 515.

Husband when not necessary party plaintiff: *Sawyer v. Vermont L. & T. Co.*, 41 Wash. 524.

Improvements placed by a husband upon property of which his wife was a cotenant, under such circumstances that, if made by her, she would be entitled upon

partition to an allowance therefor, inure to her benefit: *Leake v. Hayes*, supra.

The rule in ejectment, under § 796, supra, limiting the recovery for improvements made by one in possession of the

land of another to the value of the rents and profits accruing during such occupancy, does not apply to actions for partition: *Id.*

§ 839. (5558.) All Known Interests must be Stated in Complaint.

The interest of all persons in the property shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint. [L. '69, p. 133, § 506; Cd. '81, § 553; 2 H. C., § 578.]

Cited in 10 Wash. 640; 11 Wash. 630.

Where plaintiff alleges the extent of his interest in the property, and that of defendants as he understands it, and shows that the parties are tenants in common, he states every fact required to give the court jurisdiction: *Kromer v. Friday*, 10 Wash. 621.

In suit for partition by an alleged tenant in common, who has been excluded from possession, under an adverse claim of title, his complaint is insufficient when he alleges the legal title in defendant and fails to set forth any facts tending to

show an equitable title in himself: *Chapman v. Allen*, 11 Wash. 627.

If an action is for the sole purpose of procuring a partition, relief will not be granted on the mere ground that plaintiff is entitled to a conveyance, but he must first establish his right to such conveyance: *Id.*

Persons against whom action may be brought: See 2 Remington's Digest, p. 2209, § 10; *Legg v. Legg*, 34 Wash. 132; *Sawyer v. Vermont L. & T. Co.*, 41 Wash. 524.

§ 840. (5559.) Lien Creditors may be Made Parties—Liens Adjusted.

The plaintiff may, at his option, make creditors having a lien upon the property, or any portion thereof, other than by a judgment or decree, defendants in the suit. When the lien is upon an undivided interest or estate of any of the parties, such lien, if a partition be made, is thenceforth a lien only on the share assigned to such party; but such share shall be first charged with its just proportion of the costs of the partition, in preference to such lien. [L. '69, p. 133, § 507; Cd. '81, § 554; 2 H. C., § 579.]

Cited in 4 Wash. 374.

When a mortgage has been given upon the mortgagor's undivided interest in certain lands, upon the subsequent partition thereof, either by decree or by the volun-

tary act of the cotenant, the mortgage lien attaches to the share set off to the mortgagor in lieu of his undivided interest: *Port v. Parfit*, 4 Wash. 369.

§ 841. (5560.) Notice.

The notice shall be directed by name to all the tenants in common who are known, and in the same manner to all lien creditors who are made parties to the suit, and generally to all persons unknown having or claiming an interest or estate in the property. [L. '69, p. 133, § 508; Cd. '81, § 555; 2 H. C., § 581.]

§ 842. (5561.) Service by Publication.

If a party having a share or interest in or lien upon the property be unknown, or either of the known parties reside out of the state, or cannot be found therein, and such fact be made to appear by affidavit, the notice may be served by publication, as in ordinary cases. When service is made by publica-

tion, the notice must contain a brief description of the property which is the subject of the suit. [L. '69, p. 134, § 509; Cd. '81, § 556; 2 H. C., § 580.]

See *supra*, §§ 228, 233, service by publication generally.

§ 843. (5562.) **Answer, Contents of.**

The defendant shall set forth in his answer the nature and extent of his interest in the property, and if he be a lien creditor, how such lien was created, the amount of the debt secured thereby and remaining due, and whether such debt is secured in any other way, and if so, the nature of such other security. [L. '69, p. 134, § 510; Cd. '81, § 557; 2 H. C., § 582.]

Cited in 13 Wash. 218.

A defendant in partition may set off moneys paid out at plaintiff's request in defending the title to the land: *Blackwell v. McLean*, 9 Wash. 301.

And may also set off improvements made by him on the land, provided his claim is confined to their value as a part of the land, regardless of their cost: *Id.*

The refusal of the court to permit defendant in partition to withdraw an answer setting up the entire title in herself and file an amended answer setting up a tenancy in common with others is not erroneous, since partition must of necessity be made under the statute according to the interest of the respective owners of the land sought to be divided: *Leake v. Hayes*, 13 Wash. 213.

§ 844. (5563.) **Issues to be Tried.**

The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried, and determined in such suit, and where a defendant fails to answer, or where a sale of the property is necessary, the title shall be ascertained by proof, to the satisfaction of the court, before the decree for partition or sale is given. [L. '69, p. 134, § 511; Cd. '81, § 558; 2 H. C., § 583.]

Cited in 4 Wash. 555; 7 Wash. 37; 10 Wash. 639, 647.

Where title is put in issue in an action for partition, the same may be tried in such suit, and the calling of a jury to try it is within the discretion of the court as in other equity causes: *State v. Lichtenberg*, 4 Wash. 553.

Partition proceedings may be used as a form of action to try title to land, and the determination of that fact, by the court, is conclusive upon all the parties thereto: *Kromer v. Friday*, 10 Wash. 621; *Hill v. Young*, 7 Wash. 33.

§ 845. (5564.) **Order of Sale—Partial Partition.**

If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall decree a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and shall designate the portion to remain undivided for the owners whose interest remain unknown or are not ascertained. [L. '69, p. 134, § 512; Cd. '81, § 559; 2 H. C., § 584.]

Cited in 7 Wash. 37, 39; 9 Wash. 304.

If it appears from the evidence that partition of lands cannot be made without great prejudice to the owners, a sale may be ordered under this section, though the necessity therefor has not been alleged in the complaint: *Hill v. Young*, 7 Wash. 33.

A decree in partition is not erroneous because it designates the person appointed to take charge of the land and sell the same as a "trustee" instead of "referee," as required in this section: *Blackwell v. McLean*, 9 Wash. 301.

§ 846. (5565.) **Partition, How Made—Referees.**

In making the partition, the referees shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity

relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions by proper landmarks, and may employ a surveyor, with the necessary assistants, to aid them therein. The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided and the shares allotted to each party, with a particular description of each share. [L. '69, p. 134, § 513; Cd. '81, § 560; 2 H. C., § 585.]

§ 847. (5566.) Report of Referees—Confirmation—Decree.

The court may confirm or set aside the report in whole or in part, and if necessary, appoint new referees. Upon the report being confirmed, a decree shall be entered that such partition be effectual forever, which decree shall be binding and conclusive,—

1. On all parties named therein, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or inheritance of such property, or any part thereof, after the termination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons interested in the property, to whom notice shall have been given by publication;

3. On all other persons claiming from or through such parties or persons, or either of them. [L. '69, p. 135, § 514; Cd. '81, § 561; 2 H. C., § 586.]

Error in failing to vacate a decree of partition is not prejudicial, where the interests of all the parties were, subsequent to the partition, sold under mortgage foreclosures and there was nothing to authorize the vacation of the foreclosures: *Wilson v. Hubbard*, 39 Wash. 671.

§ 848. (5567.) Decree, Rights Affected by.

Such decree and partition shall not affect any tenants for years or for life of the whole of the property which is the subject of partition, nor shall such decree and partition preclude any persons, except such as are specified in the last section, from claiming title to the property in question, or from controverting the title of the parties between whom the partition shall have been made. [L. '69, p. 135, § 515; Cd. '81, § 562; 2 H. C., § 587.]

§ 849. (5568.) Expenses Taxed as Costs.

The expenses of the referees, including those of a surveyor and his assistants, when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, shall be paid by the plaintiff, and may be allowed as costs. [L. '69, p. 135, § 516; Cd. '81, § 563; 2 H. C., § 588.]

§ 850. (5569.) Decree of Sale on Referee's Report.

If the referees report to the court that the property of which partition shall have been decreed, or any separate portion thereof, is so situated that a partition thereof cannot be made without great prejudice to the owners, and the court is satisfied that such report is correct, it may thereupon, by an order, direct the referees to sell the property, or separate portion thereof. [L. '69, p. 135, § 517; Cd. '81, § 564; 2 H. C., § 589.]

§ 851. (5570.) Estate for Life, How Set Off.

When a part of the property only is ordered to be sold, if there be an estate for life or years in an undivided share of the property, the whole of such estate may be set off in any part of the property not ordered sold. [L. '69, p. 136, § 518; Cd. '81, § 565; 2 H. C., § 590.]

§ 852. (5571.) Lien Creditors not Parties, How Brought in.

Before making an order of sale, if lien creditors, other than those by judgment or decree, have not been made parties, the court, on motion of either party, shall order the plaintiff to file a supplemental complaint, making such creditors defendants. [L. '69, p. 136, § 519; Cd. '81, § 566; 2 H. C., § 591.]

§ 853. (5572.) Unsatisfied Liens—Reference.

If an order of sale be made before the distribution of the proceeds thereof, the plaintiff shall produce to the court the certificate of the auditor of the county [and county clerk] where the property is situated, showing the liens remaining unsatisfied, if any, by judgment or decree upon the property, or any portion thereof, and unless he do so, the court shall order a reference to ascertain them. [L. '69, p. 136, § 520; Cd. '81, § 567; 2 H. C., § 592.]

See *supra*, § 444, judgment liens.

§ 854. (5573.) Ascertainment of Liens and Their Priority.

If it appear by such certificate, or reference in case the certificate is not produced, that any such liens exist, the court shall appoint a referee to ascertain what amount remains due thereon or secured thereby respectively, and the order of priority in which they are entitled to be paid out of the property. [L. '69, p. 136, § 521; Cd. '81, § 568; 2 H. C., § 593.]

§ 855. (5574.) Notice to Lienholders.

The plaintiff must cause a notice to be served at least twenty days before the time for appearance on each person having such lien by judgment or decree, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the true amount due or to become due, contingently or absolutely, on his judgment or decree. [L. '69, p. 136, § 522; Cd. '81, § 569; 2 H. C., § 594.]

§ 856. (5575.) Proceedings of Referee on Ascertaining Liens.

The referee shall receive the evidence, and report the names of the creditors whose liens are established, the amounts due thereon, or secured thereby, and their priority respectively, and whether contingent or absolute. He shall attach to his report the proof of service of the notices and the evidence before him. [L. '69, p. 136, § 523; Cd. '81, § 570; 2 H. C., § 595.]

§ 857. (5576.) Report of Referee.

The report of the referee may be excepted to by either party to the suit, or to the proceedings before the referee, in like manner and with like effect as in ordinary cases. If a lien creditor be absent from the state, or his residence therein be unknown, and that fact appear by affidavit, the court, or judge thereof, may by order direct that service of the notice may be made upon his agent or attorney of record, or by publication thereof, for such time and in such manner as the order may prescribe. [L. '69, p. 137, § 524; Cd. '81, § 571; 2 H. C., § 596.]

§ 858. (5577.) Confirmation of Report.

If the report of the referee be confirmed, the order of confirmation is binding and conclusive upon all parties to the suit, and upon the lien creditors who have been duly served with the notice to appear before the referee, as provided in section 855. [L. '69, p. 137, § 525; Cd. '81, § 572; 2 H. C., § 297.]

See supra, § 591, confirmation in general.

A sale by virtue of partition proceedings brought by the purchaser of the wife's community interest is not subject to the deceased husband's will providing for the retention of the land until his children arrive at their majority: *Kromer v. Friday*, 10 Wash. 621.

sale is given before the signing of the decree is merely an irregularity, when the finding of the court had been made in fact prior to the publication, and, if unappealed from, would not affect the jurisdiction of the court to order and confirm the sale: *Id.*

The fact that publication of notice of

§ 859. (5578.) Distribution of Proceeds of Sale.

The proceeds of the sale of the encumbered property shall be distributed by the decree of the court, as follows:—

1. To pay its just proportion of the general costs of the suit;
2. To pay the costs of the reference;
3. To satisfy the several liens in their order of priority, by payment of the sums due and to become due, according to the decree;
4. The residue among the owners of the property sold, according to their respective shares. [L. '69, p. 137, § 526; Cd. '81, § 573; 2 H. C., § 598.]

§ 860. (5579.) Other Securities to be First Exhausted.

Whenever any party to the suit, who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such sureties to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof. [L. '69, p. 137, § 527; Cd. '81, § 574; 2 H. C., § 599.]

§ 861. (5580.) Proceedings to Ascertain and Adjust Liens do not Delay Sale.

The proceedings to ascertain the amount of the liens, and to determine their priority, as above provided, or those hereinafter authorized to determine the right of parties to funds paid into court, shall not delay the sale, nor affect any other party whose rights are not involved in such proceedings. [L. '69, p. 137, § 528; Cd. '81, § 575; 2 H. C., § 600.]

§ 862. (5581.) Proceeds of Sale, Disposition of.

The proceeds of sale, and the securities taken by the referees, or any part thereof, shall be distributed by them to the persons entitled thereto, whenever the court so directs. But if no such direction be given, all such proceeds and securities shall be paid into court, or deposited as directed by the court. [L. '69, p. 138, § 529; Cd. '81, § 576; 2 H. C., § 601.]

§ 863. (5582.) Continuance of Action to Determine Rights of Parties.

When the proceeds of sale of any shares or parcel belonging to persons who are parties to the suit, and who are known, are paid into court, the suit may be continued, as between such parties, for the determination of their re-

spective claims thereto, which shall be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy by pleadings, as in an original suit. [L. '69, p. 138, § 530; Cd. '81, § 577; 2 H. C., § 602.]

§ 864. (5583.) Sales by Referees may be Made by Auction.

All sales of real property made by the referees shall be made by public auction, to the highest bidder, in the manner required for the sale of real property on execution. The notice shall state the terms of sale, and if the property, or any part of it, is to be sold subject to a prior estate, charge, or lien, that shall be stated in the notice. [L. '69, p. 138, § 531; Cd. '81, § 578; 2 H. C., § 603.]

Cited in 9 Wash. 304; 52 Wash. 58.

Under this section a decree authorizing the sale to be made at public or private sale is irregular: *Blackwell v. McLean*, 9 Wash. 301.

But the decree is not erroneous because it designates the person, appointed to take charge of the lands and sell the same, as a "trustee" instead of "referee" as required by § 845: *Id.*

§ 865. (5584.) Terms of Sale may be Directed by Court.

The court shall, in the order of sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises, of which it may direct a sale on credit; and for that portion of which the purchase money is required by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the state. [L. '69, p. 138, § 532; Cd. '81, § 579; 2 H. C., § 604.]

§ 866. (5585.) Securities to be Taken by Referee.

The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase money of such parts of the property as are directed by the court to be sold on credit, in the name of the clerk of the court and his successors in office; and for the shares of any known owner of full age, in the name of such owner. [L. '69, p. 138, § 533; Cd. '81, § 580; 2 H. C., § 605.]

§ 867. (5586.) When Estate of Tenant for Life or for Years may be Sold.

When the estate of any tenant for life or years in any undivided part of the property in question shall have been admitted by the parties or ascertained by the court to be existing at the time of the order of sale, and the person entitled to such estate shall have been made a party to the suit, such estate may be first set off out of any part of the property, and a sale made of such parcel, subject to the prior unsold estate of such tenant therein; but if, in the judgment of the court, a due regard to the interest of all the parties require that such estate be also sold, the sale may be so ordered. [L. '69, p. 138, § 534; Cd. '81, § 581; 2 H. C., § 606.]

§ 868. (5587.) Tenant for Life or Years Entitled to Gross Sum.

Any person entitled to an estate for life or years in any undivided part of the property, whose estate shall have been sold, shall be entitled to receive such sum in gross as may be deemed a reasonable satisfaction for such estate, and which the person so entitled shall consent to accept instead thereof, by an instrument duly acknowledged and filed with the clerk. [L. '69, p. 139, § 535; Cd. '81, § 582; 2 H. C., § 607.]

§ 869. (5588.) Court to Determine Sum, if Consent not Given.

If such consent be not given, as provided in the last section, before the report of sale, the court shall ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate for life or years, and shall order the same to be deposited in court for that purpose. [L. '69, p. 139, § 536; Cd. '81, § 583; 2 H. C., § 608.]

§ 870. (5589.) Protection of Unknown Tenant.

If the persons entitled to such estate for life or years be unknown, the court shall provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared. [L. '69, p. 139, § 538; Cd. '81, § 584; 2 H. C., § 609.]

§ 871. (5590.) Inchoate and Contingent Interests.

In all cases of sales in partition, when it appears that any person has a vested or contingent future right or estate therein, the court shall ascertain and settle the proportionate value of such contingent or vested right or estate, and shall direct such proportion of the proceeds of sale to be invested, secured, or paid over in such manner as to protect the rights and interests of the parties. [L. '69, p. 140, § 539; Cd. '81, § 585; 2 H. C., § 610.]

§ 872. (5591.) Terms of Sale must be Made Known.

In all cases of sales of property, the terms shall be made known at the time, and if the premises consist of distinct farms or lots, they shall be sold separately, or otherwise, if the court so directs. [L. '69, p. 140, § 540; Cd. '81, § 586; 2 H. C., § 611.]

§ 873. (5592.) Referees or Guardians not to be Interested in Purchase.

Neither of the referees, nor any person for the benefit of either of them, shall be interested in any purchase, nor shall the guardian of an infant be an interested party in the purchase of any real property being the subject of the suit, except for the benefit of the infant. All sales contrary to the provisions of this section shall be void. [L. '69, p. 140, § 541; Cd. '81, § 587; 2 H. C., § 612.]

§ 874. (5593.) Report of Sale—Contents of.

After completing the sale, the referees shall report the same to the court, with a description of the different parcels of land sold to each purchaser, the name of the purchaser, the price paid or secured, the terms and conditions of the sale, and the securities, if any, taken. The report shall be filed with the clerk. [L. '69, p. 140, § 542; Cd. '81, § 588; 2 H. C., § 613.]

§ 875. (5594.) Exceptions to Report—Confirmation—Conveyance.

The report of sale may be excepted to in writing by any party entitled to a share of the proceeds. If the sale be confirmed, the order of confirmation shall direct the referees to execute conveyances and take securities pursuant to such sale. [L. '69, p. 140, § 543; Cd. '81, § 589; 2 H. C., § 614.]

The fact that publication of the notice of sale is given before signing of the decree therefor, in partition proceedings, is merely an irregularity, when the finding of the court had in fact been made prior to the publication, and, if unappealed from, would not affect the jurisdiction of the court to order and confirm the sale: *Kromer v. Friday*, 10 Wash. 621.

§ 876. (5595.) Receipt of Proceeds.

When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belong to him. [L. '69, p. 140, § 544; Cd. '81, § 590; 2 H. C., § 615.]

§ 877. (5596.) Investment of Proceeds of Unknown Owner.

When there are proceeds of sale belonging to an unknown owner, or to a person without the state who has no legal representative within it, or when there are proceeds arising from the sale of an estate subject to the prior estate of a tenant for life or years, which are paid into the court or otherwise deposited by order of the court, the same shall be invested in securities on interest for the benefit of the persons entitled thereto. [L. '69, p. 140, § 545; Cd. '81, § 591; 2 H. C., § 616.]

§ 878. (5597.) Investment in Name of Clerk.

When the security for the proceeds of sale is taken, or when an investment of any such proceeds is made, it shall be done, except as herein otherwise provided, in the name of the clerk of the court and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the court. [L. '69, p. 141, § 546; Cd. '81, § 592; 2 H. C., § 617.]

§ 879. (5598.) Securities to be Taken in Name of Parties, When.

When security is taken by the referees on a sale, and the parties interested in such security by an instrument in writing under their hands, delivered to the referees, agree upon the share and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities shall be taken in the names of and payable to the parties respectively entitled thereto, and shall be delivered to such parties upon their receipt therefor. Such agreement and receipt shall be returned and filed with the clerk. [L. '69, p. 141, § 547; Cd. '81, § 593; 2 H. C., § 618.]

§ 880. (5599.) Duties of Clerk Making Investments.

The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the court may direct, and shall file in his office all securities taken, and keep an account in a book provided and kept for that purpose in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof. [L. '69, p. 141, § 548; Cd. '81, § 594; 2 H. C., § 619.]

§ 881. (5600.) Unequal Partition—Compensation Adjudged.

When it appears that partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them, the court may adjudge compensation to be made by one party to another on account of the inequality of partition; but such compensation shall not be required to be made to others by owners unknown, nor by infants, unless in case of an infant it appear that he has per-

sonal property sufficient for that purpose, and that his interest will be promoted thereby. [L. '69, p. 141, § 549; Cd. '81, § 595; 2 H. C., § 620.]

§ 882. (5601.) Share of Infant may be Paid to Guardian.

When the share of an infant is sold, the proceeds of the sale may be paid by the referees making the sale, to his general guardian, or the special guardian appointed for him in the suit, upon giving the security required by law, or directed by order of the court. [L. '69, p. 142, § 550; Cd. '81, § 596; 2 H. C., § 621.]

§ 883. (5602.) Guardian of Insane, etc., may Receive.

The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive in behalf of such person his share of the proceeds of such real property from the referees, on executing a bond, with sufficient sureties, approved by the judge of the court, conditioned that he faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative. [L. '69, p. 142, § 551; Cd. '81, § 597; 2 H. C., § 622.]

§ 884. (5603.) Guardian may Consent to Partition.

The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in common or in any other manner, so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without suit, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares or parts to which they may respectively be entitled, and upon an order of the court. [L. '69, p. 142, § 552; Cd. '81, § 598; 2 H. C., § 623.]

The statute expressly provides that partition may be maintained against infant cotenants, the provision being broad enough to reach all interests and parties and expressly make confirmation conclusive against all parties to the suit: *Kromer v. Friday*, 10 Wash. 621, 641.

A guardian may consent to a partition without suit under the supervision of the court: *Kromer v. Friday*, supra, 641.

In the absence of fraud or collusion,

minors properly represented are bound as fully as if they had been adults and personally cited: *Kromer v. Friday*, supra, 641.

Guardians of infant heirs may, when acting in good faith, admit in their pleading that certain land sought to be partitioned is the community property of the parents of their wards, although the admission may be prejudicial to formerly asserted claims: *Id.* 621.

§ 885. (5604.) Costs, How Apportioned.

The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the decree. In that case there shall be a lien on the several shares, and the decree may be enforced by execution against the parties separately. When, however, a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them. [L. '69, p. 142, § 553; Cd. '81, § 599; 2 H. C., § 624.]

Cited in 34 Wash. 138.

Only statutory attorney's fees can be

taxed as part of the costs: *Legg v. Legg*, 34 Wash. 132.

CHAPTER IV.

ACTIONS AGAINST THE STATE.

§ 886. (5608.) Manner of Collecting Claims Against the State—Bond.

Any person or corporation having any claim against the state of Washington shall have the right to begin an action against the state in the superior court of Thurston county. Such action shall be begun against the state of Washington by filing a complaint in such superior court, setting forth the nature of such claim, and containing a direction to the defendant to appear within twenty days after service of the complaint exclusive of the day of service, and defend the action, and a notice that in case of failure so to do, judgment will be rendered against the state according to the prayer of the complaint. The plaintiff in such action shall, at the time of filing his complaint, file a bond or undertaking with two or more sureties to be approved by the clerk of the court to the effect that such party will indemnify the state against all costs that may accrue in such action, and will pay to the clerk of said court all costs in case the plaintiff shall fail to prosecute his action or to obtain a judgment against the state. [L. '95, p. 188, § 1.]

Cited in 18 Wash. 74; 27 Wash. 291; 28 Wash. 502.

See 2 Remington's Digest, p. 2606, §§ 33-36.

The word "claim" construed to mean "cause of action": See *Northwestern & Pac. Hypotheek Bank v. State*, 18 Wash. 73.

A statute permitting suits to be brought against a state does not of itself subject the state to a liability that did not ex-

ist before, but is merely a waiver of the state's immunity from suit: *Billings v. State*, 27 Wash. 288.

The state auditor cannot plead an offset in favor of the state against a county, when mandamus at the suit of the county to issue warrants for the amount duly apportioned by the state superintendent to the county as its share of public school funds: *State ex rel. Tanner v. Cheetham*, 23 Wash. 666.

§ 887. (5609.) Service, How Made.

Service of the complaint shall be made by the sheriff of the county in which such action is brought, or by any of his deputies, by delivering an attested copy thereof to the attorney general, or by leaving such copy in his office, and by delivering another like copy to the secretary of state, or by leaving such copy in his office. [L. '95, p. 188, § 2.]

Cited in 18 Wash. 74.

§ 888. (5610.) Attorney General Counsel for State—Procedure.

The attorney general or his assistant shall appear and act as counsel for the state. The action shall proceed in all respects as other actions. Appeals may be taken to the supreme court of the state as in other actions or proceedings, but in case an appeal shall be taken on behalf of the state, no bond shall be required of the appellant. [L. '95, p. 188, § 3.]

Cited in 18 Wash. 75; 28 Wash. 502; 42 Wash. 655.

§ 889. (5611.) Judgment, How Satisfied.

No execution shall issue against the state on any judgment, but whenever a final judgment against the state shall have been obtained in any such action, the clerk shall make and furnish to the auditor of state a duly certified transcript of such judgment; and the auditor of state shall thereupon audit the

amount of damages and costs therein awarded, and the same shall be paid out of the state treasury. [L. '95, p. 188, § 4.]

See supra, § 454, satisfaction of judgments in general.

§ 890. (5612.) Limitations.

All provisions of law relating to the limitations of personal actions shall apply to claims against the state, but the computation of time thereunder shall not begin until this chapter shall have become a law. [L. '95, p. 189, § 5.]

See supra, §§ 155-178, limitations of actions.

Cited in 18 Wash. 75.

CHAPTER V.

EMINENT DOMAIN.

§ 891. (5616.) Appropriation of Property by the State, Requisites of Petition.

Whenever the legislature of this state shall deem it necessary for the public uses of the state to acquire or appropriate land, real estate, premises, or other property, and shall by act set forth and describe such land, real estate, premises, or other property, it shall be the duty of the attorney general to present to the superior court of the county in which said land, real estate, premises, or other property so sought to be acquired or appropriated shall be situated, a petition in which the land, real estate, premises, or other property, sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records, the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for taking such lands, real estate, premises, or other property, or in case a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law, then that the compensation to be made as aforesaid be ascertained and determined by the court or judge thereof. [L. '91, p. 138, § 1; 2 H. C., § 638.]

See Const., Art. I, § 16.

Cited in 4 Wash. 67; 28 Wash. 501; 38 Wash. 687.

The right to prepayment guaranteed by the constitution, for land appropriated for public use, is a personal privilege which the owner may waive: *Lewis v. Seattle*, 5 Wash. 741; but it was held that in exercising the right of eminent domain payment must be made in advance in all cases: *Brown v. Seattle*, 5 Wash. 35.

The word "damaged," in the provision of the constitution that no private property shall be taken or damaged, etc., does not mean the same thing as "taken": *Brown v. Seattle*, supra, 40.

But was not intended to give a right of action for injuries *damnum absque in-*

juria: *Smith v. St. Paul etc. R. Co.*, 39 Wash. 355.

Construction of slopes on abutting property to grade of street is not a taking, but a damaging only: See *Compton v. Seattle*, 38 Wash. 514.

The exercise of the power of eminent domain requires not only legislative action conferring the power but the method by which it is to be exercised must be prescribed: *Tacoma v. State*, 4 Wash. 64, 66; *Long v. Billings*, 7 Wash. 269.

The building by the state or its grantees of wharves upon shores of navigable waters is neither a taking nor damaging of private property for public use: *Eisenbach v. Hatfield*, 2 Wash. 236; *West Coast Imp. Co. v. Winsor*, 8 Wash. 492, 493.

§ 892. (5617.) Notice—Contents of—Service.

A notice stating briefly the objects of the petition, and containing a description of the land, real estate, premises, or property sought to be acquired and appropriated, and stating the time and place when and where the same will be presented to the court or the judge thereof, shall be served on each and every person named therein as owner, encumbrancer, tenant, or otherwise interested therein at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her usual place of abode, by leaving a copy of such notice at his or her usual place of abode; or in case of a foreign corporation, at its principal place of business in this state, with some person of more than sixteen years of age. In case of domestic corporations, such service shall be made upon the president, secretary, or other director or trustee of such corporation. In case of minors, on their guardians, or in case no guardian shall have been appointed, then on the person who has the care and custody of such minor; in case of idiots, lunatics, or distracted persons, on their guardians, or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In case the land, real estate, premises, or other property sought to be appropriated is school or county land, the notice shall be served on the auditor of the county in which the land, real estate, premises, or other property sought to be acquired and appropriated is situated. In all cases where the owner or person claiming an interest in such real estate or other property is a nonresident of this state, or where the residence of such owner or person is unknown, and an affidavit of the attorney general shall be filed that such owner or person is a nonresident of this state, or that after diligent inquiry his residence is unknown or cannot be ascertained, service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks; and in case no newspaper is published in said county, then such publication may be had in a newspaper published in the county nearest the county in which lies the land sought to be acquired and appropriated. And such publication shall be deemed service upon each of such nonresident person or persons whose residence is unknown. Such notice shall be signed by the attorney general of the state of Washington. Such notice may be served by any competent person over twenty-one years of age. Due proof of the service of such notice by affidavit of the person serving the same, or by the printer's affidavit of publication, shall be filed with the clerk of such superior court before or at the time of the presentation of such petition. Want of service of such notice shall render the subsequent proceedings void as to the person not served, but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all other cases not otherwise provided for, service of notices, order, and other papers in the proceedings authorized by this act, may be made as the superior court or judge thereof may direct. [L. '91, p. 139, § 2; 2 H. C., § 639.]

⁴ "Act" refers to §§ 891-900.

§ 893. (5618.) Adjournment of Proceedings—Notice.

The court or judge may, upon application of the said attorney general or any owner or party interested, for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any part whose interest may be affected. [L. '91, p. 140, § 3; 2 H. C., § 640.]

§ 894. (5619.) Hearing of Petition—Jury.

At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises, or other property described in said petition have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really necessary for the public use of the state of Washington, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summons from the citizens of the county in which such land, real estate, premises, or other property sought to be acquired or appropriated shall be situated, as many qualified persons as may be necessary in order to form a jury of twelve persons, unless the parties to the proceedings consent to a less number (such number to be not less than three), and such consent shall be entered by the clerk in the minutes of the trial. If necessary to complete the jury, the sheriff, under the direction of the court or judge thereof, shall summon as many qualified persons as may be required to complete the jury from the bystanders, citizens of the county where the land, real estate, premises, or other property is situated. [L. '91, p. 140, § 4; 2 H. C., § 641.]

§ 895. (5620.) Trial—Damages—Judgment.

A judge of the superior court shall preside at the trial, which shall be held at such time as the court or the judge thereof may direct, at the courthouse in the county where the land, real estate, premises, or other property sought to be appropriated or acquired is situated, and the jurors at such trial shall make in each case a separate assessment of damages which shall result to any person, corporation, or company, or to any county, by reason of the appropriation and use of such land, real estate, premises, or other property, and shall ascertain, determine, and award the amount of damage to be paid said owner or owners respectively, and to all tenants, encumbrancers, and others interested for taking such land, real estate, premises, or other property so taken. Upon the trial, witnesses may be examined in behalf of either party to the proceedings as in civil actions; and a witness served with a subpoena in such proceedings shall be punished for failure to appear at such trial, or for perjury, as upon a trial of a civil action. Upon the verdict of the jury, judgment shall be entered for the amount of the damages awarded to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for taking such land, real estate, or premises. In case a jury is waived, as in civil cases in courts of record, in the manner prescribed by law, the compensation to be paid for the property sought to be appropriated shall be ascertained and determined by the court or judge thereof, and the proceedings shall be the same as in trials of an issue of fact by the court. [L. '91, p. 141, § 5; 2 H. C., § 642.]

Cited in 38 Wash. 687; 46 Wash. 48.

See supra, § 316, waiver of jury.

§ 836. (5621.) Judgment—Filing and Recording of.

At the time of rendering judgment for damages, whether upon default or trial, the court or judge thereof shall also enter a judgment or decree of appropriation of the land, real estate, or premises sought to be appropriated, thereby vesting the legal title to the same in the state of Washington. Whenever said judgment or decree of appropriation is made, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, or other premises are situated, and shall be recorded by said auditor like a deed of real estate, and with like effect. [L. '91, p. 142, § 6; 2 H. C., § 643.]

§ 897. (5622.) Payment of Damages, Effects of—Appeal.

Upon the entry of judgment upon the verdict of the jury or the decision of the court or judge thereof, awarding damages as hereinbefore prescribed, the state of Washington may make payment of the damages assessed to the parties entitled to the same, and of the costs of the proceedings, by depositing the same with the clerk of said superior court, to be paid out under the direction of the court or the judge thereof; and upon making such payment into the court of the damages assessed and allowed, and of the costs to any land, real estate, premises or other property mentioned in said petition, said state of Washington shall be released and discharged from any and all further liability therefor, unless upon appeal the owner or party interested shall recover a greater amount of damages; and in that case only for the amount in excess of the sum paid into said court and the costs of appeal: Provided, that in case of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by the state as aforesaid shall remain in the custody of said court until the final determination of the proceedings by the said supreme court. [L. '91, p. 142, § 7; 2 H. C., § 644.]

§ 898. (5623.) Claimants, How Paid — Conflicting Claims, How Determined.

Any person, corporation, or county claiming to be entitled to any money paid into court, as provided in this act, may apply to the court therefor, and upon furnishing evidence satisfactory to the court that he or it is entitled to the same, the court shall make an order directing the payment to such claimant the portion of such money as he or it shall be found entitled to; but if, upon application, the court or judge thereof should decide that the title to the land, real estate, or premises specified in the application of such claimant was in such condition as to require that an action be commenced to determine the conflicting claims thereto, he shall refuse such order until such action is commenced, and the conflicting claims to such land, real estate, or premises be determined according to law. [L. '91, p. 143, § 8; 2 H. C., § 645.]

"Act" refers to §§ 891-900.

§ 899. (5624.) Appeal.

Either party may appeal from the judgment for damages entered in the superior court to the supreme court of the state, within thirty days after the entry of judgment as aforesaid, and such appeal shall bring before the supreme court the propriety and justness of the amount of damage in respect to

the parties to the appeal: Provided, however, that upon such appeal no bond shall be required: And provided further, that, if the owner of land, the real estate, or premises accepts the sum awarded by the jury, the court, or the judge thereof, he shall be deemed thereby to have waived conclusively an appeal to the supreme court, and final judgment by default may be rendered in the superior court as in other cases: Provided further, that no appeal shall operate so as to prevent the said state of Washington from taking possession of such property pending such appeal, after the amount of said award shall have been paid into court. [L. '91, p. 143, § 9; 2 H. C., § 646.]

§ 900. (5625.) Payment of Award and Costs.

Whenever the attorney general shall file with the auditor of this state a certificate setting forth the amount of any award found against the state of Washington under the provisions of this act, together with the costs of said proceeding, and a description of the lands and premises sought to be appropriated and acquired, and the title of the action or proceeding in which said award is rendered, it shall be the duty of the state auditor to forthwith issue a warrant upon the state treasury to the order of the attorney general in a sum sufficient to make payment in money of said award and the costs of said proceeding, and thereupon it shall be the duty of said attorney general to forthwith pay to the clerk of said court in money the amount of said award and costs. [L. '91, p. 143, § 10; 2 H. C., § 647.]

"Act" refers to §§ 891-900.

§ 901. (5629.) Counties may appropriate Lands for Public Use.

Every county in this state is hereby, for the purposes of this and the four following sections, declared to be a body corporate and is authorized and empowered by and through its board of county commissioners whenever said board shall judge it to be clearly for the general welfare and benefit of the people of the county, and so far as shall be in harmony with the constitution of this state and the provisions of this article, to condemn and appropriate as hereinafter in this act provided and to dispose of for public use such lands, properties, rights and interests as are hereinafter in this act mentioned, whenever the government of the United States or of this state is intending or proposing the construction, operation or maintenance of any public work situated or to be situated wholly or partly within such county, or the expenditure of money or labor for the construction, operation or maintenance of any such work, and such condemnation or appropriation will enable the county to aid, promote, facilitate or prepare for any such construction, operation, maintenance or expenditure by either or both such governments, or to fulfill or dispose of any condition upon which such construction, operation, maintenance or expenditure is by law or from any cause contingent, and no property shall be exempt from such condemnation, appropriation or disposition by reason of the same having been or being dedicated, appropriated or otherwise reduced or held to public use. [L. '95, p. 3, § 1.]

See Const., Art. I, § 16.

"Act" refers to §§ 901-905.

• See notes to § 921, *infra*.

See *infra*, § 5623 et seq., and notes, appropriation of lands for county roads, etc.

The act embraced in this chapter contains but one subject matter, which is fairly embraced within the scope of its title: *Lancey v. King Co.*, 15 Wash. 9.

It is not necessary that the public at large be benefited, but only that part of the public affected by the improvement to be made: *Lewis County v. Gordon*, 20 Wash. 80.

§ 902. (5630.) Tax Levy to Pay Cost of Condemnation.

The board of county commissioners is hereby authorized and empowered in aid of the powers granted or prescribed in the foregoing section to levy, annually, a tax as large as may be necessary, but not exceeding the rate of one mill on the dollar, upon all the taxable property in the county, such tax to be assessed, levied and collected at the same time and in the same manner as taxes for general county purposes, but the proceeds of said taxes, when collected, shall constitute and be a special fund, applicable solely to the cost of such condemnation, appropriation or disposition, as is mentioned in the foregoing section, and the expenses incident thereto. [L. '95, p. 4, § 2.]

§ 903. (5631.) Eminent Domain Extended to Counties.

The right of eminent domain for the purposes intended in this act is hereby extended to all counties in this state and every such county for any purpose of condemnation, appropriation or disposition such as is mentioned in section 901, supra, is hereby authorized and empowered to condemn and appropriate all necessary lands and all rights, properties and interests in or appurtenant to land under the same procedure as is or shall be provided by the laws of this state for the case of any similar condemnation or appropriation by other corporations. [L. '95, p. 4, § 3.]

"Act" refers to §§ 901-905.

§ 904. (5632.) Indebtedness Contracted, General County Purpose.

Any county purpose mentioned in this act shall be deemed and held to be a general county purpose and any indebtedness contracted or to be contracted therefor shall be deemed and held to be an indebtedness for general county purposes, and all the provisions of law of this state relative to indebtedness for general county purposes or the contracting of such indebtedness or the bonds for funding the same shall be deemed applicable to any indebtedness contracted or to be contracted or any bonds issued by any county under this act, but the accounts of the county with respect to the receipts and disbursements of all moneys received or disbursed by the county under the provisions of this act shall, for each condemnation, appropriation and disposition, be so kept as to clearly and fully exhibit such accounts separate and apart from the other accounts of the county. [L. '95, p. 5, § 4.]

"Act" refers to §§ 901-905.

§ 905. (5633.) County Purpose, Defined.

Any condemnation, appropriation or disposition intended in this act shall be deemed and held to be for a county purpose and public use within the meaning of this act when it is directly or indirectly, approximately or remotely for the general benefit or welfare of the county or of the inhabitants thereof, or when it is otherwise within the meaning of the phrase "for a county purpose" as occurring in the constitution of this state. [L. '95, p. 5, § 5.]

"Act" refers to §§ 901-905.

This act authorizing counties to condemn land for a right of way for a ship canal projected by the general government, is not a violation of Article VIII, § 7, of the Constitution, which forbids counties giving any money or property, etc., to or in aid of any individual, association, company or corporation, etc., as neither the state nor the United States can be brought within the meaning of the section: *Lancy v. King Co.*, 15 Wash. 9.

Such undertaking is not open to the objection that it is in violation of Article VIII, § 6, of the Constitution, which prohibits a county from incurring debt for

any other than strictly county purposes, as it is entirely within the limits of the county, and for the purpose of connecting two large local water-ways with the Pacific Ocean: *Id.*

The fact that an act authorizes the exercise of the state's eminent domain for the purpose of constructing a ship canal which shall be under the control of the general government, but for the use and benefit of the public generally, will not render the act unconstitutional, when there is no express constitutional provision prohibiting it: *Id.*

§ 906. School Districts may Appropriate Land.

Whenever any school district shall select any real estate as a site for a schoolhouse, or as additional grounds to an existing schoolhouse site, within the district, and the board of school directors of such district and the owner or owners of the site or any part thereof, or addition thereto so selected, shall be unable to agree upon the compensation to be paid by such school district to the owner or owners thereof, such school district shall have the right to take and acquire title to such real estate for use as a schoolhouse site or additional site, upon first paying to the owner or owners thereof therefor the value thereof, to be ascertained in the manner hereinafter provided. [L. '03, p. 193, § 1; L. '09, p. 372, § 1.]

This and the following sections were re-enacted without change as part of the School Code of 1909, so that it is immaterial whether or not they are within the title of that act.

§ 907. Petition to Superior Court.

The board of directors of the school district shall present to the superior court of the state of Washington in and for the county wherein is situated the real estate desired to be acquired for schoolhouse site purposes, a petition, reciting that the board of directors of such school district have selected certain real estate, describing it, as a schoolhouse site, or as additional grounds to an existing site, for such school district; that the site so selected, or some part thereof, describing it, belongs to a person or persons, naming him or them, that such school district has offered to give the owner or owners thereof therefor dollars, and that the owner of such real estate has refused to accept the same therefor; that the board of school directors of such school district and the said owner or owners of such real estate are unable to agree upon the compensation to be paid by such school district to the owner or owners of such real estate therefor, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money by such school district to such owner or owners for the taking of such real estate for the use as a schoolhouse site for such school district; or in case a jury be waived in the manner provided by law in other civil actions in courts of record, then that the compensation to be made as aforesaid, be ascertained and determined by the court, or judge thereof. [L. '03, p. 194, § 2; L. '09, p. 372, § 2.]

§ 908. Notice of Petition—Service.

A notice, stating the time and place when and where such petition will be presented to the court, or the judge thereof, together with a copy of such

petition, shall be served on each and every person named therein as owner, or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such notice shall be signed by the prosecuting attorney of the county wherein the real estate sought to be taken is situated, and may be served in the same manner as summons in a civil action in such superior court is authorized by law to be served. [L. '03, p. 194, § 3; L. '09, p. 373, § 3.]

§ 909. Adjournment of Proceedings.

The court may, upon application of the petitioner or of any owner of said real estate, or any person interested therein, for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any party whose interests may be affected by such proceedings. [L. '03, p. 194, § 4; L. '09, p. 373, § 4.]

§ 910. Findings of Necessity—Setting Trial.

At the time and place appointed for the hearing of such petition, or to which the same may have been adjourned, if the court shall find that all parties interested in such real estate sought to be taken have been duly served with notice and a copy of the petition as above prescribed, and shall further find that such real estate sought to be taken is required and necessary for the purposes of a schoolhouse site, or as a part of or as an addition to a schoolhouse site, for such school district, the court shall make an order reciting such findings, and shall thereupon set the hearing of such petition down for trial by a jury, as other civil actions are tried, unless a jury is waived in the manner provided by law in other civil actions. [L. '03, p. 195, § 5; L. '09, p. 373, § 5.]

§ 911. Jury Trial.

The jury impaneled to hear the evidence and determine the compensation to be paid to the owner or owners of such real estate desired for such schoolhouse site purpose shall consist of twelve persons unless a less number be agreed upon, and shall be selected, impaneled and sworn in the same manner that juries in other civil actions are selected, impaneled and sworn, provided a juror may be challenged for cause on the ground that he is a taxpayer of the district seeking the condemnation of any real estate. [L. '03, p. 195, § 6; L. '09, p. 373, § 6.]

§ 912. Trial—View by Jury.

A judge of the superior court shall preside at the trial and witnesses may be examined in behalf of either party to the proceedings, as in other civil actions, and upon the request of the parties interested in such proceedings the court shall cause the jury impaneled to hear the same, to view the premises sought to be taken, and upon the request of any less number of the persons interested in the proceedings, the court may cause the jury to view the premises, pending the hearing of the same. [L. '03, p. 195, § 7; L. '09, p. 374, § 7.]

§ 913. Verdict for Full Value of Property.

Upon the close of the evidence, and the argument of counsel, the court shall instruct the jury as to the matters submitted to them, and the law

pertaining thereto, whereupon the jury shall retire and deliberate and determine upon the amount of compensation in money that shall be paid to the owner or owners of the real estate sought to be taken for such schoolhouse site purposes therefor, which shall be the amount found by the jury to be the fair and full value of such premises; and when the jury shall have determined upon their verdict, they shall return the same to the court as in other civil actions. [L. '03, p. 195, § 8; L. '09, p. 374, § 8.]

§ 914. Verdict by Ten Jurors.

When ten of the jurors agree upon a verdict, the verdict so agreed upon shall be signed by the foreman, and the verdict so agreed upon shall be and stand as the verdict of the jury. [L. '03, p. 196, § 9; L. '09, p. 374, § 9.]

§ 915. Waiver of Jury.

In case a jury is waived, the compensation that shall be paid for the premises taken shall be determined by the court and the proceedings shall be the same as in the trial of issues of fact by the court in other civil actions. [L. '03, p. 196, § 10; L. '09, p. 374, § 10.]

See supra, § 316, waiver of jury.

§ 916. Judgment—Effect.

Upon the verdict of the jury, or upon the determination by the court of the compensation to be paid for the property sought to be taken as herein provided, judgment shall be entered against such school district in favor of the owner or owners of the real estate sought to be taken, for the amount found as compensation therefor, and upon the payment of such amount by such school district to the clerk of such court for the use of the owner or owners of, and the persons interested in the premises sought to be taken, the court shall enter a decree of appropriation of the real estate sought to be taken, thereby vesting the title to the same in such school district; and a certified copy of such decree of appropriation may be filed in the office of the county auditor of the county wherein the real estate taken is situated, and shall be recorded by such auditor like a deed of real estate, and with like effect. The money so paid to the clerk of the court shall be by him paid to the person or persons entitled thereto, upon the order of the court. [L. '03, p. 196, § 11; L. '09, p. 374, § 11.]

§ 917. Costs.

All the costs of such proceedings in the superior court shall be paid by the school district initiating such proceedings. [L. '03, p. 196, § 12; L. '09, p. 375, § 12.]

§ 918. Appeal to Supreme Court.

Either party may appeal from the judgment for compensation awarded for the property taken, entered in the superior court, to the supreme court of the state within sixty days after the entry of the judgment, and such appeal shall bring before the supreme court the justness of the compensation awarded for the property taken, and any error occurring on the hearing of such matter, prejudicial to the party appealing, and no bond shall be required of either party appealing from such judgment: Provided, however, that if the owner or owners of the land taken accepts the sum awarded by the jury or court, he or they shall be deemed thereby to have waived their

right of appeal to the supreme court. [L. '03, p. 196, § 13; L. '09, p. 375, § 13.]

§ 919. Possession of Premises.

An appeal from such judgment by the owner or owners of the land sought to be taken, shall not have the effect to preclude the school district from taking possession of the premises sought, pending the appeal, provided the amount of the judgment against the school district shall have been paid in to the clerk of the court, as hereinbefore provided. [L. '03, p. 197, § 14; L. '09, p. 375, § 14.]

§ 920. Parties—Designation—Fees of Clerk.

In all proceedings under this act the school district seeking to acquire title to real estate for a schoolhouse site, shall be denominated plaintiff, and all other persons interested therein shall be denominated defendants; and in all such proceedings the clerk of the superior court wherein any such proceedings is brought shall charge nothing for his services, except in taking an appeal from the judgment entered in the superior court. [L. '03, p. 197, § 15; L. '09, p. 375, § 15.]

§ 921. (5637.) Eminent Domain by Corporations—Petition, Requisites of.

Any corporation authorized by law to appropriate land, real estate, premises, or other property for right of way or any other corporate purposes, may present to the superior court of the county in which any land, real estate, or premises, or other property sought to be appropriated shall be situated, or to the judge of such superior court in any county where he has jurisdiction or is holding court, a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records, the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by such corporation, to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such lands, real estate, premises, or other property, or in case a jury be waived, as in other civil cases in courts of record in the manner prescribed by law, then that the compensation to be made, as aforesaid, be ascertained and determined by the court, or judge thereof. [Cf. L. '88, p. 58, § 1; L. '90, p. 294, § 1; 2 H. C., § 648.]

See Const., Art. I, § 16.

See supra, § 316, waiver of jury in civil cases.

See infra, § 3677, necessity of subscription to all of capital stock.

See §§ 4091-4179, except §§ 4098-4101, 4152-4155, appropriation of lands for diking and drainage districts.

See infra, § 4974, appropriation by electric light and power companies.

See infra, § 5717, appropriation for toll road.

See §§ 6325-6359, 6362-6391, 6416-6494, appropriation for irrigation purposes.

See infra, § 6359, appropriation for water rights.

See infra, § 7109, appropriation for toll logging roads.

See infra, § 7120, appropriation for boom companies.

See infra, § 7344 et seq., right of eminent domain extended to mining companies.

See infra, § 7767, eminent domain in cities.

See §§ 8736-8740, appropriation by railroad companies.

See *infra*, § 8740, appropriation of public lands by certain corporations.

See *infra*, § 9081, appropriation by street and electric railways.

See §§ 9300-9321, appropriation for telegraph and telephone companies.

Cited in 2 Wash. 378, 380, 501; 4 Wash. 65, 311, 451; 5 Wash. 780; 14 Wash. 145; 19 Wash. 205; 29 Wash. 498; 31 Wash. 463; 45 Wash. 321; 47 Wash. 92; 48 Wash. 281; 52 Wash. 448.

Delegation of power—Necessity, construction and operation of legislative acts: See 1 Remington's Digest, p. 1027, §§ 6-9.

The Constitution, Article I, § 16, authorizing the taking of private lands for "private ways of necessity" is not self-executing, but before such right can arise, the legislature must define what they are, authorize application therefor, and provide the procedure: *Long v. Billings*, 7 Wash. 267; *Tacoma v. State*, 4 Wash. 64.

The constitutional inhibition against ownership of lands by corporations, the majority of whose stock is held by aliens, applies to the acquisition of land under the condemnation laws of this state: *State ex rel. Morrell v. Superior Court*, 33 Wash. 542.

The authority to take private property for a public use is one of the recognized powers of sovereignty, and is inherent in the state: *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586.

The taking of land by eminent domain proceedings is an action in rem: *In re Smith's Petition*, 9 Wash. 85, 88.

The proceedings authorized by this chapter are not exclusive of all other remedies: *Downs v. S. & M. Ry. Co.*, 5 Wash. 778; *Bellingham Bay etc. Ry. Co. v. Loose*, 2 Wash. 500.

Statutes authorizing condemnation proceedings are strictly construed and will not be extended beyond the plain provisions of the law: See 1 Remington's Digest, p. 1027, §§ 6-9; *Spokane v. Colby*, 16 Wash. 610; *Seattle v. Fidelity Trust Co.*, 22 Wash. 154; *State ex rel. Atty. Gen. v. Superior Court*, 36 Wash. 381.

Petitioner need not show that it has obtained all its franchises: See *State ex rel. Harlan v. Centralia etc. Co.*, 42 Wash. 632.

As to sufficiency of stock subscription, to enable corporations to exercise power of eminent domain: See *State ex rel. Biddle v. Superior Court*, 44 Wash. 108. See, also, *State ex rel. Columbia Valley R. Co. v. Superior Court*, 45 Wash. 316.

When lands have been appropriated before the institution of condemnation proceedings as provided for in this chapter, the land owner may maintain the common-law action of trespass: *Downs v. S. & M. Ry. Co.*, 5 Wash. 778.

A railroad incorporated under a special act of the legislature may, at its election, proceed to condemn land under the gen-

eral act relating to corporations: *Cascade Ry. Co. v. Sohns*, 1 W. T. 557.

One railroad company having leased its line to another may still condemn: *State ex rel. Trimble v. Superior Court*, 31 Wash. 445.

A railroad not yet in operation may exercise the power of eminent domain: *Spokane Falls & N. R. Co. v. Superior Court*, 40 Wash. 389.

Boom companies are quasi-public corporations: *North River Boom Co. v. Smith*, 15 Wash. 138; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586.

The proceeding to condemn private property for corporate use is begun by the party seeking to appropriate the land, by a petition describing the premises, and setting forth the owner's name, and the object sought, and praying a jury to ascertain damages to be awarded: *Seattle etc. Ry. Co. v. Murphine*, 4 Wash. 448.

Notice is given to the owner and interested parties of the time and place when such petition will be presented (see next section); *Id.*

Where a railroad company at the time of instituting proceedings for the appropriation of a right of way over certain lands has actual notice that a certain parcel thereof is in possession of a certain person under claim of ownership, such person should be made a party to the proceedings in order to be bound, although in fact the record title to such land may stand in the name of another at the time of the filing of a *lis pendens* notice of the condemnation proceedings, and the deed transferring title may not have been recorded until after the date of the filing of such notice: *Owen v. St. Paul etc. Ry. Co.*, 12 Wash. 314.

Where possession of land has been taken upon the institution of proceedings for its condemnation under the right of eminent domain, the proceedings cannot be afterward dismissed, at any stage of the proceedings, by the one seeking the appropriation, unless at the same time an abandonment of possession is also tendered: *Bellingham Bay etc. Co. v. Strand*, 14 Wash. 144.

Where the petitioner has not taken possession of the land, it may elect to abandon the proceedings and it is not liable for the damages awarded: *Port Angeles Pac. R. Co. v. Cooke*, 38 Wash. 184.

As to sufficiency of petition: See 1 Remington's Digest, p. 1046, § 92; *Lewis County v. Schobey*, 31 Wash. 357; *Chelan County v. Navarre*, 38 Wash. 684; *State ex rel. O. R. & N. Co. v. Superior Court*, 45 Wash. 321.

Remedies of owners of property: See 1 Remington's Digest, p. 1055, §§ 126-139; Owen v. St. Paul & M. R. Co., 12 Wash. 313; Slagt v. N. P. R. Co., 39 Wash. 576; State ex rel. S. E. Co. v. Superior Court, 28 Wash. 317; Spokane v. Colby, 16 Wash. 610; Lewis v. Seattle, 5 Wash. 741; Seattle Transfer Co. v. Seattle, 27 Wash. 520.

Injunction is the proper remedy to restrain public authorities from taking private property for a public use without first making just compensation therefor: Brown v. Seattle, 5 Wash. 35; State ex rel. Smith v. Superior Court, 26 Wash. 278; Seattle Transfer Co. v. Seattle, 27 Wash. 520; Olson v. Seattle, 30 Wash. 687; Swope v. Seattle, 36 Wash. 113; Colby v. Spokane, 12 Wash. 690.

Jurisdiction: Parker v. Superior Court, 25 Wash. 154.

Defenses available to owner of property sought to be appropriated: See 1 Remington's Digest, p. 1057, § 134.

A party owning land appropriated for a public purpose cannot be compelled to present a claim for damages: Peterson v. Smith, 6 Wash. 163; Snohomish County v. Hayward, 11 Wash. 429; Seanor v. County Commrs., 13 Wash. 48; Adams County v. Dobschlag, 19 Wash. 356; State ex rel. Smith v. Superior Court, 26 Wash. 278.

Defense that plaintiff is an alien: State ex rel. Morrell v. Superior Court, 33 Wash. 542.

Upon a motion for judgment upon an award against the city, in condemnation proceedings for widening a street, the city may set up as a defense the abandonment of the improvement scheme: Seavey v. Seattle, 17 Wash. 361.

Condemnation of land to develop power for street-car and electric lighting purposes cannot be objected to as being for a merely temporary purpose, from the fact that in six years more power would probably be required, where no intention is

shown to abandon the same at such time: State ex rel. Harris v. Olympia Light and Power Co., 46 Wash. 511.

An owner of land who stands by without protest while a railroad is constructed thereon is estopped to maintain a suit for injunction to prevent the operation of the road, his remedy being limited to damages: Kakeldy v. Columbia etc. R. Co. 37 Wash. 675.

But not where his title was in litigation, and ejectment proceedings are seasonably brought: See Slaght v. Northern Pac. R. Co., 39 Wash. 576.

PROPERTY SUBJECT TO APPROPRIATION: See 1 Remington's Digest, p. 1030, §§ 23-27.

A city may condemn land outside its limits: State ex rel. Kent Lumber Co. v. Superior Court, 35 Wash. 303.

Railroad companies not authorized to appropriate state tide lands: S. & M. Ry. Co. v. State, 7 Wash. 150; North River Boom Co. v. Smith, 15 Wash. 138; Samish Boom Co. v. Callvert, 27 Wash. 611; State ex rel. Trimble v. Superior Court, 31 Wash. 445.

But a purchaser's interest may be appropriated: State ex rel. Trimble v. Superior Court, supra.

State school lands may not be appropriated by water companies: State ex rel. Atty. Gen. v. Superior Court, 36 Wash. 381.

As to property previously devoted to public use: See Seattle & M. R. Co. v. Bellingham Bay & E. R. Co., 29 Wash. 491; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586; State ex rel. Kent Lumber Co. v. Superior Court, 46 Wash. 516.

The easement of light and air, of an owner of property abutting on a street may be appropriated: State ex rel. Smith v. Superior Court, 30 Wash. 219.

§ 922. (5638.) Notice, Contents of and Service.

A notice, stating briefly the objects of the petition, and containing a description of the land, real estate, premises or property sought to be appropriated, and stating the time and place when and where the same will be presented to the court, or the judge thereof, shall be served on each and every person named therein as owner, encumbrancer, tenant, or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her usual place of abode, by leaving a copy of such notice at his or her usual place of abode; or in case of a foreign corporation, at its principal place of business in this state, with some person of more than sixteen years of age. In case of domestic corporations, such service shall be made upon the president, secretary, or other directors or trustee of such corporation. In case of minors or [on] their guardians, or in case no guardian shall

have been appointed, then on the person who has the care and custody of such minor. In case of idiots, lunatics, or distracted persons, on their guardian; or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In case the land, real estate, premises, or other property sought to be appropriated is [state, school,] or county land, the notice shall be served on the auditor of the county in which the land, real estate, premises, or other property sought to be appropriated is situated. In all cases where the owner or person claiming an interest in such real or other property is a nonresident of this state, or where the residence of such owner or person is unknown, and an affidavit of the agent or attorney of the corporation shall be filed that such owner or person is a nonresident of this state, or that, after diligent inquiry, his residence is unknown, or cannot be ascertained by such deponent, service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks; and in case no newspaper is published in said county, then such publication may be had in a newspaper published in the county nearest to the county in which lies the land sought to be appropriated. And such publication shall be deemed service upon each of such nonresident person or persons whose residence is unknown. Such notice shall be signed by the president, manager, secretary, or attorney of the corporation; and in case the proceedings provided for in this article are instituted by the owner or any other person or party interested in the land, real estate, or other property sought to be appropriated, then such notice shall be signed by such owner, person, or party interested, or his, her, or its attorney. Such notice may be served by any competent person over twenty-one years of age. Due proof of the service of such notice, by affidavit of the person serving the same, or by the printer's affidavit of publication, shall be filed with the clerk of such superior court before or at the time of the presentation of such petition. Want of service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all other cases not otherwise provided for, service of notices, order, and other papers in the proceedings authorized by this article may be made as the superior court, or the judge thereof, may direct. [Cf. L. '88, p. 58, § 2; L. '90, p. 295, § 2; 2 H. C., § 649.]

Superseded as to service in case of state lands, by the next section.

See notes to last section.

Cited in 5 Wash. 780, 781; 7 Wash. 152; 18 Wash. 381; 31 Wash. 463; 32 Wash. 595; 42 Wash. 174; 43 Wash. 93; 45 Wash. 321; 48 Wash. 518; 50 Wash. 30.

Who must be made parties defendant—Necessity and sufficiency of notice: See 1 Remington's Digest, p. 1044, §§ 86-91; State ex rel. Trimble v. Superior Court, 31 Wash. 445; Chehalis County v. Ellingson, 21 Wash. 638; Weed v. Goodwin, 36 Wash. 31; Moynahan v. Superior Court, 42 Wash. 172; Hanson v. Hammer, 15 Wash. 315; State ex rel. Thomas v. Superior Court, 42 Wash. 521; King County v. Melker, 50 Wash. 29; Spokane Interurban Ry. Co. v. Connelly, 48 Wash. 515.

In an action for damages to abutting property for the construction and operation of a railroad in a street, an answer which is, in effect, a plea of license from the city cannot be stricken out as irrelevant and immaterial: Hatch v. Tacoma etc. R. Co., 6 Wash. 1; but where the answer alleges that the right to enter upon the street and change the grade thereof was authorized by ordinance, it is demurrable, when the city charter provides that "No railway tracks can thus be laid down until the injury to property abutting, etc., has been ascertained and compensated": Id.

In an action for damages against a city for the wrongful appropriation of community lands, the wife is a necessary

party plaintiff with the husband: *Park v. Seattle*, 8 Wash. 78; see *Brotian v. Langert*, 1 Wash. 73.

§ 923. Service Where State is Party Defendant.

In all condemnation proceedings brought for the purpose of appropriating any land owned by the state or in which it has an interest, service of process shall be made upon the commissioner of public lands. [L. '07, p. 507, § 1.]

See *infra*, § 928, decree against state lands.

§ 924. (5639.) Adjournment of Proceedings.

The court or judge may, upon application of the petitioner or of any owner or party interested, for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any party whose interest may be affected. [Cf. L. '88, p. 60, § 3; L. '90, p. 297, § 3; 2 H. C., § 650.]

§ 925. (5640.) Court to Adjudicate Necessity for Appropriation—Calling Jury.

At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises or other property described in said petition, have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, or the private use is for a private way of necessity, and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summon a jury. [Cf. L. '88, p. 60, § 4; L. '90, p. 297, § 4; 2 H. C., § 651; L. '97, p. 63, § 1.]

The last part of this section with reference to the manner of selecting a jury is omitted, as repealed by Laws of 1905, page 270: *O. R. & N. Co. v. McCormick*, 46 Wash. 45.

Cited in 7 Wash. 167; 20 Wash. 456; 25 Wash. 552; 32 Wash. 594; 38 Wash. 187; 46 Wash. 46, 47, 278.

An intersecting railroad cannot determine for itself the point and manner of its crossing another road, under § 8736, *infra*, and this section, but the necessity must be adjudicated by the court: *Seattle etc. Ry. Co. v. State*, 7 Wash. 150, 152; and it should attempt to agree with the road to be intersected as to the point and manner of intersection and the compensation therefor, before instituting condemnation proceedings: *Id.*

PUBLIC USE: See 1 Remington's Digest, p. 1028, § 9 et seq.

Question of public use is for the court: *Peterson v. Smith*, 6 Wash. 163; *Healy Lumber Co. v. Morris*, 33 Wash. 490.

Character and not the extent of the use governs: *State ex rel. Ami v. Superior Court*, 42 Wash. 675.

It is not necessary that all the public be benefited: *Lewis County v. Gordon*, 20 Wash. 80.

Taking for private use: *Healy Lumber Co. v. Morris*, 33 Wash. 490; *State v. White River Power Co.*, 39 Wash. 648; *State ex rel. Harlan v. Centralia etc. Co.*, 42 Wash. 632; *Morrell v. Superior Court*, 33 Wash. 542; *Harris v. Superior Court*, 42 Wash. 660.

What are public utilities: See 1 Remington's Digest, p. 1028, §§ 12-22.

— Highways and streets: *State ex rel. Schroeder v. Superior Court*, 29 Wash. 1; *State ex rel. Thomas v. Superior Court*, 42 Wash. 521; *State ex rel. Pagett v. Superior Court*, 47 Wash. 11.

— Railroads and street railways: *State ex rel. Smith v. Superior Court*, 30 Wash. 219; *State ex rel. Trimble v. Supe-*

rior Court, 31 Wash. 445; State ex rel. Harlan v. Centralia etc. Co., 42 Wash. 632; State ex rel. Kent Lumber Co. v. Superior Court, 46 Wash. 516; State ex rel. Harris v. Olympia L. & P. Co., 46 Wash. 511.

— Canals: Lancey v. King County, 15 Wash. 9.

— Boom companies: North River Boom Co. v. Smith, 15 Wash. 138; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586; Nicomem Boom Co. v. North Shore Boom Co., 40 Wash. 315.

— Water supply and irrigation: New Whatcom v. Fairhaven Land Co., 24 Wash. 493; Everett Water Co. v. Powers, 37 Wash. 143; Prescott Irr. Co. v. Flathers, 20 Wash. 454; Weed v. Goodwin, 36 Wash. 31.

— Levees, dikes, and drains: Hansen v. Hammer, 15 Wash. 315; Lewis County v. Gordon, 20 Wash. 80.

— Production and supply of electric power or light: State ex rel. Kent Lumber Co. v. Superior Court, 35 Wash. 303; Tacoma Ind. Co. v. White River P. Co., 39 Wash. 648; State ex rel. Harris v. Olympia L. & P. Co., 46 Wash. 511.

— Laws of 1899, page 255, granting to the owner of timber lands the right to con-

demn right of way, etc., contravenes Constitution, Article I, § 16: Healy Lumber Co. v. Morris, 33 Wash. 490; Matthews v. Belfast Mfg. Co., 35 Wash. 662.

The court having adjudged the use a public one, it is not error to exclude evidence to the contrary: Sultan W. & P. Co. v. Weyerhauser Timber Co., 31 Wash. 558.

Acts constituting appropriation of property: See 1 Remington's Digest, p. 1033, § 330; O. R. & N. Co. v. Owsley, 3 W. T. 38; O. R. & N. Co. v. Day, 3 W. T. 252; Eisenbach v. Hatfield, 2 Wash. 236; Lewis v. Seattle, 5 Wash. 741; Brown v. Pierce County, 28 Wash. 345; Compton v. Seattle, 38 Wash. 514.

Necessity for the appropriation must be shown: See 1 Remington's Digest, p. 1032, § 31; Bellingham Bay etc. R. Co. v. Strand, 4 Wash. 311; S. & M. R. Co. v. State, 7 Wash. 150; S. & M. R. Co. v. Murphine, 4 Wash. 448; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586; State ex rel. Spokane Falls & N. R. Co. v. Superior Court, 40 Wash. 389; State ex rel. Ami Co. v. Superior Court, 42 Wash. 675; State ex rel. Harlan v. Centralia etc. Co., 42 Wash. 632.

§ 926. (5641.) Trial, How Conducted.

A judge of the superior court shall preside at the trial, which shall be held at such time as the court, or the judge thereof, may direct, at the courthouse in the county where the land, real estate, premises, or other property sought to be appropriated is situated, and the jurors at such trial shall make in each case a separate assessment of damages which shall result to any person, corporation, or company, or to the state, or to any county, by reason of the appropriation and use of such land, real estate, premises, or other property by such corporation, as aforesaid, for any and all corporate purposes, and shall ascertain, determine, and award the amount of damages to be paid to said owner or owners respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such land, real estate, premises, or other property, for the purpose of such enterprise, irrespective of any benefit from any improvement proposed by such corporation. Upon the trial, witnesses may be examined in behalf of either party to the proceedings, as in civil actions; and a witness served with a subpoena in such proceedings shall be punished for failure to appear at such trial, or for perjury, as upon a trial of a civil action. Upon the verdict of the jury, judgment shall be entered for the amount of the damages awarded to such owner or owners respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such land, real estate, premises, or other property. In case a jury is waived as in civil cases in courts of record in the manner prescribed by law, the compensation to be paid for the property sought to be appropriated shall be ascertained and determined by the court, or the judge thereof, and the proceedings shall be the same as in trials of an issue of fact by the court. [L. '90, p. 297, § 5; 2 H. C., § 652.]

See Const., Art. I, § 16.

See notes to §§ 921, 922.

Cited in 18 Wash. 382; 38 Wash. 188; 46 Wash. 278.

Section 16, Article I, of the Constitution should be construed as requiring payment to be first made in all cases, and giving to the second clause the effect of laying down the rule of damages as to the appropriation of a right of way by corporations other than municipal: *Lewis v. Seattle*, 5 Wash. 741, 754; criticised, *In re Smith*, 9 Wash. 93.

Necessity of payment before taking: See 1 Remington's Digest, p. 1035, § 40; *Askham v. King County*, 9 Wash. 1; *Smith v. Superior Court*, 26 Wash. 278; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520; *Swope v. Seattle*, 36 Wash. 113; *Peterson v. Smith*, 6 Wash. 163; *Snohomish Co. v. Haywood*, 11 Wash. 429; *Seanor v. County Commrs.*, 13 Wash. 48; *Hansen v. Hammer*, 15 Wash. 315; *Lewis County v. Gordon*, 20 Wash. 80; *Olson v. Seattle*, 30 Wash. 687; *Puyallup v. Lacey*, 43 Wash. 110.

As to construction, validity and sufficiency of statutory provisions for compensation: See 1 Remington's Digest, p. 1034, §§ 37-39.

The measure of damages, where land is appropriated for railway right of way, is the fair market value of the land taken at the time of the appropriation, together with the amount of depreciation, if any, in the value of the land not taken, to be ascertained without regard to any benefit resulting from the construction, or proposed construction of the railroad (overruling *N. P. etc. Ry. Co. v. Coleman*, 3 Wash. 234): *Enoch v. Spokane Falls etc. Ry. Co.*, 6 Wash. 393; *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244.

A county is a municipal corporation within Constitution, Article I, § 16: *Lincoln County v. Brook*, 37 Wash. 14; *King County v. Melker*, 50 Wash. 29.

Municipal corporation may set off benefits: See *Jones v. Seattle*, 23 Wash. 753; *Lincoln County v. Brock*, 37 Wash. 14.

Elements of compensation for injuries to property not taken: See 1 Remington's Digest, p. 1037, §§ 46-53.

— Alteration of flow or discharge of water: *Yakima County v. Tullar*, 3 W. T. 393; *Wendel v. Spokane County*, 27 Wash. 121; *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244.

— Prevention of access to navigable waters: *S. W. & P. Co. v. Weyerhaeuser Timber Co.*, 31 Wash. 588.

— Occupation or use of street or alteration of grade: *Hatch v. Tacoma etc. R. Co.*, 6 Wash. 1; *S. & M. R. Co. v. State*, 7 Wash. 150; *Schwede v. Hemrich Bros. etc. Co.*, 29 Wash. 21; *Patton v. Olympia Door etc. Co.*, 15 Wash. 210; *Brown v. Seattle*, 5 Wash. 35; *Parke v. Seattle*, 5 Wash. 1.

— Smoke, odors, etc., obstruction of light, air, or access: *Brown v. Seattle*,

supra; *Smith v. Superior Court*, 26 Wash. 278; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520; *Patton v. Olympia Door etc. Co.*, *supra*; *Smith v. St. Paul etc. R. Co.*, 39 Wash. 355.

The right of ingress or egress as to lots abutting on a street is property, and interference therewith by building a railroad in the street is damage, within the meaning of the constitution requiring that compensation be first made before taking or damaging property: *Lund v. Idaho & Washington Northern R.*, 50 Wash. 574.

Measure and amount of damages—Taking entire tract: See 1 Remington's Digest, p. 1039, §§ 57-63.

Value of land: See *S. & M. R. Co. v. Gilchrist*, 4 Wash. 509; *Kaufman v. Tacoma etc. Co.*, 11 Wash. 632; *S. & M. R. Co. v. Roeder*, 30 Wash. 244; *Swope v. Seattle*, 36 Wash. 113; *State ex rel. Biddle v. Superior Court*, 44 Wash. 108.

— Improvements made by appropriator: *B. B. etc. R. Co. v. Strand*, 14 Wash. 144; *Lake Whatcom Logging Co. v. Callvert*, 33 Wash. 126; *S. & M. R. Co. v. Corbett*, 22 Wash. 189.

— Value for special use: *S. & M. R. Co. v. Murphine*, 4 Wash. 448; *S. & M. R. Co. v. Roeder*, 30 Wash. 244.

Taking part of tract or property: See 1 Remington's Digest, p. 1040, §§ 64-71.

— Injuries to part not taken to be added to value of that taken: *Enoch v. Spokane Falls etc. Co.*, 6 Wash. 393; *S. & M. R. Co. v. Roeder*, 30 Wash. 244; *S. & M. R. Co. v. Gilchrist*, 4 Wash. 509; *Sultan W. & P. Co. v. Weyerhaeuser etc. Co.*, 31 Wash. 558.

Benefits to part not taken may not be set off, except by municipal corporations: *Enoch v. Spokane Falls etc. R. Co.*, 6 Wash. 393; *S. & M. R. Co. v. Roeder*, 30 Wash. 244; *Kaufman v. Tacoma etc. R. Co.*, 11 Wash. 632.

— Opening or improving streets and setoff of the benefits thereof: *Lewis v. Seattle*, 5 Wash. 741; *Jones v. Seattle*, 23 Wash. 753; *Lincoln County v. Brock*, 37 Wash. 14.

The proceeding is not one to recover damages for land actually taken, but to ascertain what is a full compensation for the taking or injuriously affecting the land; and before the land can be taken at all, petitioner must proceed affirmatively and have the compensation "ascertained and determined," according to law, or fail in the appropriation: *Seattle etc. Ry. Co. v. Murphine*, 4 Wash. 448, 452.

This is true whether the defendant appears or not: *Weed v. Goodwin*, 36 Wash. 31.

If lands held under a leasehold interest are appropriated by a railway company for right of way, the tenant's measure of damages is the difference between the value of the leasehold at the time of the appropriation and its diminished value due

thereto: *Seattle etc. Ry. Co. v. Scheike*, 3 Wash. 625.

In such case, the tenant cannot recover for injuries to land, buildings, etc., thereon at the time of his entry under the lease, but may recover the value of growing crops destroyed, and the value of buildings erected by him for his use as tenant, or, in case of removal of such buildings the cost thereof: *Id.*

When fencing is necessary by reason of appropriation no specific sum should be allowed for fences or crossings as distinct items of damages, but the allowances should be made only to the extent of deprivation of market value of the land, and the burden of constructing such fence taken into consideration only so far as it affects such market value: *Seattle etc. Ry. Co. v. Murphine*, supra; followed in *Seattle & M. Ry. Co. v. Gilchrist*, 4 Wash. 509, 514.

This act sufficiently provides for the assessment of damages for condemnation of right of way: *Weed v. Goodwin*, 36 Wash. 31.

Persons entitled to payment: See 1 Remington's Digest, p. 1042, §§ 72-76; *Olson v. Seattle*, 36 Wash. 31; *Commercial Nat. Bank of Seattle v. Johnson*, 16 Wash. 536; *Yakima Water etc. Co. v. Hathaway*, 18 Wash. 377; *Seattle, In re*, 26 Wash. 602; *Seattle & M. R. Co. v. Scheike*, 3 Wash. 625; *Legg v. Legg*, 34 Wash. 132.

A railroad is liable for damages to a pre-emption entryman where it appropriates public lands upon which he has made entry prior to the filing of the profile of the road in the office of the Secretary of the Interior: *Enoch v. Spokane Falls etc. Ry. Co.*, 6 Wash. 393.

Proof of specific damages is inadmissible where no allegation of such damages is made in the pleadings: *Kaufman v. Tacoma etc. Ry. Co.*, 11 Wash. 632.

When a city has power and authorizes a railroad company to construct tracks on certain streets, the latter assumes all liability to damages to property owners, but the benefits may be set off against such damage the same as if the city had made the improvement itself: *Id.*

Although a railroad company authorized by city ordinance to use, plank, alter and tunnel a street may offset benefits against damages to abutting owner, it is not entitled to offset benefits against the damages to such owner occasioned by the running of trains upon or under such streets: *Id.*

A railroad company is liable to abutting property owners arising from a change of grade of a street when no provision is otherwise made in the ordinance granting the use of the street in that way; the city being not a necessary party, the railway company being the party ultimately liable: *Id.*

Upon assessment of damages for the condemnation of lands abutting on a public

highway, it is immaterial whether the owner's rights in the use of the roadway are based upon establishment of the highway by prescriptive use or by dedication: *Portland and Seattle R. Co. v. Clarke County*, 48 Wash. 509.

Where land has been appropriated prior to the rendition of judgment the proper judgment in condemnation proceedings is one for the damages found and an award of execution for its collection: *Bellingham Bay etc. Co. v. Strand*, 14 Wash. 144.

In condemnation proceedings, when no issue as to title has been raised, and the only question before the jury is as to the amount of the damages, the petitioner in the condemnation proceedings is estopped from raising the question of title in the appellate court, although the question may have been raised upon the cross-examination of a witness: *Id.*

Where possession has been taken of land under condemnation proceedings, the owner is entitled to interest upon the amount of damages awarded him from the date of the taking: *Id.*

The appropriation of land under condemnation proceedings will not entitle the owner, in the award of damages subsequently made, to a judgment including the value of houses erected on the land by the appropriator prior to the rendition of judgment in the condemnation proceedings: *Id.*

No formal pleadings or issues are contemplated or required by the statute, and the amount to be paid is to be determined upon the petition alone: *Seattle etc. Ry. Co. v. Murphine*, 4 Wash. 448, 452.

The filing by the land owner of what purports to be an answer, though none was required by law alleging facts which could be proved without it does not shift the burden of proof to the defendant: *Id.*

And it is not error to strike an answer: See *Pike Street, In re*, 42 Wash. 551.

Abandonment and dismissal of proceedings for laches: See *Seattle v. Fidelity Trust Co.*, 22 Wash. 154.

It is not error to refuse to dismiss a condemnation proceeding as to one party upon its appearing that he was not interested in any of the lands in his own right, where he came into the action on his own initiative alleging that he owned a portion of the lands: *Fulton v. Methow Trading Co.*, 45 Wash. 136.

An order of default against owners appearing specially to object to condemnation proceedings for a county road is without prejudice where they were permitted to appear and be heard on the question of damages: *King County v. Melker*, 50 Wash. 29.

Evidence as to compensation: See 1 Remington's Digest, p. 1047, §§ 95-98; *Seattle & M. R. Co. v. Murphine*, 4 Wash. 448; *Weed v. Goodwin*, 36 Wash. 31; *Seattle & M. R. Co. v. Scheike*, 3 Wash. 625;

B. B. etc. R. Co. v. Strand, 4 Wash. 311; Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509; Seattle M. R. Co. v. Roeder, 30 Wash. 244; Oregon R. & N. Co. v. Owsley, 3 W. T. 38; Skagit County v. McLean, 20 Wash. 92; Swope v. Seattle, 36 Wash. 113; Chicago, M. & St. P. R. Co. v. Alexander, 47 Wash. 131; Portland & Seattle R. Co. v. Ladd, 47 Wash. 88; Inland Empire R. Co. v. McKinley, 48 Wash. 675; Port Townsend S. R. Co. v. Barbare, 46 Wash. 275.

Upon condemnation of lands to be overflowed by the erection of a dam, which would deprive the owner of a swift current through his land valuable as a water power, the current is an appurtenant to the lands actually taken, for which damages are to be assessed with the land, and is not an appurtenant to other land not taken where the power had not been developed and made appurtenant to such other lands: Inland Empire R. Co. v. McKinley, 48 Wash. 675.

Evidence of recent increase in value of the land through which the railroad runs is irrelevant and immaterial, when not shown that such increase results directly from the proposed construction: Seattle etc. Ry. Co. v. Gilchrist, 4 Wash. 509.

It is competent for a witness to testify as to how much land lying on one side of the railroad will be diminished in value by reason of drainage being obstructed, when the character of the land and the direction of the drainage has been shown, and it appears that the proposed road would naturally obstruct the drainage: Id.

Where, in a condemnation proceeding, the defendants expressly raise the point that the tract across which condemnation is sought is only part of an entire farm used as one tract, they are entitled to have the entire tract considered as a basis for estimating their damages: State ex rel. Biddle v. Superior Court, 44 Wash. 108.

An appropriator may limit by stipulation the rights or easements sought in condemnation proceedings: State ex rel. Kent Lumber Co. v. Superior Court, 46 Wash. 516.

In an action against a city for damages for wrongful appropriation of land, evidence of the price the owner had been offered is competent for purpose of proving value: Parke v. Seattle, 8 Wash. 78.

If a witness states that he does not know the market value of land in the vicinity of land sought to be appropriated, he is not competent to give an opinion: Id.

In determining the market value of a particular tract it is competent to allow proof of the sale of similar property in the vicinity at or near the time of the appropriation: Id.

It is competent for a witness to testify as to how much, in his opinion, defend-

ant's land would be depreciated in value on account of the appropriation of a right of way and construction of a railway: Id.

In condemnation proceedings the desire or unwillingness of the defendant to sell the land cannot be shown upon the question of its market value: Port Townsend Southern R. Co. v. Barbare, 46 Wash. 275; or the price paid by the condemning party for similar property: Id.

On the question of the value of land condemned, it is inadmissible to show what price similar land near by is held at by another owner, or to introduce evidence of offers that had been made for the land: Chicago Milwaukee & St. Paul R. Co. v. Alexander, 47 Wash. 131.

As to expert evidence, see Id.

In assessing the amount of damages to property appropriated for right of way it is admissible in establishing its market value to show its value for any use for which it is adapted, and not merely the use to which it may have been put by the owner: Seattle etc. Ry. Co. v. Murphine, 4 Wash. 448; Seattle & M. R. Co. v. Roeder, 30 Wash. 244.

Where a defendant, in attempting to exercise its right of eminent domain, had surveyed and located its road over plaintiff's land, but that plaintiff offered to donate a right of way at another place, and relying on such promise said location was changed and the road constructed thereon at increased expense to defendant, held, that plaintiff was estopped from recovering damages for right of way: Oregon Nav. Co. v. Owsley, 3 W. T. 38.

In condemnation proceedings evidence offered to show that defendant proposed, in its construction of its road across certain irrigating ditches, to place them in the same condition as before and thereafter maintain them at defendant's expense, is admissible on the question of damages: Id.

A condemnation of land for the purpose of developing a water power is not objectionable on the ground that it will damage other lands by diverting water therefrom, where it is only proposed to divert water during the freshets and high water: State ex rel. Harris v. Olympia Light and Power Co., 46 Wash. 511.

It is error, in awarding damages, to allow witnesses to include in their estimate the value of certain prospective rights to lands below high tide: Bellingham Bay etc. Ry. Co. v. Strand, 4 Wash. 311.

Where it is necessary to have the damages assessed by a jury, the railway company is entitled to open and close, both in production of proof and argument to the jury, as the burden is on the company, not only to show the necessity for the taking, but the reasonable value of the land appropriated: Bellingham Bay etc. Ry. Co. v. Strand, supra; Seattle etc. Ry. Co. v.

Murphine, *supra*; Seattle etc. Ry. Co. v. Gilchrist, *supra*.

In proceedings of this kind it is discretionary with the court whether to permit the jury to view the premises: Bellingham Bay etc. Ry. Co. v. Strand, *supra*.

Where there is a conflict in the testimony, it is not error to charge the jury that they may resort to the evidence of their senses on the view to determine the truth: Seattle & M. R. Co. v. Roeder, 30 Wash. 244.

Where, under an agreement between a mill owner and a railroad company, a railroad switch has been constructed by the mill owner, from the railroad to a mill for the purpose of running cars over same for the benefit of the mill, the mill owner cannot escape liability for damages occasioned by the necessary operation of the switch in the customary manner, although the trains may be run and operated by the railroad company: Patton v. Olympia Door etc. Co., 15 Wash. 210.

If the owner of a lot has been damaged in a manner different from that of the public generally by the appropriation of a street for railroad purposes, he is entitled to compensation: *Id.*; following Hatch v. Tacoma etc. Ry. Co., 6 Wash. 1.

There is proof of damages peculiar to plaintiff in the construction and operation of a railroad track in the street in front of his dwelling-house, when it appears that the track runs so close to the sidewalk that a team cannot stand between them clear of the track, and that the

dwelling-house is damaged and rendered of less value by the running of trains over the track: *Id.*

The law of 1888 (Laws 1888, p. 58) on this subject repealed by implication the provisions of the city charter of Spokane Falls (Laws 1886, p. 304, § 11) giving jurisdiction to justices of the peace in eminent domain: N. P. Ry. Co. v. Haas, 2 Wash. 376.

Inadequate or excessive compensation, see Seattle & M. R. Co. v. Roeder, 30 Wash. 244; East Spring Street, *In re*, 41 Wash. 366.

A verdict for \$15,000 damages for land taken for a railroad right of way will not be set aside on appeal as inadequate, where there was much conflict in the evidence, the jury and judge viewed the premises, and the trial court denied a motion for a new trial, and the verdict appears to do substantial justice: Portland and Seattle R. Co. v. Clarke County, 48 Wash. 509.

Waiver of jury in condemnation proceedings: Chelan County v. Navarre, 38 Wash. 684.

A challenge to a juror, in condemnation proceedings by a city, because he had worked for the city, is properly denied: Swope v. Seattle, 36 Wash. 113.

Verdict and findings: See Lincoln County v. Brock, 37 Wash. 14; Quirk v. Seattle, 38 Wash. 25.

In a condemnation proceeding an award of nominal damages is a sufficient verdict: King County v. Melker, 50 Wash. 29.

§ 927. (5642.) Judgment and Decree of Appropriation.

At the time of rendering judgment for damages, whether upon default or trial, if the damages awarded be then paid, or upon their payment, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes. Whenever said judgment or decree of appropriation shall affect lands, real estate, or other premises, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, or other premises are situated, and shall be recorded by said auditor like a deed of real estate, and with like effect. If the title to said land, real estate, premises, or other property attempted to be acquired is found to be defective from any cause, the corporation may again institute proceedings to acquire the same, as in this article provided. [Cf. L. '90, p. 298, § 6; L. '91, p. 84, § 1; 2 H. C., § 653.]

Cited in 18 Wash. 382; 38 Wash. 188; 46 Wash. 279.

If the judgment of appropriation is irregular and erroneous on its face, because it does not conform to the verdict and the statute in relation to the interest acquired by petitioner, the court may correct it

upon motion or petition: Seattle etc. Ry. Co. v. Johnson, 7 Wash. 97.

A decree in condemnation proceedings appropriating certain lands for right of way purposes is not binding on the owner when not a party thereto, nor is he estopped from setting up the invalidity of

the proceedings from the fact that he was present at the hearing and gave testimony therein, when it was conceded on the hearing that no claim for damages in regard to that particular lot was involved: *Owen v. St. Paul etc. Ry. Co.*, 12 Wash. 314.

In an action of ejectment a decree in condemnation proceedings awarding the land to defendant for right of way is no defense, where it appears that plaintiff was the owner of the land and had not been made a party to the condemnation proceedings: *Id.*

As to remedies of owners of property sought to be appropriated, see notes to § 921. Also, see 1 Remington's Digest, p. 1055, § 126 et seq.

Ejectment may be maintained to recover possession of a railroad right of way used and occupied by a railroad company for its roadbed for public purposes, where proceedings are stayed and the effect of the judgment is to compel the company to make compensation for the property taken: *Slaght v. Northern Pac. R. Co.*, 39 Wash. 576.

Upon granting an injunction to restrain the operation of a railroad until damages to abutting property be first paid, the injunction should be held in abeyance for thirty days to allow condemnation proceedings to be commenced: *Lund v. Idaho & Washington Northern R.*, 50 Wash. 574.

Where a railroad company obtained an assignment of a contract by which the owner agreed to convey a right of way to another road, in consideration of its construction between certain points: Held, that the right of the owner to compensation accrued when the company entered the land; and that having entered without reference to the agreement in question the company could not claim any right thereunder to have the land conveyed, which it had already appropriated under the power of eminent domain: *O. R. & N. Co. v. Day*, 3 W. T. 252; and the land owner is likewise estopped from claiming compensation under the contract, as the company did not act upon the faith of it: *Id.*

Under an agreement between the owner and a railway company whereby a right of way was to be conveyed in considera-

tion of one dollar and expenses incident to execution of deed, if the company should construct and operate its road thereon within two years, the substantial consideration is the construction and operation of the road, and upon performance of this condition the equitable title passes to the company, although the money consideration may not have been paid: *Matson v. Pt. Townsend S. Ry. Co.*, 9 Wash. 449.

COSTS: See 1 Remington's Digest, p. 1055, § 125.

Under Code of 1881, § 2475, in a particular action for damages for appropriation of land by a railway company: Held, that plaintiff was entitled to costs and disbursements, including fifteen dollars attorney's fees: *Owsley v. O. R. & N. Co.*, 1 Wash. 491.

Costs cannot be taxed against a non-consenting owner who recovers no more than is tendered: See *Adams County v. Dobschlag*, 19 Wash. 356.

Where the proceedings are instituted in the name of a county, but in reality for the benefit of a ditch district, the district and not the county would be liable for the costs: *Lewis County v. Schobey*, 31 Wash. 357.

As to conclusiveness and effect of award or judgment, see 1 Remington's Digest, p. 1051, § 112; *Seavey v. Seattle*, 17 Wash. 361; *Compton v. Seattle*, 38 Wash. 514; *Jones v. Seattle*, 23 Wash. 753.

Title or rights acquired by petitioner: See 1 Remington's Digest, p. 1058, §§ 141-144; *Yakima Water etc. Co. v. Hathaway*, 18 Wash. 377; *State ex rel. Morrell v. Superior Court*, 33 Wash. 542; *Kakeldy v. Columbia & P. S. R. Co.*, 37 Wash. 675.

Reversion for nonuser of lands condemned for booming purposes: *Nicomen Boom Co. v. North Shore etc. Co.*, 40 Wash. 315.

Where mortgaged premises are taken for public uses, the damages awarded become a substitute therefor, and the mortgage is a specific lien upon the fund: *Commercial Nat. Bank of Seattle v. Johnson*, 16 Wash. 536.

Interest on award or judgment: See *State ex rel. Donofrio v. Humes*, 34 Wash. 347.

§ 928. Decree Against State Lands—Filing with Commissioner—Effect.

When a decree is entered appropriating lands owned by the state, or in which the state has an interest, before any such decree shall be effective, the plaintiff shall cause to be filed in the office of the commissioner of public lands a certified copy of such decree, together with a plat of the lands appropriated and contiguous thereto, in form and substance as prescribed and required by the board of state land commissioners, showing in detail the lands appropriated, together with the amount of damages fixed and awarded in the decree. Upon receipt of such decree, plat and damages, the commissioner

of public lands shall examine the same, and if he shall find that the final decree and proceedings comply with the original petition and notice and any amendment duly authorized, and that no additional interest of the state has been taken or appropriated through error or mistake, he shall cause notations thereof to be made upon the abstracts, records and tract books of his office, and shall issue to the plaintiff his certificate, reciting compliance, in substance, with the requirements of this act, particularly describing the lands appropriated, and thereupon the appropriation shall become effective and the commissioner of public lands shall forthwith transmit the amount received as damages to the state treasurer, as in case of the sale of land, and the subdivision of land through which such right of way is appropriated shall thereafter be sold or leased subject to the right of way. [L. '07, p. 507, § 2; L. '09, p. 625, § 1.]

See *supra*, § 923, service in case of state lands.

§ 929. (5643.) Payment to Petitioner—On Appeal Money to Remain in Court.

Upon the entry of judgment upon the verdict of the jury, or the decision of the court, or judge thereof, awarding damages, as hereinbefore prescribed, the petitioner, or any officer of or other person duly appointed by said corporation, may make payment of the damages assessed to the parties entitled to the same, and of the costs of the proceedings, by depositing the same with the clerk of said superior court, to be paid out under the direction of the court, or judge thereof; and upon making such payment into the court of the damages assessed and allowed, and of the costs to any land, real estate, premises, or other property mentioned in said petition, such corporation shall be released and discharged from any and all further liability therefor, unless upon appeal the owner, or other person or party interested, shall recover a greater amount of damages; and in that case, only for the amount in excess of the sum paid into said court, and the costs of appeal; Provided, that in case of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by such corporation as aforesaid shall remain in the custody of said court until the final determination of the proceedings by the said supreme court. [L. '90, p. 299, § 7; 2 H. C., § 654.]

Cited in 22 Wash. 160; 52 Wash. 52.

A special proceeding to appropriate a "private way of necessity," not being an equitable proceeding, but legal, the record on appeal may be brought up as in ordinary civil actions: *Long v. Billings*, 7 Wash. 267. See, also, *Seavey v. Seattle*, 17 Wash. 361.

Enforcement of award or judgment: See *Skagit County v. McLean*, 20 Wash. 92.

In condemnation proceedings, after an assessment of damages by the jury, judgment cannot be entered for the amount of the award before the relator's election to take the property, nor can the relator be required to make the election at once, but the same may be made within a reasonable time after the decree of appropriation: *Port Townsend Southern R. Co. v. Barbare*, 46 Wash. 275.

Where proceedings to condemn a street across railroad rights of way and tracks resulted in an award of \$12,000 in favor of the defendants, and the city elected to abandon the proceeding and repealed the ordinance therefor, the judgment is a bar to a subsequent proceeding brought shortly after to condemn a street across the rights of way six inches south of the former location, where the same was brought for the purpose of evading the prior award, and in the hope of getting a lower verdict: *Northern Pac. R. Co. v. Georgetown*, 50 Wash. 580.

Objection to a decree in condemnation proceedings in that it failed to fix the time within which the petitioner shall pay the award is immaterial where, by a supplemental transcript, it appears that the award has been paid into court: *Fulton v. Methow Trading Co.*, 45 Wash. 136.

Where the record on an appeal does not contain the pleadings of the defendants, in a proceeding to condemn property for widening a street, under Laws of 1905, page 84, and it appears that twelve parties were represented by counsel at the trial, claiming interest in the property, the court may refuse to require the

jury to assess the compensation to be paid each person; and in aid of a judgment it will be presumed that there was a doubt or contest as to the ownership of the property condemned authorizing such refusal within the meaning of § 13 of the act: *Seattle v. Park*, 42 Wash. 151.

§ 930. (5644.) Disposition of Money—Conflicting Claims.

Any person, corporation, state, or county claiming to be entitled to any money paid into court, as provided in this article may apply to the court therefor, and upon furnishing evidence satisfactory to the court that he or it is entitled to the same, the court shall make an order directing the payment to such claimant the portion of such money as he or it shall be found entitled to; but if, upon application, the court, or judge thereof, shall decide that the title to the land, real estate, premises, or other property specified in the application of such claimant was in such condition as to require that an action be commenced to determine the conflicting claims thereto, he shall refuse such order until such action is commenced, and the conflicting claims to such land, real estate, premises, or other property be determined according to law. [Cf. L. '88, p. 61, § 8; L. '90, p. 299, § 8; 2 H. C., § 655.]

Cited in 18 Wash. 382.

See *Commercial Nat. Bank v. Johnson*, 16 Wash. 536.

§ 931. (5645.) Appeal.

Either party may appeal from the judgment for damages entered in the superior court to the supreme court of the state within thirty days after the entry of judgment as aforesaid, and such appeal shall bring before the supreme court the propriety and justness of the amount of damages in respect to the parties to the appeal; Provided, however, that no bond shall be required of any person interested in the property sought to be appropriated by such corporation, but in case the corporation appropriating such land, real estate, premises, or other property is appellant, it shall give a bond like that prescribed in the next following section, to be executed, filed, and approved in the same manner: And provided further, that if the owner of the land, real estate, premises, or other property accepts the sum awarded by the jury, the court, or the judge thereof, he shall be deemed thereby to have waived conclusively an appeal to the supreme court, and final judgment by default may be rendered in the superior court as in other cases. [Cf. L. '88, p. 61, § 9; L. '90, p. 300, § 9.]

See *supra*, § 929, disposition of moneys.

Cited in 4 Wash. 17, 18; 22 Wash. 159; 25 Wash. 550; 28 Wash. 321; 30 Wash. 222; 38 Wash. 189, 190; 42 Wash. 689; 43 Wash. 93, 94, 112; 44 Wash. 556; 46 Wash. 36; 48 Wash. 92.

Taking and perfecting appeal: See 1 Remington's Digest, p. 1052, § 120.

The provision that either party "may" appeal from the judgment for damages, etc., must be construed to mean that the appeal "must" be prosecuted within the time limited: *Seattle etc. Ry. Co. v. O'Meara*, 4 Wash. 17.

This provision being a special enactment is not repealed by the general act of 1891, limiting the time for taking appeals: *Id.*

For effect of appeal under §§ 2977, 2978, Code 1881, see *Pearson v. Island Co.*, 3 Wash. 497.

The statute upon the subject of condemnation proceedings being a complete act and containing a special enactment upon the subject of appeals, the general law regulating appeals is inapplicable: *Western American Co. v. St. Ann Co.*, 22

Wash. 158; *Tacoma v. Birmingham Co.*, 50 Wash. 683.

When appeal bond necessary: *Port Angeles Pac. R. Co. v. Cooke*, 38 Wash. 184.

As to matters that may be reviewed on appeal, see 1 Remington's Digest, p. 1053, § 122; *Bellingham B. & B. C. R. Co. v. Strand*, 14 Wash. 144; *Western American Co. v. St. Ann Co.*, 22 Wash. 158; *Seattle & M. R. Co. v. Bellingham Bay etc. R. Co.*, 29 Wash. 491; *Parker v. Superior Court*, 25 Wash. 44; *East Spring Street, In re*, 41 Wash. 366; *State ex rel. McCormick v. Superior Court*, 43 Wash. 91; *Puyallup v. Lacey*, 43 Wash. 110; *O. R. & N. Co. v. McCormick*, 46 Wash. 45.

Matters reviewable on certiorari: See 1 Remington's Digest, p. 1054, § 124; *Parker v. Superior Court*, 25 Wash. 544; *Seattle & M. R. Co. v. Bellingham Bay etc. R. Co.*, 29 Wash. 491; *State ex rel. Smith v. Superior Court*, 30 Wash. 219; *State ex rel. Trimble v. Superior Court*, 31 Wash. 445; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586; *Healy*

Lumber Co. v. Morris, 33 Wash. 490; *State ex rel. Morrell v. Superior Court*, 33 Wash. 542; *State ex rel. Ami Co. v. Superior Court*, 42 Wash. 675; *State ex rel. Pagett v. Superior Court*, 46 Wash. 35; *State ex rel. Kettle Falls Power etc. Co. v. Superior Court*, 46 Wash. 500; *State ex rel. Northern Pac. R. Co. v. Superior Court*, 49 Wash. 390.

Application for writ of certiorari must be made within thirty days after entry of order: *State ex rel. Alexander v. Superior Court*, 42 Wash. 684.

Matters not reviewable on certiorari: See *State ex rel. Young v. Superior Court*, 43 Wash. 34; *State ex rel. Nelson v. Superior Court*, 31 Wash. 32; *State ex rel. McCormick v. Superior Court*, 43 Wash. 91; *State ex rel. Port Townsend Southern R. Co. v. Superior Court*, 44 Wash. 554; *State ex rel. N. P. R. Co. v. Superior Court*, 46 Wash. 303.

Laws 1901, page 213, § 1, attempting to amend this section, was void for defect in the title: *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317.

§ 932. (5646.) Prosecution of Work Pending Appeal.

The construction of any railway surface tramway, elevated cable tramway, or canal, or the prosecution of any works or improvements by any corporation as aforesaid shall not be hindered, delayed or prevented by the prosecution of the appeal of any party to the proceedings: Provided, the corporation aforesaid shall execute and file with the clerk of the court in which the appeal is pending a bond to be approved by said clerk, with sufficient sureties, conditioned that the persons executing the same shall pay whatever amount may be required by the judgment of the court therein, and abide any rule or order of the court in relation to the matter in controversy. [Cf. L. '88, p. 62, § 10; L. '90, p. 300, § 10; 2 H. C., § 657; L. '97, p. 64, § 2.]

Cited in 28 Wash. 319; 38 Wash. 186, 189, 190.

Upon an appeal from an award of damages in condemnation proceedings, where there was no decree of appropriation, the appeal bond under this section is neces-

sary to perfect the appeal, and does not assume that the petitioner desires to proceed with the condemnation, nor preclude the abandonment thereof: *Port Angeles Pac. R. Co. v. Cooke*, 38 Wash. 184.

§ 933. (5647.) Appropriation of Right of Way Through Defiles, etc.

Any railroad company whose right of way passes through any canyon, pass, or defile shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile for the purpose of its road in common with the road first located or the crossing of other railroads at grade, and any railroad company authorized by law to appropriate land, real estate, premises, or other property for right of way, or any other corporate purpose, may present a petition in the manner and form hereinbefore provided for the appropriation of a right of way through any canyon, pass, or defile for the purpose of its road, where right of way has already been located, condemned, or occupied by some other railroad company through such canyon, pass, or defile for the purpose of its road, and thereupon like proceedings shall be had upon such petition as herein provided in other cases; and at the time of rendering judgment for damages, whether upon default or trial, the court, or judge thereof, shall enter a judgment or decree authorizing said railroad

company to occupy and use said right of way, roadbed, and track, if necessary, in common with the railroad company or companies already occupying or owning the same, and defining the terms and conditions upon which the same shall be so occupied and used in common. [L. '90, p. 301, § 12; 2 H. C., § 658.]

Cited in 7 Wash. 164; 29 Wash. 497.

This section provides for cases where it is necessary for railroad to go through a canyon, pass, or defile already occupied

by an earlier road: Seattle etc. Ry. Co. v. State, 7 Wash. 150, 164.

As to construction, operation and effect of this section, see North Coast R. Co. v. North. Pac. R. Co., 48 Wash. 529.

§ 934. (5648.) Appropriation by Electric Power Companies, etc.

The right of eminent domain is hereby extended to all corporations incorporated or that may hereafter be incorporated under the laws of this state or any state or territory of the United States, and doing business in this state, for the purpose of transmitting electric power by wire, cable or by any other means: Provided, however, that said right of eminent domain shall not be exercised in respect to any residence or business structure or structures. [L. '95, p. 80, § 1.]

§ 935. (5649.) Right to Enter Lands for Survey, etc.

Every corporation incorporated or that may hereafter be incorporated under the laws of this state or any state or territory of the United States, and doing business in this state, for the purpose of transmitting electric power by wire, cable or any other means, shall have the right to enter upon any land between the termini of the proposed lines for the purpose of examining, locating and surveying such lines, doing no unnecessary damage thereby. [L. '95, p. 80, § 2.]

§ 936. (5650.) Procedure as in Other Cases.

Every such corporation shall have the right, subject to the proviso contained in the last preceding section, to appropriate real estate or other property for right of way or for any corporate purposes in the same manner and under the same procedure as now is or may be hereafter provided by the law in the case of other corporations authorized by the laws of this state to exercise the right of eminent domain. [L. '95, p. 80, § 3.]

CHAPTER VI.

WASTE, TRESPASS AND NUISANCE.

§ 937. (5654.) Waste Actionable.

Wrongs heretofore remediable by action of waste shall be subjects of actions, as other wrongs. [Cf. L. '54, p. 206, § 403; L. '69, p. 143, § 554; Cd. '81, § 600; 2 H. C., § 659.]

See *supra*, § 159, limitation of actions for.

See *infra*, §§ 1536, 1537, action by administrator for waste, trespass, etc.

§ 938. (5655.) Action Against Guardian or Tenant—Damages—Forfeiture—Eviction.

If a guardian, tenant in severalty or in common, for life or for years, of real property, commit waste thereon, any person injured thereby may main-

tain an action at law for damages therefor against such guardian or tenant; in which action there may be judgment for treble damages, forfeiture of the estate of the party committing or permitting the waste, and of eviction from the property. But judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion against the tenant in possession, when the injury to the estate in reversion is determined in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done or suffered in malice. [Cf. L. '54, p. 206, § 403; L. '69, p. 143, § 555; Cd. '81, § 601; 2 H. C., § 660.]

See *supra*, § 217, venue in actions affecting real property.

Cited in 2 Wash. 120.

Injuries to lands formerly cognizable in the technical action of waste were assembled in this section, while those in which a stranger to the land was the wrongdoer, and which had been cognizable in the action of trespass, were collected and provided for in the two following sections: *McLeod v. Ellis*, 2 Wash. 117, 120.

The common-law remedies embraced in these sections are continued as before,

though they are now to be known as actions for injuries to real property instead of waste in one case and trespass in the other: *Id.*

The fact that a mortgagee in possession of premises is committing waste will not authorize the appointment of a receiver in the absence of proof of the mortgagee's insolvency: *Brundage v. Home Savings & Loan Assn.*, 11 Wash. 277.

§ 939. (5656.) Trespass for Cutting Trees, etc.—Damage.

Whenever any person shall cut down, girdle, or otherwise injure or carry off any tree, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, village, town, or city lot, or cultivated ground, or on the common or public grounds of any village, town, or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city, against the person committing such trespasses, or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be. [L. '69, p. 143, § 556; Cd. '81, § 602; 2 H. C., § 661.]

See *infra*, §§ 2822, 2823, offense of trespass on inclosed and uninclosed lands.

Cited in 2 Wash. 120, 122, 123; 27 Wash. 66, 358; 40 Wash. 45, 47.

TRESPASS: See 2 Remington's Digest, p. 2728, §§ 1, 2.

A person, though the owner, has no right to invade forcibly the actual and peaceful occupancy of land by another, even if the latter holds the same without right. By so doing he becomes a trespasser: *White v. Territory*, 3 W. T. 397.

The owners of lands upon which a railroad company has entered without notice of an intention to appropriate the same under the statute, and without setting apart the lands to be taken, may maintain trespass for injuries to their property: *Bellingham Bay etc. Ry. Co. v. Loose*, 2 Wash. 500; *Downs v. Seattle etc. Ry. Co.*, 5 Wash. 781; *Olson v. Seattle*, 30 Wash. 687.

A person entering upon inclosed and improved lands occupied and claimed under a certificate of purchase from a railroad company is a naked trespasser: *Laurendeau v. Fugelli*, 1 Wash. 559.

A lessee's possession of stone quarried from his leasehold estate is sufficient to

support replevin against a trespasser who removes the same: *Reynolds v. Dexter Horton & Co.*, 2 Wash. 185.

Although the act of quarrying may be waste by the tenant, his possession or that of his assignee is good as against a mere wrongdoer: *Id.*

Sufficiency of title or right of possession to support action: See 2 Remington's Digest, p. 2729, §§ 5, 6; *Colwell v. Smith*, 1 W. T. 92; *Wendel v. Spokane County*, 27 Wash. 121; *Olson v. Seattle*, 30 Wash. 687; *Nickelson v. Cameron Lumber Co.*, 39 Wash. 569.

As to defenses: See *United States v. Kelly*, 3 W. T. 41; *Anderson v. Northern Pac. R. Co.*, 19 Wash. 340.

Trespass does not lie for consequential damages: *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1.

In an action for the wrongful conversion of trees, not commenced or tried in the county where the lands were situated, a paragraph of the complaint relating to trespass thereon based upon this section of the code may be rejected as surplusage, and the action treated merely as one

of conversion in order to sustain the jurisdiction of the court: *McLeod v. Ellis*, 2 Wash. 117.

In an action to enjoin the commission of trespass upon lands the complaint is defective where the trespasses are alleged in general terms only: *Wilkeson C. & C. Co. v. Driver*, 9 Wash. 177.

Sufficiency of allegations as to title and possession: See *Maggs v. Morgan*, 30 Wash. 604.

A brought suit against B for damage to his crops by cattle of B. Upon trial, it being disclosed that C had an interest in the crops, the court summarily dismissed the action, because of the non-joinder of C: Held, error in so doing; that the interest of C might be consistent with the right of A to recover for the trespass and at most could only operate as a partial failure of proof: *Washburn v. Case*, 1 W. T. 253.

In an action of trespass to real property, parol proof of plaintiff's undisputed possession is sufficient to show title in himself, when no better title is alleged to be in defendant or some other person: *Spurlock v. Pt. Townsend So. Ry. Co.*, 13 Wash. 29.

In an action of trespass by a lessee to recover damages for the tearing down of a leased building and the removal of the lessee's effects therefrom, evidence of the market value of the building and contents is inadmissible: *Froelich v. Morse*, 15 Wash. 636.

As to burden of proof to show malicious and wanton damage, when charged in complaint: See *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535.

Damages—Actions for treble damages, recovery, etc.: See 2 Remington's Digest, p. 2730, §§ 12-18; *Tacoma Mill Co. v. Perry*, 40 Wash. 44; *Rice Fisheries Co. v. Pac. Realty Co.*, 35 Wash. 535; *Gardner v. Lovegren*, 27 Wash. 356; *Chappel v. Puget Sound Reduction Co.*, 27 Wash. 63.

DAMAGES.—An instruction that the jury could themselves assess treble damages is erroneous, as it is for the court to treble the damages in its judgment after the jury have assessed actual damages: *McLeod v. Ellis*, 2 Wash. 117.

In an action to enjoin defendant from interfering with plaintiff's right to take gravel from defendant's land, defendant cannot counterclaim damages committed by plaintiff to the land and growing wheat when such trespass has no connection with the taking of the gravel: *Corliss v. Dunning*, 8 Wash. 332.

Proof of damages subsequent to commencement of an action is inadmissible under an answer which states, "that for the period of one year prior to the commencement of said cause plaintiff has wrongfully and oppressively torn down defendant's fences, etc.": *Id.*

Action for continuing trespass: See *Doran v. Seattle*, 24 Wash. 182.

This section was not intended to apply to cases in which the trespass was committed through an innocent mistake as to the boundary or location of a tract of land claimed by the defendant: See the next section.

A finding that a trespass was not casual or involuntary is supported where defendants cut trees without having made an effort to locate section lines, which were easily located after the trespass: *Nethery v. Nelson*, 51 Wash. 624.

§ 940. (5657.) Casual or Involuntary Trespass—Damages.

If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodlands, for the purpose of repairing any public highway or bridge upon the land, or adjoining it, judgment shall only be given for single damages. [L. '69, p. 143, § 557; Cd. '81, § 603; 2 H. C., § 662.]

Cited in 2 Wash. 120; 27 Wash. 66, 358; 40 Wash. 45, 47.

Where a boundary line between two quarter section corners is in dispute, a land owner who adopts a line run on the magnetic variation called for in the field-

notes, without resorting to a proper method for determining the true line, is guilty of voluntary and not a casual or involuntary trespass, if he cuts timber on the adjoining tract: *Heybrook v. Index Lumber Co.*, 49 Wash. 378.

§ 941. (5658.) Injunction to Prevent Waste.

When any two or more persons are opposing claimants under the laws of the United States to any land in this state, and one is threatening to commit upon such land waste which tends materially to lessen the value of the inheritance, and which cannot be compensated by damages, and there is imminent

danger that unless restrained such waste will be committed, the party, on filing his complaint and satisfying the court or judge of the existence of the facts, may have an injunction to restrain the adverse party. In all cases he shall give notice and bond as is provided in other cases where injunction is granted, and the injunction when granted shall be set aside or modified as is provided generally for injunction and restraining orders. [L. '54, p 206, § 404; Cd. '81, § 604; 2 H. C., § 663.]

Cited in 5 Wash. 153, 155, 156.

Actions for waste: See 2 Remington's Digest, p. 2852, § 1; Brundage v. Home Savings & L. Assn., 11 Wash. 277.

The statute assumes that there will be instances where money will be inadequate to compensate for damages to lands: Arment v. Hensel, 5 Wash. 152, 154.

Cutting down trees on public land is waste within the meaning of this section, and an injunction will lie by a claimant thereof to restrain an opposing claimant from committing waste thereon: Id. See, also, Colwell v. Smith, 1 W. T. 92.

The provisions of this section are not applicable in a case in which the state is

one of the claimants, because the word "person," when used in the statute, does not include the state: McBride v. Board of Commrs. (Wash.), 44 Fed. 17.

A bill for an injunction to prevent waste, showing that plaintiff is an applicant to purchase the premises from the United States as mineral land; that his right is under contest in the land office; that defendant claims title adversely to him, does not state a case within the exception to the rule, that equity will not interfere to prevent waste when complainant's title is in dispute: Id.

§ 942. (5659.) Action by Occupant of Unsurveyed Land.

Any person now occupying and settled upon, or who may hereafter occupy or settle upon, any of the unsurveyed public lands, not to exceed one hundred and sixty acres, in this state, for the purpose of holding and cultivating the same, may commence and maintain any action, in any court of competent jurisdiction, for interference with or injuries done to his or her possessions of said lands, against any person or persons so interfering with or injuring such lands or possession: Provided always, that if any of the aforesaid class of settlers are absent from their claims continuously for a period of six months in any one year, the said person or persons shall be deemed to have forfeited all rights under this section. [L. '83, p. 70, § 1; 2 H. C., § 545.]

"Section" substituted for "act," being identical as to the provisions referred to.

A settler on unsurveyed lands cannot recover damages for the cutting and removal of timber therefrom: See Nicholson v. Cameron Lumber Co., 39 Wash. 569.

§ 943. (5660.) Actionable Nuisances, Defined.

The obstruction of any highway, or the closing of the channel of any stream used for boating or rafting logs, lumber, or timber, or whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance, and the subject of an action for damages and other and further relief. [Cf. L. '54, p. 207, § 405; L. '69, p. 144, § 559; Cd. '81, § 605; 2 H. C., § 664.]

See infra, § 8307 et seq., public nuisances.

See infra, § 8310, private nuisance defined.

Cited in 13 Wash. 618.

As to matters constituting a public nuisance, see 2 Remington's Digest, p. 2164, §§ 11-14; State v. Bruce, 23 Wash. 777; Graetz v. McKenzie, 9 Wash. 696; Wilcox v. Henry, 35 Wash. 591; Tilden v. Gordon & Co., 34 Wash. 92; Dempsie v.

Darling, 39 Wash. 125; Ingersoll v. Rousseau, 35 Wash. 92.

A court of equity will not grant injunctive relief against parties destroying or threatening to destroy a fence placed and maintained upon a public highway in violation of law: Johnson v. Maxwell, 2 Wash. 482.

The obstruction of a public road by building a fence therein is a nuisance which may be abated by any person injuriously affected thereby, provided it be done without committing a breach of the peace or doing unnecessary injury: *Id.*; *Smith v. Mitchell*, 21 Wash. 536.

Temporary closing of a street by a railroad company under authority of city in

order to build a bridge, not a nuisance: See *Lund v. St. Paul M. & M. R. Co.*, 31 Wash. 286.

Acts or conduct constituting a private nuisance: See 2 *Remington's Digest*, p. 2162, §§ 1, 2; *Doran v. Seattle*, 24 Wash. 182; *Sterrett v. Northport Min. etc. Co.*, 30 Wash. 164; *Woodard v. West Side Mill Co.*, 43 Wash. 308.

§ 944. (5661.) Who may Maintain.

Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance. If the judgment be given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate such nuisance. Such motion shall be allowed, of course, unless it appear on the hearing that the nuisance has ceased, or that such remedy is inadequate to abate or prevent the continuance of the nuisance, in which latter case the plaintiff may have the defendant enjoined. [Cf. L. '54, p. 207, § 406; L. '69, p. 144, § 560; Cd. '81, § 606; L. '91, p. 89, § 1; 2 H. C., § 665.]

See references to last section.

Cited in 13 Wash. 618.

Rights of private persons: See 2 *Remington's Digest*, p. 2165, §§ 15, 16; *Morris v. Graham*, 16 Wash. 343; *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558; *Dawson v. McMillan*, 34 Wash. 269; *Smith v. Mitchell*, 21 Wash. 536; *Sutton W. & P. Co. v. Weyerhaeuser Tim. Co.*, 31 Wash. 558; *Grantham v. Gilson*, 41 Wash. 125.

An injunction will not lie to restrain the sale of intoxicating liquors to plaintiff's employees on the ground that some of such employees become intoxicated and become disqualified from rendering service to their employer: *N. P. Ry. Co. v. Whalen*, 3 W. T. 452.

A complaint by a railroad company alleging that there are a number of saloons and gambling-houses along the line of its road, and that they are public and private nuisances, but failing to name any particular houses, or designate wherein it is disorderly or a nuisance, is insufficient: *Id.*

Riding on a bicycle on a public highway is not a nuisance requiring special police surveillance: *State v. Bruce*, 23 Wash. 777.

A city, proceeding to abate a nuisance in one of its streets, is clothed with the attributes of sovereignty, and may prosecute its suit in the first instance by a bill in equity: *Moore v. Walla Walla*, 2 W. T. 184.

Resort to a judicial tribunal should precede destruction of property, where there is any doubt as to existing rights of the person whose property is sought to be destroyed: *Spokane St. Ry. Co. v. Spokane Falls*, 6 Wash. 521, 527.

Although a street railway track constructed without authority may be technically a nuisance, yet where there is no

general law of the city declaring such railway a nuisance and authorizing its abatement, the city is not authorized, under a charter provision empowering it "to cause any nuisance to be abated," to tear up the same: *Id.*

A public nuisance can be abated only by a public officer, except where the party who desires to abate it has some special interest in the abatement which is different from and greater than the interest of the community: *Griffith v. Holman*, 23 Wash. 347.

Public nuisances—Actions for abatement or injunction: See 2 *Remington's Digest*, p. 2165, §§ 18-28; *Id.*, p. 2068, §§ 310-312; *Ingersoll v. Rousseau*, 35 Wash. 92; *Dempsie v. Darling*, 39 Wash. 125; *Wilcox v. Henry*, 35 Wash. 591; *Winsor v. Hanson*, 40 Wash. 423; *Grantham v. Gilson*, 41 Wash. 125; *Wilson v. West & Slade Mill Co.*, 28 Wash. 312; *West Seattle v. West Seattle Land etc. Co.*, 38 Wash. 359; *Lund v. St. Paul M. & M. R. Co.*, 31 Wash. 286.

The fact that the remedy provided by § 943 and this section for the abatement of a nuisance is an action at law will not preclude the court from granting equitable relief, in a proceeding therefor, when a suit at law for the abatement of the nuisance would prove entirely inadequate: *Carl v. West Aberdeen Land etc. Co.*, 13 Wash. 616.

Although the obstruction of a navigable stream may be a public nuisance, yet a private action may be maintained for its removal, when plaintiffs have a special interest in having the obstruction removed so that they can float their logs down the stream: *Id.*

The fact that the court mistakenly admitted evidence competent only in a suit

at law for the abatement of a nuisance, will not deprive plaintiffs of a right to equitable relief, where the pleadings and proofs are sufficient to warrant the granting of such relief: *Id.*

Boom companies organized under § 7119 et seq. have no right to interfere with the navigation or use of the streams upon which they have constructed booms: *Id.*

A decree granting equitable relief in a petition for a mandatory injunction against a nuisance, which impliedly goes further and adjudges the abatement of the nuisance, should be interpreted in the light of the finding made by the court, in which it has decided that it is not within its province, in the action brought, to determine whether or not an obstruction should be abated as a nuisance: *Id.*

A proprietor is not justified in entering upon adjoining lands to abate a nuisance by the removal of a boom placed across the stream, where it has caused him no injury, and merely because of a probability that it will create a nuisance in the future: *Winsor v. Hanson*, 40 Wash. 423.

A private action will not lie to abate a nuisance common to the entire public: *Jones v. St. Paul etc. R. Co.*, 16 Wash. 25.

Private nuisances—Abatement, injunction and actions for damages: See 2 Remington's Digest, p. 2163, §§ 4-10; *Winsor v. Hanson*, 40 Wash. 423; *Doran v. Seattle*, 24 Wash. 182; *Sterrett v. Northport*

Min. etc. Co., 30 Wash. 164; *Rowe v. Northport Smelt. etc. Co.*, 35 Wash. 101.

The evidence is sufficient to show a nuisance in maintaining a fish market in an improper and obnoxious manner, where the evidence of many witnesses from the immediate vicinity was to the effect that offensive fumes and odors from shellfish, boiled or stored in an improper manner, permeated the atmosphere, and the same was not disputed except by negative testimony of persons occasionally in the market; and it was error to dismiss an action to abate the same: *Asia v. Pool*, 47 Wash. 515.

Sufficiency of evidence of damage: See *Id.*

The evidence is sufficient to show that the operation of a stamp-mill in a leased storeroom, on the ground floor of a hotel building, is a nuisance which the landlord has a right to have abated by termination of the lease, and it is error to grant a nonsuit in his action of forcible entry and detainer, where it appeared that the operation of the machinery severely shook and jarred the building to such an extent as to greatly annoy the guests everywhere in the hotel, and prevent the leasing of certain rooms: *Ridpath v. Spokane Stamp Works*, 48 Wash. 320.

Public nuisances—Criminal prosecutions: See 2 Remington's Digest, p. 2168, §§ 29-33; *State v. Schaffer*, 31 Wash. 305; *State v. Brown*, 7 Wash. 10; *State v. Paggett*, 8 Wash. 579; *State v. Horlacher*, 16 Wash. 325.

§ 945. (5662.) Warrant for Abatement of Nuisance.

If the order be made, the clerk shall thereafter, at any time within six months, when requested by the plaintiff, issue such warrant directed to the sheriff, requiring him forthwith to abate the nuisance at the expense of the defendant, and return the warrant as soon thereafter as may be, with his proceedings indorsed thereon. The expenses of abating the nuisance may be levied by the sheriff on the property of the defendant, and in this respect the warrant is to be deemed an execution against property. [Cf. L. '54, p. 207, § 407; L. '69, p. 145, § 561; Cd. '81, § 607; 2 H. C., § 666.]

§ 946. (5663.) Stay of Warrant.

At any time before the order is made or the warrant issues, the defendant may, on motion to the court, or judge thereof, have an order to stay the issue of such warrant for such period as may be necessary, not exceeding six months, to allow the defendant to abate the nuisance himself, upon his giving bond to the plaintiff, in a sufficient amount, with one or more sureties, to the satisfaction of the court, or judge thereof, that he will abate it within the time and in the manner specified in such order. The sureties shall justify as bail upon arrest. If the defendant fails to abate such nuisance within the time specified, the warrant for the abatement of the nuisance may issue as if the same had not been stayed. [L. '69, p. 145, § 562; Cd. '81, § 608; 2 H. C., § 667.]

See supra, § 765, qualifications of bail on arrest.

See infra, § 8322, stay in cases of public nuisance.

CHAPTER VII.

ESTABLISHMENT OF BOUNDARIES OF LANDS.

§ 947. (5667.) Establishment of Lost or Uncertain Boundary Lines.

Whenever the boundaries of lands between two or more adjoining proprietors shall have been lost, or by time, accident, or any other cause shall have become obscure or uncertain, and the adjoining proprietors cannot agree to establish the same, one or more of said adjoining proprietors may bring his civil action in equity, in the superior court for the county in which such lands, or part of them, are situated, and such superior court, as a court of equity, may, upon such complaint, order such lost or uncertain boundaries to be erected and established and properly marked. [L. '86, p. 104, § 1; 2 H. C., § 668.]

See *infra*, § 3984, establishment of lines and corners by county surveyor.

Cited in 9 Wash. 185; 44 Wash. 101; 47 Wash. 403.

As to the description of boundaries, see 1 Remington's Digest, p. 392, §§ 1-9; *Owen v. Henderson*, 16 Wash. 39; *Hutchcraft v. Lutwig*, 13 Wash. 240; *Odson v. Knox*, 8 Wash. 642; *Shelton Logging Co. v. Gosser*, 26 Wash. 126; *Maynard v. Puget Sound Nat. Bank*, 24 Wash. 455; *Thayer v. Spokane County*, 36 Wash. 63; *Pachscher v. Fuller*, 6 Wash. 534; *McIrwin v. Charlebois*, 38 Wash. 151; *Waring v. Loomis*, 35 Wash. 85; *Stangair v. Roads*, 41 Wash. 583.

The true corner for a donation claim is where the United States surveyor established it, notwithstanding its location may not be such as is designated on the plat or field-notes; but proof of such actual establishment at a place other than that indicated by the field-notes must be clear and convincing: *Cadeau v. Elliott*, 7 Wash. 205; *Greer v. Squire*, 9 Wash. 359; see *Squire v. Greer*, 2 Wash. 209.

Where neither course, distance, nor computed contents agree with the monuments, yet the monument controls when it is definitely ascertained: *Cadeau v. Elliott*, *supra*.

The law establishes an obliterated corner where the surveyor actually located it, and not where it ought to be located by a correct survey: *Inmon v. Pearson*, 47 Wash. 402.

If a deed describes the land conveyed as commencing at a point west of the northeast corner of a certain section, the presumption is that the point is due west, although the north line of the section is not the true meridian; but such presumption may be rebutted by extraneous testimony: *Reed v. Tacoma Bldg. & Sav. Assn.*, 2 Wash. 198.

Reference to a plat or map in a deed of conveyance makes it a part thereof; and when thus incorporated all the lines thereof have the same effect as monuments in controlling courses and distances therein

set out: *State v. Tide Land Appraisers*, 5 Wash. 425, 426.

One who purchases with reference to monuments marking the boundaries acquires title regardless of the lines shown by a recorded plat: *Olson v. Seattle*, 30 Wash. 687.

In a proceeding to re-establish a lost corner by a survey, if the actual location of the monuments can be ascertained, it is the duty of the surveyor to relocate the lost corner by following the government field-notes, proceeding from conceded monuments and corners: *Strunz v. Hood*, 44 Wash. 99.

The government meander line of a navigable lake marks the boundary of a grant made prior to the adoption of the constitution only where the same is below high-water mark, and if the meander is above high-water mark, the owner took title to the land to high-water mark: *Van Sielen v. Muir*, 46 Wash. 38.

Presumptions and burden of proof, admissibility, weight and sufficiency of evidence in actions for the establishment of boundaries: See 1 Remington's Digest, p. 395, §§ 11-13; *Moore v. Brownfield*, 7 Wash. 23; *Blair v. Brown*, 17 Wash. 570; *Simmons v. Jamieson*, 32 Wash. 619; *Stangair v. Roads*, 41 Wash. 583; *Thayer v. Spokane County*, 36 Wash. 63.

Where the custom of surveyors in laying out plats and in running lines is to make them conform to the nearest lines of the government survey, if such lines vary from the true line upon which they should have been run, the boundary lines given in a deed of conveyance as running north and south and east and west will be construed as conforming with the variations in the nearest lines of the government survey: *Tacoma Bldg. etc. Assn. v. Clark*, 8 Wash. 289.

Where a corner post placed upon the original government survey cannot be more definitely located than as being somewhere within a space covered by a circle whose radius is fifty feet or more,

it must be held to be a lost corner within the rule for the relocation of such corners: *Wilkerson Coal & Coke Co. v. Driver*, 13 Wash. 610.

The relocation of a lost quarter post is without effect unless there is proof that, in relocating it, the rules prescribed by the United States statutes and the regulations adopted thereunder have been complied with: *Id.*

The original location of a government corner marks the boundary line if it has been preserved; but if it is lost, it is properly established according to government rules for the relocation of lost corners: *King v. Carmichael*, 45 Wash. 127.

Evidence of one purchasing a lot according to the recorded plat, that she saw a stake at one corner of the block, is not sufficient to show a corner at variance with the plat, where the stake was not identified in any way: *La Bounty v. Seattle*, 46 Wash. 141.

Hearsay or general reputation is admissible to establish the location of a lost or obliterated boundary line or corner: *Inmon v. Pearson*, 47 Wash. 402.

The grantees in a deed conveying land in a block by metes and bounds, which description would be coincident with the south half of lot number 11, in case all the lots were sixty feet in width as stated on the plat, are not entitled to have their title quieted as against owners of the adjoining lot number 10, upon the mere claim that there was a shortage in the length of the block which, if evenly distributed among all the lots, would make the metes and bounds description cover part of lot 10, where there was no definite proof as to the location of the shortage or as to the lots affected thereby: *Mason v. Long*, 49 Wash. 18.

That the true high-water mark of a navigable lake was rendered difficult of ascertainment by the acts of one in possession, does not entitle the state to have the same established at the government meander line, where the meander was admittedly many feet distant from the original high-water mark; and therefore the state cannot complain of the adoption of a con-

ventional line which is approximately correct: *Brace & Hergert Mill Co. v. State*, 49 Wash. 326.

Where the quarter section corners on the north and south sides of a section are in place, the dividing line between the east and west halves is a straight line between the said corners, and not an adopted line run on the magnetic variation given by the government surveyor's field-notes: *Heybrook v. Index Lumber Co.*, 49 Wash. 378.

Where a quarter corner is lost, it must be located halfway between the section corners: *Heybrook v. Index Lumber Co.*, *Id.*

Where a description first calls for the north boundary of the tract as at the center of a street, and runs thence south a certain number of feet to a railroad right of way for the south boundary, the first call prevails over the last call in determining the location of the north boundary, where there is a shortage between the two boundaries: *Stokes v. Curtis*, 49 Wash. 235.

There is sufficient evidence of the location of a disputed boundary line, the starting point of which was given as the center of F. street in a town plat, 823.5 feet north of a certain government corner, where it appears that the center of F. street is 823.5 feet north of the center of S. street, as given by the plat, the accuracy of the plat not being disputed, and that the government stake originally stood in the center of S. street, although it has long since disappeared: *Stokes v. Curtis*, 49 Wash. 235.

Agreements between parties as to lines, estoppel, and adverse possession: See 1 *Remington's Digest*, p. 396, §§ 14-16; *Lindley v. Johnston*, 42 Wash. 257; *Denny v. Northern Pac. R. Co.*, 19 Wash. 298; *Phinney v. Campbell*, 16 Wash. 203; *Erickson v. Murlin*, 39 Wash. 43.

An agreement for the re-establishment of a lost corner does not estop the party from objections to its location pursuant to the agreement when all the conditions of the agreement had not been carried out: *Inmon v. Pearson*, 47 Wash. 402.

§ 948. (5668.) Commissioners Appointed—Duties of.

Said court may, in its discretion, appoint commissioners, not exceeding three competent and disinterested persons, one or more of whom shall be practical surveyors, residents of the state, which commissioners shall be, before entering upon their duties, duly sworn to perform their said duties faithfully, and the said commissioners shall thereupon survey, erect, establish, and properly mark said boundaries, and return to the court a plat of said survey, and the field-notes thereof, together with their report. Said report shall be advisory, and either party may except thereto, in the same manner as to a report of referees. [L. '86, p. 105, § 2; 2 H. C., § 669.]

The appointment of commissioners under this section rests in the discretion of the trial court, and is not subject to review on appeal: *Stangair v. Roads*, 41 Wash. 583.

In a proceeding to re-establish a lost corner by a survey, it is not error, upon receiving the report of the commissioner

appointed to make the survey, to refuse to admit additional evidence as to whether the monuments were lost, and contradicting the report in that particular, where that issue had been previously determined before the appointment of the commissioner: *Strunz v. Hood*, 44 Wash. 99.

§ 949. (5669.) Proceedings, How Conducted—Decree.

The proceedings shall be conducted as other civil actions, and the court, on final decree, shall apportion the costs of the proceedings equitably, and the costs so apportioned shall be a lien upon the said lands, severally, as against any transfer or encumbrance made of or attaching to said lands, from the time of the filing of the complaint: Provided, a notice of lis pendens is filed in the auditor's office of the proper county, in accordance with law. [L. '86, p. 105, § 3; 2 H. C., § 670.]

Cited in 44 Wash. 101.

CHAPTER VIII.

ACTIONS BY AND AGAINST PUBLIC CORPORATIONS.

§ 950. (5673.) Actions by Public Corporations.

An action at law may be maintained by any county, incorporated town, school district, or other public corporation of like character in this state, in its corporate name, and upon a cause of action accruing to it, in its corporate character, and not otherwise, in either of the following cases:—

1. Upon a contract made with such public corporation;
2. Upon a liability prescribed by law in favor of such public corporation;
3. To recover a penalty or forfeiture given to such public corporation;
4. To recover damages for an injury to the corporate rights or property of such public corporation. [L. '69, p. 154, § 601; Cd. '81, § 661; 2 H. C., § 671.]

See supra, § 886, actions against the state.

See infra, § 3822, capacity of counties to sue and be sued.

See infra, § 3823, actions to be brought in corporate name.

See infra, § 4483, power and liability of school districts.

See infra, § 7518, power of cities of first class to sue and be sued.

See infra, § 7671, power of cities of third class to sue and be sued.

See §§ 7939-7951, actions by and against townships.

Cited in 38 Wash. 106; 48 Wash. 88.

Municipal corporations are subject to suit only in the county in which they are situated: *North Yakima v. Superior Court*, 4 Wash. 655.

A county is not liable for personal injuries caused by a defective sidewalk under its control: *Clark v. Lincoln Co.*, 1 Wash. 518. Contra: *Kirtly v. Snohomish County*, 20 Wash. 111.

A school district is liable under this and the next section for the negligent act and omissions of its officers or agents whereby a bucket of hot water, used in connection with the heating apparatus of a schoolroom, is overturned and a pupil burned or scalded: *Redfield v. School District No. 3*, 48 Wash. 85.

§ 951. (5674.) Actions Against Public Corporations.

An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation. [L. '69, p. 154, § 602; Cd. '81, § 662; 2 H. C., § 672.]

Cited in 4 Wash. 658; 20 Wash. 113; 21 Wash. 648; 48 Wash. 88.

See *Collinsworth v. New Whatcom*, 16 Wash. 224.

§ 952. (5675.) Verification of Pleadings by Public Corporations.

In such actions, the pleadings of the public corporation shall be verified by any of the officers representing it in its corporate capacity, in the same manner as if such officer was a defendant in the action, or by the agent or attorney thereof, as in ordinary actions. [L. '69, p. 154, § 603; Cd. '81, § 663; 2 H. C., § 673.]

§ 953. (5676.) Manner of Enforcing Judgments.

If judgment be given for the recovery of money or damages against such county or other public corporation, no execution shall issue thereon for the collection of such money or damages, but such judgment in such respect shall be satisfied as follows:—

1. The party in whose favor such judgment is given may, at any time thereafter, when execution might issue on a like judgment against a private person, present a certified transcript of the docket thereof to the officer of such county or other public corporation who is authorized to draw orders on the treasury thereof;

2. On the presentation of such transcript, such officer shall draw an order on such treasurer for the amount of the judgment, in favor of the party for whom the same was given. Thereafter such order shall be presented for payment and paid with like effect and in like manner as other orders upon the treasurer of such county or other public corporation;

3. The certified transcript herein provided for shall not be furnished by the clerk, unless at the time an execution might issue on such judgment if the same were against a private person, nor until satisfaction of the same judgment in respect to such money or damages be acknowledged as in ordinary cases. The clerk shall include in the transcript the memorandum of such acknowledgment of satisfaction and the entry thereof. Unless the transcript contain such memorandum, no order upon the treasurer shall issue thereon. [L. '69, p. 154, § 604; Cd. '81, § 664; 2 H. C., § 674.]

See *infra*, § 3947, municipal warrants, action on. See notes.

Cited in 9 Wash. 400; 14 Wash. 223; 16 Wash. 458; 18 Wash. 37, 227; 20 Wash. 398; 31 Wash. 539; 34 Wash. 352, 641; 45 Wash. 53; 50 Wash. 103.

This section did not contemplate the issue of warrants in satisfaction of judgments except against existing funds, but a general practice has grown out of issuing them like other warrants and paying them as the treasurer is able, with interest at the legal rate from time of presentation until paid: *Seymour v. Spokane*, 6 Wash. 362, 364.

An action cannot be maintained upon a city warrant, but the holder's remedy, in case of refusal of the treasurer to make payment in the order of presentation, is by mandamus, and questions affecting the legality of the warrant can be tried therein: *Cloud v. Town of Sumas*, 9 Wash. 399; *Union Savings Bank v. Gelbach*, 8 Wash. 497.

All that a judgment creditor of a city can obtain is a warrant for the payment

of his claim according to the provisions of this section. No execution can be issued thereon, against the town: *Cloud v. Town of Sumas*, *supra*; see *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142, 145; *La France Fire Engine Co. v. Davis*, 9 Wash. 600; *Eidemiller v. Tacoma*, 14 Wash. 376, 387.

As to execution and enforcement of judgment against municipal corporations, see 2 *Remington's Digest*, p. 2118, § 475; *Lorence v. Bean*, 18 Wash. 36; *Smith v. Ormsby*, 20 Wash. 396; *Chapin v. Port Angeles*, 31 Wash. 535; *State ex rel. Lane v. Ballinger*, 41 Wash. 23; *State ex rel. Donofrio v. Humes*, 34 Wash. 347.

This section does not preclude supplemental proceedings to enforce a judgment against the state dental board, which under section 8423 handles its funds and satisfies its claims the same as any individual or corporation: *Stern v. State Board of Dental Examiners*, 50 Wash. 100.

§ 954. (5677.) Officer Refusing to Satisfy Judgment may be Attached.

Should the proper officer of said corporation fail or refuse to satisfy said judgment, as in the preceding section provided, an attachment may be issued to compel his performance of said duty. [L. '69, p. 155, § 605; Cd. '81, § 665; 2 H. C., § 675.]

Cited in 14 Wash. 223; 31 Wash. 541.

§ 955. (5678.) Tender Condition Precedent to Action to Enjoin Tax Collection.

Hereafter no action or proceeding shall be commenced or instituted in any court of this state to enjoin the sale of any property for taxes, or to enjoin the collection of any taxes, or for the recovery of any property sold for taxes, unless the person or corporation desiring to commence or institute such action or proceeding shall first pay, or cause to be paid, or shall tender to the officer entitled under the law to receive the same, all taxes, penalties, interest, and costs justly due and unpaid from such person or corporation on the property sought to be sold or recovered. [L. '88, p. 43, § 1; 2 H. C., § 676.]

See supra, §§ 718, 719, injunctions.

See notes to § 9267, infra.

Cited in 7 Wash. 641; 16 Wash. 535; 19 Wash. 571; 22 Wash. 446, 448; 24 Wash. 374; 29 Wash. 183; 31 Wash. 541; 38 Wash. 497, 500; 43 Wash. 468; 44 Wash. 245; 49 Wash. 425.

Necessity of tender: See 2 Remington's Digest, pp. 2702, 2703, § 166; Lewiston Water & P. Co. v. Asotin County, 24 Wash. 371; Miller v. Pierce County, 28 Wash. 110; Ward v. Huggins, 16 Wash. 530; Kinsman v. Spokane, 20 Wash. 118;

Denman v. Steinbach, 29 Wash. 179; State ex rel. McClain v. Reed, 29 Wash. 383; Landes Estate Co. v. Clallam County, 19 Wash. 570; Merritt v. Covey, 22 Wash. 444; Phillips v. Thurston County, 35 Wash. 187; McManus v. Morgan, 38 Wash. 528; Shepard v. Vincent, 38 Wash. 493; Young v. Droz, 38 Wash. 468; Moyer v. Foss, 41 Wash. 130; Kahn v. Thorpe, 43 Wash. 463.

§ 956. (5679.) What Complaint must State.

In all actions to enjoin the sale of any property for taxes, in all actions to enjoin the collection of any tax, and in all actions for the recovery of any property sold for taxes, the complainant must state and set forth specially in his complaint the tax that is justly due, with penalties, interest, and costs, the tax alleged to be illegal, and point out the illegality thereof; that the taxes for that and previous years have been paid; and when the action is for the recovery of lands or other property sold for taxes against the person or corporation in possession thereof, that all taxes, penalties, interest, and costs paid by the purchaser at tax sale, his assignees or grantees, have been fully paid or tendered, and payment refused. [L. '88, p. 44, § 2; 2 H. C., § 677.]

Cited in 19 Wash. 571; 38 Wash. 531; 43 Wash. 468; 47 Wash. 695; 49 Wash. 424, 425; 52 Wash. 515.

As to sufficiency of the complaint: See 2 Remington's Digest, p. 2704, § 169; Id., p. 2707, § 182; Puget Sound Nat. Bank of Seattle v. Seattle, 9 Wash. 608; Lewiston W. & P. Co. v. Asotin County, 24 Wash. 371; Miller v. Pierce County, 28 Wash. 110; Morrison v. Berlin, 37 Wash. 600; Kahn v. Thorpe, 43 Wash. 463.

This section does not apply to an ordinary action of ejectment, where the plaintiff was ousted by one claiming un-

der a void tax title which, under the Law of 1897, was subject to collateral attack from the fact that the tax had already been paid: Bullock v. Wallace, 47 Wash. 690.

Under §§ 955-957, a suit to recover possession of lands sold to satisfy a tax cannot be commenced without first paying or tendering to the person in possession claiming under the tax title the amount of the tax with interest, penalties and costs for which the land was sold; and the fact that the judgment had been irregularly vacated and the taxes were there-

upon paid to the county treasurer does not alter the case: *Ryno v. Snider*, 49 Wash. 421.

An action to set aside a tax deed and quiet title is properly nonsuited where it is not alleged or proved that the plaintiff

tendered to the defendant holders of the tax title all taxes, penalties, interest, and costs, paid by them at the tax sale, the same being made a condition precedent to action by this section: *Nunn v. Stewart*, 52 Wash. 513.

§ 957. (5680.) Construction.

The provisions of sections 955 and 956 shall be construed as imposing additional conditions upon the power of the court or judge in granting injunctions to those already imposed, and of imposing additional conditions upon the complainant in actions for the recovery of property sold for taxes. [L. '88, p. 44, § 3; 2 H. C., § 678.]

Cited in 43 Wash. 468; 49 Wash. 425.

CHAPTER IX.

ACTIONS ON OFFICIAL BONDS, FINES AND FORFEITURES.

§ 958. (5684.) Official Bonds, to Whom Deemed Security.

The official bond of a public officer to the state, or to any county, city, town, or other municipal or public corporation of like character therein, shall be deemed a security to the state, or to such county, city, town, or other municipal or public corporation, as the case may be, and also to all persons severally, for the official delinquencies against which it is intended to provide. [L. '69, p. 152, § 592; Cd. '81, § 652; 2 H. C., § 694.]

See supra, § 777, bonds not to fail for want of form.

See infra, § 974 et seq., actions for protection to sureties, and notes.

See infra, § 1159, action on contractor's bond to indemnify public corporations.

See infra, §§ 8326, 8327, actions on official bonds.

See infra, § 8336 et seq., provisions for release of sureties on official bonds.

Liabilities on official bonds: See 2 Remington's Digest, p. 2183, §§ 53-63; *Spokane v. Allen*, 9 Wash. 229; *Ballard v. Thompson*, 21 Wash. 669; *Snohomish County v. Ruff*, 15 Wash. 637; *Kittitas County v. Travers*, 16 Wash. 528.

An action may be maintained on the official bond of a treasurer of the board of regents of the agricultural college for the failure to turn over funds in his hands to his successor appointed by the board: *State v. Smith*, 9 Wash. 195.

The fact that a custodian of city funds is required by law to give a bond for the proper disposition of moneys coming into his hands does not thereby constitute him a mere debtor to the city, to the extent that the funds can be garnisheed by his judgment creditors: *Marx v. Parker*, 9 Wash. 473.

In an action on the official bond of the county treasurer for moneys unaccounted for, held, in a particular case, that the findings of the referee justify the conclusion of law that plaintiff was entitled to judgment for the sum not accounted for: *Ferry v. King Co.*, 2 Wash. 337.

Settlements made by the county commissioners with an officer have not the force of a judicial decision, and are not

binding on the county: *Ferry v. King Co.*, supra; *Dillon v. Spokane Co.*, 3 W. T. 498.

If the legislature has extended the term of an officer beyond the limit fixed by law at the time of his election and qualification, the sureties upon his bond cannot be held liable for his official acts during such extended term: *King Co. v. Ferry*, 5 Wash. 536.

Sureties on official bond of a chief of police cannot be held liable for his acts in receiving and detaining in a city prison persons arrested without process by police officers of the city, as such acts are not done *virtute officii* but *colore officii*: *Marquis v. Willard*, 12 Wash. 528.

DEFECTS — ALTERATIONS: See 2 Remington's Digest, p. 2183, § 54; *Tumwater v. Hardt*, 28 Wash. 684; *State v. Bokien*, 14 Wash. 403.

An official bond with no penal sum named in it, but left in blank where the penalty should be inserted, is a nullity: *Walla Walla Co. v. Ping*, 1 W. T. 339. And when the penal sum is not written in it until after it has been signed and sealed by the sureties and passed from their control, for delivery, the sureties are not estopped from denying their lia-

bility, although the bond has been accepted without knowledge of the alteration: *Walla Walla Co. v. Ping*, supra; criticised in *King Co. v. Ferry*, supra.

Although there has been an alteration made in an official bond of a county treasurer before delivery, by erasure in the body of the bond of the name of a person proposed as surety, and the substitution of another name without the knowledge or consent of the sureties signing the same, yet where the bond is regular on its face and erasures incapable of easy detection, and the commissioners have no notice thereof, the sureties must be held liable thereon: *King Co. v. Ferry*, supra.

It is not a fatal defect in a bond to secure laborers and materialmen under § 1159, infra, to name the board of school directors as obligees, instead of the state of Washington: *Ihrig v. Scott*, 5 Wash. 584; *Wadsworth v. School District*, 7 Wash. 485.

Where an official bond has been altered after execution by erasing the name of one surety and substituting that of another person, the sureties who do not consent thereto are thereby discharged: *Fairhaven v. Cowgill*, 8 Wash. 686; compare *King Co. v. Ferry*, supra.

The contract which embodies the obligation of an official bond, like any other contract, must be construed to give effect to the intention of the parties, and that intention is to be gathered from the language employed and the circumstances surrounding its execution: *King Co. v. Ferry*, 5 Wash. 536, 550.

A bond is valid under § 777, supra, if it appear therefrom that it was executed and accepted with the intention on the part of all parties to provide the security required by said statute, although it may not be in strict statutory form: *Ihrig v. Scott*, 5 Wash. 584.

Although an official bond is executed, charging the sureties with separate and limited liabilities in accordance with § 8335, infra, yet such fact does not alter the rule that sureties who do not consent to the release or withdrawal of the co-sureties are entitled to discharge from liability on the bond: *Fairhaven v. Cowgill*, 8 Wash. 686. The fact that sureties on an official bond, immediately after discovery of defalcation by their principal, unite with a cosurety, who had been substituted without their knowledge in place of another surety, in an endeavor to hold the money of the principal upon deposit in bank, does not amount to a ratification of the altered bond: *Id.*

EVIDENCE.—In an action on an official bond, the bond may be introduced in evidence without first explaining an evident alteration in a material part of the instrument: *Fairhaven v. Cowgill*, supra. And under plea of general denial, evidence is admissible to show an alteration therein after its execution: *Id.*

Failure to produce a bond or a copy before trial, where the same is material, will not preclude proof of loss and contents, where a sufficient excuse is made for a failure to produce the same: *Spears v. Lawrence*, 10 Wash. 368.

§ 959. (5685.) Injured Party may Maintain Action.

When a public officer by official misconduct or neglect of duty shall forfeit his official bond, or render his sureties therein liable upon such bond, any person injured by such misconduct or neglect, or who is by law entitled to the benefit of the security, may maintain an action at law thereon in his own name against the officer and his sureties to recover the amount to which he may by reason thereof be entitled. [L. '69, p. 152, § 593; Cd. '81, § 653; 2 H. C., § 695.]

Cited in 19 Wash. 75.

§ 960. (5686.) Leave to Commence Action.

Before an action can be commenced by a plaintiff, other than the state, or the municipal or public corporation named in the bond, leave shall be obtained of the court, or judge thereof, where the action is triable. Such leave shall be granted upon the production of a certified copy of the bond, and an affidavit of the plaintiff, or some person in his behalf, showing the delinquency. But if the matter set forth in his affidavit be such that, if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that the leave herein provided for has been granted, the defendant, on motion, shall be entitled to judgment of nonsuit; if it does, the defendant may con-

trovert the allegation, and if the issue be found in his favor, judgment shall be given accordingly. [L. '69, p. 152, § 594; Cd. '81, § 654; 2 H. C., § 696.]

See *infra* § 8326, who may maintain action on official bond.

Cited in 4 Wash. 633; 19 Wash. 75, 424.

This section does not apply to suits against administrators, as they are not public officers within the meaning of this chapter: *Bartels v. Gove*, 4 Wash. 632.

Leave of court to sue is not necessary in an action upon an official bond by the agents of the state where the action is solely for the benefit of the state: *Nye v. Kelly*, 19 Wash. 73. See *Spokane County v. Prescott*, 19 Wash. 418.

§ 961. (5687.) Judgment for Delinquency No Bar to Another Action.

A judgment in favor of a party for one delinquency shall not preclude the same or another party from maintaining another action on the same bond for another delinquency. [L. '69, p. 153, § 595; Cd. '81, § 655; 2 H. C., § 697.]

§ 962. (5688.) Amount of Judgment.

In an action upon an official bond, if judgments have been recovered against the surety therein other than by confession, equal in the aggregate to the penalty, or any part thereof, of such bond, and if such recovery be established on the trial, judgment shall not be given against such surety for an amount exceeding such penalty, or such portion thereof as is not already recovered against him. [L. '69, p. 153, § 596; Cd. '81, § 656; 2 H. C., § 698.]

§ 963. (5689.) Actions for Fines and Forfeitures.

Fines and forfeitures may be recovered by an action at law in the name of the officer or person to whom they are by law given, or in the name of the officer or person who by law is authorized to prosecute for them. [L. '69, p. 153, § 597; Cd. '81, § 657; 2 H. C., § 699.]

See *supra*, § 159, limitations of actions for.

§ 964. (5690.) Amount of Recovery.

When an action shall be commenced for a penalty which by law is not to exceed a certain amount, the action may be commenced for that amount, and if judgment be given for the plaintiff, it may be for such amount or less, in the discretion of the court, in proportion to the offense. [L. '69, p. 153, § 598; Cd. '81, § 658; 2 H. C., § 700.]

§ 965. (5691.) Collusive Judgment No Bar.

A recovery of a judgment for a penalty or forfeiture by collusion between the plaintiff and defendant, with intent to save the defendant wholly or partially from the consequences contemplated by law, in case when the penalty or forfeiture is given wholly or partly to the person who prosecutes, shall not bar the recovery of the same by another person. [L. '69, p. 153, § 599; Cd. '81, § 659; 2 H. C., § 701.]

§ 966. (5692.) Disposition of Fines and Forfeitures—Venue.

Fines and forfeitures not specially granted or otherwise appropriated by law, when recovered, shall be paid into the school fund of the proper county. Whenever, by the provisions of law, any property, real or personal, shall be forfeited to the state, or to any officer for its use, the action for the recovery of such property may be commenced in any county where the de-

fendant may be found, or where such property may be. [L. '69, p. 153, § 600; Cd. '81, § 660; 2 H. C., § 702.]

See *infra*, § 2189, and notes, disposition of fines.

Cited in 23 Wash. 578.

CHAPTER X.

ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

§ 967. (5695.) What Actions Survive.

All other causes of action [than those enumerated in section 183 *supra*] by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. Where the cause of action survives, as herein provided, the executors or administrators may maintain an action at law thereon against the party against whom the cause of action accrued, or after his death, against his personal representatives. [L. '69, p. 165, § 659; Cd. '81, § 718; 2 H. C., § 704.]

See Laws of 1869, p. 166, § 665; Laws of 1877, p. 147, § 728, omitted from Code of 1881, limitation of actions on claims against estates.

Section 703 of 2 Hill's Code, which preceded this section, is omitted as repealed by § 183, *supra*: See cases cited in § 183.

See *supra*, § 155, limitations of actions.

See *supra*, § 156, limitations of actions on real property.

See *supra*, § 161, limitation of actions by heirs, etc., against executor or administrator for malfeasance, etc.

See *supra*, § 170, suspension of statute of limitation by death of party.

See *supra*, § 180, executors, etc., as parties.

See *supra*, § 193, action not to abate by disability if continued by or against representatives.

See *supra*, § 194, survival of action for personal injury.

See *infra*, §§ 1166-1171, limitations of actions for liens for logs.

See *infra*, § 1432, limitations against sureties.

See *infra*, § 1472, limitations of claims against estates.

See *infra*, § 1477 et seq., limitations of actions on claims against estates; see, also, on same subject, § 164, *supra*.

See *infra*, §§ 1534-1542, actions by and against executors and administrators in certain cases.

See *infra*, § 1540, limitations of action against fraudulent conveyance.

Cited in 4 Wash. 787; 5 Wash. 262; 15 Wash. 294; 35 Wash. 501.

Survival of action on death of party: See 1 Remington's Digest, p. 7, §§ 18-26; Jones v. Miller, 35 Wash. 499; Dwyer v. Nolan, 40 Wash. 459; Ralph v. Lomer, 3 Wash. 401; Donnerberg v. Oppenheimer, 15 Wash. 290; Baker v. Northwest Bldg. etc. Co., 33 Wash. 677; Megrath v. Gilmore, 15 Wash. 558; Overlock v. Shinn, 28 Wash. 20; Power v. Nolan, 27 Wash. 318; Strong v. Eldridge, 8 Wash. 595.

Mere personal torts which die with a party and do not survive to his personal representatives are not assignable: Slau-son v. Schwabacher Bros. & Co., 4 Wash. 783.

The legislature did not intend to declare by this section what causes of action should survive, but were legislating merely with reference to causes which already survive: *Id.*

In an action by an administrator against the son of the deceased for the appropriation of property and the collection of

debts belonging to the deceased, it was error to exclude a brother of defendant from testifying, because such person was not interested adversely to the estate: McCoy v. Ayers, 2 W. T. 307.

A suit in equity may be maintained against the person collecting money without authority from a debtor, if it be shown that the debtor to the estate is insolvent: *Id.*

If an unauthorized person collects debts belonging to an estate, an action at law cannot be maintained against him, for the recovery of the money by the administrator, because the original debtor is still liable to the estate. The rule is otherwise as to specific property, subject to identification in the hands of one unauthorized to receive it: *Id.*

Negotiable notes collected by an administrator in Oregon and accounted for by him relieves the administrator from liability therefor at the suit of an administrator in this territory, although the notes

were secured by mortgage on property therein: *Id.*

Sufficiency of a complaint considered and the powers of an executor under the will discussed in *Miller v. Borst*, 11 Wash. 260.

Upon the death of an appellant pending an appeal from an order granting a new trial, after a final judgment in appellant's favor, the action does not abate,

and the administrator of the estate of the deceased is entitled to be substituted as party plaintiff to prosecute such appeal, since the cause of action is merged in the judgment, which descends to the estate as property, the order granting a new trial being suspended pending the appeal therefrom: *Wright v. Northern Pac. R. Co.*, 45 Wash. 432.

§ 968. (5696.) Several Representatives Regarded as One.

In an action against several executors or administrators, they shall all be considered as one person representing their testator or intestate, and judgment may be given and execution issued against all of them who are defendants in the action, although the notice be served only on part of them, in the same manner and with like effect as if served on all, except as provided in the next section. [L. '69, p. 165, § 660; Cd. '81, § 719; 2 H. C., § 705.]

See *Strong v. Eldridge*, 8 Wash. 595.

Service need not be made upon the

devisees: See *Hill v. Lowman*, 15 Wash. 503.

§ 969. (5697.) Judgment by Default—Not Evidence of Assets, When.

When a judgment is given against an executor or administrator for want of answer, such judgment is not to be deemed evidence of assets in his hands, unless it appear that the complaint alleged assets, and that the notice was served upon him. [L. '69, p. 166, § 661; Cd. '81, § 720; 2 H. C., § 706.]

Where the executors are liable in their representative capacity, the judgment must provide for payment in due course

of administration and not by execution: See *Collins v. Denny Clay Co.*, 41 Wash. 136.

§ 970. (5698.) Inventory may be Contradicted, When.

In an action against executors and administrators, in which the fact of their having administered the estate of their testator or intestate, or any part thereof, is put in issue, and the inventory of the property of the deceased returned by them is given in evidence, the same may be contradicted or avoided by evidence,—

1. That any property has been omitted in such inventory, or was not returned therein at its full value, or that since the return thereof such property has increased in value;

2. That such property has perished or been lost without the fault of such executors or administrators, or that it has been fairly and duly sold by them at a less price than the value so returned, or that since the return of the inventory such property has deteriorated in value. In such action the defendants cannot be charged for any things in action specified in their inventory, unless it appear that they have been collected, or with due diligence might have been. [L. '69, p. 166, § 662; Cd. '81, § 721; 2 H. C., § 707.]

§ 971. (5699.) No Liability as Executor de Son Tort.

No person is liable to an action as executor of his own wrong for having taken, received, or interfered with the property of a deceased person, but is responsible to the executors or administrators of such deceased person for the value of all property so taken or received, and for all injury caused by his interference with the estate of the deceased. [L. '69, p. 166, § 663; Cd. '81, § 722; 2 H. C., § 708.]

Cited in 6 Wash. 203.

If a husband acts as executor of a deceased wife's will, but, at the time of his death, has not completed administration upon her estate, and the executors of his own will take possession and administer upon all the property the husband held,

including the separate and community estate of the deceased wife, such administration is merely irregular and not void, nor do the ordinary rules relating to liability of executors de son tort apply thereto: In re Hill's Estate, 6 Wash. 285.

§ 972. (5700.) **Executor of Executor—Limit of Powers of.**

An executor of an executor has no authority as such to commence or maintain an action or proceeding relating to the estate of the testator of the first executor, or to take any charge or control thereof. [L. '69, p. 166, § 664; Cd. '81, § 723; 2 H. C., § 709.]

§ 973. (5701.) **Provisional Remedies, When Authorized.**

In an action against an executor or administrator as such, the remedies of arrest and attachment shall not be allowed on account of the acts of his testator or intestate; but for his own acts as such executor or administrator, such remedies shall be allowed for the same causes in the manner and with like effect as in actions at law generally. [L. '69, p. 167, § 666; Cd. '81, § 724; 2 H. C., § 710.]

CHAPTER XI.

PROTECTION OF SURETIES.

§ 974. (5705.) **Notice to Creditor to Institute Action.**

Any person bound as surety upon any contract in writing for the payment of money or the performance of any act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to institute an action upon the contract. [L. '54, p. 210, § 426; Cd. '81, § 644; 2 H. C., § 756.]

See supra, § 958, and notes, sureties on official bonds.

See supra, § 962, aggregate judgment against sureties on official bonds.

See infra, § 978, subrogation.

See infra, § 979, contribution among sureties.

See infra, § 8333 et seq., sureties on official bonds, number, justification and extent of liability.

See infra, § 8336 et seq., provisions for the release of sureties on official bonds.

Cited in 6 Wash. 304; 10 Wash. 428; 11 Wash. 5; 13 Wash. 332; 16 Wash. 551.

Neglect of creditor to proceed against principal—Notice by surety: See 2 Remington's Digest, p. 2349, § 42; Kittridge v. Stegmier, 11 Wash. 3.

This section has no application to a case where the principals on the bond are non-residents, and it is not made to appear that they have property in the state liable to attachment: Seattle Crockery Co. v. Haley, 6 Wash. 302, 304.

The leaning of the law being in favor of sureties, their contracts are strictly construed: Walla Walla v. Ping, 1 W. T. 339.

If two persons have signed a promissory note jointly, but nothing to show which was principal and which was surety, it is competent to show by extrinsic evidence these facts and that the payee had knowledge of the same: Harman v. Hale, 1 W.

T. 422, 34 Am. Dec. 816; see Warburton v. Ralph, 9 Wash. 537. And such showing may be made in an action at law under our code: Harman v. Hale, supra.

The statute permitting sureties, in an action against them and their principals, to have the question of suretyship adjudicated is not a limitation of their rights as existing before its enactment, but is intended as an additional and more complete remedy than existed under the common law: Denny v. Sayward, 10 Wash. 422.

Where a judgment has been rendered against sureties without fault on their part and after defense made in good faith by them, such judgment will be conclusive in an action by them to recover money which they paid on account thereof, if the principal had knowledge of the action, even though he was not served with process therein: Id.

The doctrine of *res adjudicata* does not apply to an action brought by a surety to recover from his principal such portion as has been paid upon a judgment obtained against them in a former action, in which the principal was a defendant, but in which no judgment had been taken against him for the reason that he was a nonresident of the state and did not appear in the action: *Id.*

Unreasonable delay in suing the principal at the request of a surety is not shown where notice to sue was given some time in February and a waiver of the notice was given on the 3d of the next month: *Rotting v. Cleman*, 20 Wash. 116.

Sureties cannot escape liability because of the failure of the obligee to inform them of the existence of a judgment held by him against the principal, nor because of a representation by the obligee that their responsibility as sureties would be merely nominal: *Oregon Nat. Bank v. Gardner*, 13 Wash. 154.

NOTICE TO SUE.—If the payee forbear suing after request in writing by surety, as provided in this section, such delay will operate to discharge the liability: *Harman v. Hale*, *supra*. A verbal request is insufficient: *Id.* Fraudulent conduct by payee which lulls the surety into groundless confidence and prevents him from obtaining indemnity is sufficient to discharge him: *Id.*

EXTENSION OF TIME.—If, after maturity of note, the holder thereof takes from the principals thereon a new note extending the time of payment of the debt, without the knowledge of the sureties, the

latter are discharged: *First Nat. Bank v. Harris*, 7 Wash. 139.

If a contract for the extension of time of payment of a promissory note executed by two principal makers and their sureties is made with one of the principals only, such contract is valid, and, if not assented to by the sureties, will result in their discharge: *Warburton v. Ralph*, 9 Wash. 537.

The request of a surety upon a promissory note that further time be granted him for payment will not estop him from claiming a discharge, when a contract for extension has been entered into with his principal without his knowledge or consent: *Id.*

If a payee, at the time of extending the time of payment of a promissory note, reserves his rights against sureties thereon, the extension will not operate as a discharge, although the sureties may not have been notified: *National Bank v. Jose*, 10 Wash. 185.

A mere oral request upon the part of the surety to sue, and a promise upon the part of the creditor to comply, will not constitute a waiver of the notice in writing required by this section, when it appears that the demand for suit had been made some ten months before suit was actually brought by the creditor: *Kittridge v. Slegmier*, 11 Wash. 3.

If, after a surety has notified the creditor to bring suit, he subsequently consents to the dismissal of the suit brought pursuant to such notice, he will remain bound without any new promise: *Id.*

§ 975. (5706.) Surety Discharged, When.

If the creditor or obligee shall not proceed within a reasonable time to bring his action upon such contract, and prosecute the same to judgment and execution, the surety shall be discharged from all liability thereon. [L. '54, p. 210, § 427; Cd. '81, § 645; 2 H. C., § 757.]

Cited in 13 Wash. 332; 16 Wash. 551.

§ 976. (5707.) Trial of Suretyship.

When any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may, upon a written complaint to the court, cause the question of suretyship to be tried and determined upon the issues made by the parties at the trial of the cause, or at any time before or after the trial, but such proceedings shall not affect the proceedings of the plaintiff. [L. '54, p. 210, § 428; Cd. '81, § 646; 2 H. C., § 758.]

Cited in 13 Wash. 332; 18 Wash. 409.

Adjudication of suretyship: See 2 Remington's Digest, p. 2353, § 57; *Denny v.*

Sayward, 10 Wash. 422; *McKee v. Whitworth*, 15 Wash. 536; *Kirkland Land etc. Co. v. Jones*, 18 Wash. 407.

§ 977. (5708.) Order to Exhaust Principal's Property.

If the finding upon such issue be in favor of the surety, the court shall make an order directing the sheriff to levy the execution upon and first ex-

haust the property of the principal before a levy shall be made upon the property of the surety, and the clerk shall indorse a memorandum of the order upon the execution. [L. '54, p. 211, § 429; Cd. '81, § 647; 2 H. C., § 759.]

Cited in 13 Wash. 332.

§ 978. (5709.) Subrogation of Surety.

When any defendant surety in a judgment or special bail or replevin [bail], or surety in a delivery bond or replevin bond, or any person being surety in any bond whatever, has been or shall be compelled to pay any judgment, or any part thereof, or shall make any payment which is applied upon such judgment by reason of such suretyship, or when any sheriff or other officer or other surety upon his official bond shall be compelled to pay any judgment, or any part thereof, by reason of any default of such officer, except for failing to pay over money collected, or for wasting property levied upon, the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail, surety, officer, or other person making such payment, and after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use. [L. '54, p. 211, § 430; Cd. '81, § 648; 2 H. C., § 760.]

See supra, § 974, notes, notice to institute action.

Cited in 5 Wash. 696; 28 Wash. 34.

This section preserves to the surety not only the judgment, but also the benefit of any levy made on the judgment debtor's property under an execution issued on the judgment: *Murray v. Meade*, 5 Wash. 693, 696.

If, after levy of an execution upon the property of the judgment debtor sufficient to satisfy the judgment against him, the judgment and costs are paid by a surety

of the judgment debtor, who takes an assignment of all rights of plaintiff under such judgment and execution, the surety does not stand in the position of a volunteer, but is subrogated to plaintiff's rights: *Murray v. Meade*, supra.

See, also, 2 Remington's Digest, p. 2650, § 1; *Perkins v. North End Bank*, 17 Wash. 100; *Blewett v. Bash*, 22 Wash. 536; *Dowling v. Seattle*, 22 Wash. 592.

§ 979. (5710.) Contribution Among Sureties.

Any one of several judgment defendants, and any one of several replevin bail having paid and satisfied the plaintiff, shall have the remedy provided in the last section against the codefendants and cosureties to collect of them the ratable proportion each is equitably bound to pay. [L. '54, p. 211, § 431; Cd. '81, § 649; 2 H. C., § 761.]

See supra, § 454, satisfaction of judgments.

The surety in a judgment who pays the same is not relegated to the position of a simple creditor of the principal debtor: *Catheart v. Bryant*, 28 Wash. 31.

As to right of surety to contribution from cosurety, see 2 Remington's Digest, p. 2354, §§ 63, 64; *Belond v. Guy*, 20 Wash. 160; *Shoemake v. Stimson*, 16 Wash. 1.

§ 980. (5711.) Surety Shall not Suffer Judgment, When.

No surety or his representative shall confess judgment or suffer judgment by default in any case where he is notified that there is a valid defense, if the principal will enter himself defendant to the action and tender to the surety or his representatives good security to indemnify him, to be approved by the court. [L. '54, p. 211, § 432; Cd. '81, § 650; 2 H. C., § 762.]

§ 981. (5712.) Provisions Extended to Heirs of Sureties.

The foregoing provisions of this chapter shall extend to heirs, executors, and administrators of deceased persons, but the provisions of section 975, shall not operate against persons under legal disabilities. [L. '54, p. 211, § 433; Cd. '81, § 651; 2 H. C., § 763.]

CHAPTER XII.

DIVORCE AND ALIMONY.

§ 982. (5716.) Grounds for Divorce.

Divorces may be granted by the superior court on application of the party injured, for the following causes:—

1. When the consent to the marriage of the party applying for the divorce was obtained by force or fraud, and there has been no subsequent voluntary cohabitation;

2. For adultery on the part of the wife or of the husband, when unforgiven, and application is made within one year after it shall come to the knowledge of the party applying for divorce;

3. Impotency;

4. Abandonment for one year;

5. Cruel treatment of either party by the other, or personal indignities rendering life burdensome;

6. Habitual drunkenness of either party, or the neglect or refusal of the husband to make suitable provisions for his family;

7. The imprisonment of either party in the penitentiary, if complaint is filed during the term of such imprisonment;

And a divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together;

8. In case of incurable chronic mania or dementia of either party, having existed for ten years or more, the court may, in its discretion, grant a divorce. [Cf. L. '54, p. 405, § 1; Cd. '81, § 2000; L. '86, p. 120, § 1; L. '91, p. 42, § 1; 2 H. C., § 764.]

See Const., Art. II, § 24: The legislature has no power to grant divorces.

See supra, § 228, service by publication.

See infra, § 5915 et seq., property rights of husband and wife.

See infra, § 5926 et seq., provisions relating to husband and wife.

See infra, § 7150 et seq., marriage, how contracted.

Cited in 7 Wash. 534; 15 Wash. 493; 24 Wash. 140, 465; 32 Wash. 403; 38 Wash. 492; 45 Wash. 186; 46 Wash. 672.

THE MARRIAGE RELATION is a status rather than a contract, and can be annulled by public authority, without impairing vested rights: *Maynard v. Hill*, 2 W. T. 321; affirmed in *Maynard v. Hill*, 125 U. S. 190.

A legislative divorce granted by the territory of Oregon, held not obnoxious to the provision of the federal constitution forbidding laws to be passed impairing the obligation of contracts: *Maynard v. Valentine*, 2 W. T. 3.

Paragraph 8 of this section, relating to incurable chronic mania or dementia, is

constitutional and not void as against public policy: *Hickman v. Hickman*, 1 Wash. 257.

Grounds for divorce: See 1 Remington's Digest, pp. 956-958, §§ 4-10; *Stanley v. Stanley*, 24 Wash. 460; *Page v. Page*, 43 Wash. 293; *McAllister v. McAllister*, 28 Wash. 613; *Branscheid v. Branscheid*, 27 Wash. 368; *Wheeler v. Wheeler*, 38 Wash. 491; *Jackson v. Jackson*, 17 Wash. 687; *Kimble v. Kimble*, 17 Wash. 75; *Clemans v. Western*, 39 Wash. 290; *Lamere v. Lamere*, 41 Wash. 475; *Buell v. Buell*, 42 Wash. 277; *Colvin v. Colvin*, 15 Wash. 490; *Poler v. Poler*, 32 Wash. 400.

Where the husband, in an action for a divorce, establishes that his wife, without

cause, abandoned him and went to another state, where she continued to live for ten years, refusing to live with him in this state, the court, as a matter of law, must grant a divorce on the statutory ground of abandonment for more than one year, notwithstanding the fact that the husband made no effort to have her return: *Patterson v. Patterson*, 45 Wash. 296.

Nonsupport by an able-bodied husband, earning good wages, which were spent for liquor, without any excuse for the neglect, constitutes statutory ground for a divorce: *Seigmund v. Seigmund*, 46 Wash. 572.

PLEADINGS.—No binding order can be made upon a person in no manner made a party to a divorce suit: *Madison v. Madison*, 1 W. T. 60.

Service by publication: See *Goore v. Goore*, 24 Wash. 139.

It is not an improper joinder of causes of action in a suit for divorce and alimony to seek to set aside at the same time certain fraudulent conveyances on which the award of alimony would be dependent: *Prouty v. Prouty*, 4 Wash. 174.

Refusal to strike allegations in defendant's answer setting forth the physical condition of the defendant and the present and prospective financial condition of the parties, although not constituting a defense to the action, is not prejudicial error: *Lee v. Lee*, 3 Wash. 236, 239.

Although the court may have erred in denying the defendant's motion to dismiss an action for divorce at close of plaintiff's testimony, it is cured by the defendant thereafter proceeding with the case: *Scoland v. Scoland*, 4 Wash. 118.

A decree of divorce granted the wife on her cross-complaint will not be set aside after three years, for want of jurisdiction, on the ground of her nonresidence, as her appearance estopped her from denying jurisdiction: *Ferry v. Ferry*, 9 Wash. 239.

While new and separate items of complaint, sufficient in themselves as grounds for divorce, cannot be proved unless pleaded, minor circumstances and general conduct which disclose the animus of defendant in the commission of the acts charged may be shown: *Lee v. Lee*, supra.

Alleging grounds for divorce: See 1 Remington's Digest, p. 961, § 23; *Stanley v. Stanley*, 24 Wash. 460; *McAlister v. McAlister*, 28 Wash. 613; *Branscheid v. Branscheid*, 27 Wash. 368; *Page v. Page*, 43 Wash. 293.

In an action for divorce, where the answer alleges that plaintiff had since contracted marriage with another man, a reply thereto is not demurrable where it admits such subsequent marriage but excuses the same by showing that plaintiff was misled thereto by information that the defendant was a married man at the time he married the plaintiff, and that plaintiff was informed and then believed that no divorce from defendant was necessary: *Potter v. Potter*, 45 Wash. 401.

CRUELTY: See 1 Remington's Digest, p. 957, § 7. Acts of cruelty occurring subsequent to the action for divorce should be alleged by supplemental complaint: *Scoland v. Scoland*, supra.

In an action by a wife for divorce on the ground of her husband's cruelty in publicly accusing her of unchastity, where the evidence is conflicting, and it appears that his conduct was stimulated by jealousy, for which the act of the wife gave some occasion, the findings of the trial court against the plaintiff will not be disturbed: *Blurock v. Blurock*, 4 Wash. 495.

If the evidence in an action on the ground of cruelty shows that the husband was often violent in the treatment of his wife, forcibly laying hands upon and striking her at times, called her vile and abusive names in the presence of their minor children, a decree granting a divorce will be sustained: *Dennison v. Dennison*, 4 Wash. 705.

In an action for divorce on the grounds of the husband's cruelty in maliciously and publicly charging the wife with adultery, a decree in her favor will not be reversed, although her indiscreet conduct in receiving visits of a man to whom her husband made objections was the direct cause of his accusations: *Scoland v. Scoland*, supra.

If the uncontradicted testimony shows frequent intoxication of husband, and at such times he is abusive, and is guilty of insulting conduct toward her, frequent threats of violence, and sometimes violently assaulting her, accusing her of infidelity, etc., she is entitled to a decree of divorce on the ground of cruelty: *Lee v. Lee*, supra.

Personal violence is not necessary to constitute cruel treatment as a ground for divorce, and the evidence is sufficient to warrant a decree where it appears that the husband for seven years refused to speak to his wife or children except when absolutely necessary, made unjust charges of improper conduct, insulted and humiliated her guests, and made himself so disagreeable that the wife's life was rendered miserable and the legitimate ends and objects of matrimony had ceased to exist: *Sullivan v. Sullivan*, 52 Wash. 160.

That the parties lived in a constant state of turmoil, and that the husband repeatedly, in the presence of strangers, accused the wife of infidelity without any justification, warrants a divorce on the ground of cruelty and personal indignities rendering life burdensome: *Markowski v. Markowski*, 44 Wash. 594.

The statutory ground of "personal indignities rendering life burdensome" authorizes a divorce, although the conduct does not fall within the accepted definition of cruel treatment: *Sullivan v. Sullivan*, 52 Wash. 160.

ADULTERY.—In charging adultery, it is necessary to allege time and place of the

act, and make proof with some particularity of circumstances going to show its commission: *Dennison v. Dennison*, supra.

Cohabitation will not be presumed where the wife, after bringing suit, continues to reside in the home of herself and defendant, but testifies that she slept separate and apart from him and no longer lived with him as his wife: *Id.*, 708.

A complaint for divorce on the ground of adultery which fails to allege that the last act was committed within one year before the commencement of the action and was unforgiven, is insufficient; but such defect is cured by judgment, where proof showing such fact has been admitted without objection: *Burdick v. Burdick*, 7 Wash. 533.

Where condonation of acts of adultery was conditional, a breach of the condition works a revival of the offense: *Cozard v. Cozard*, 48 Wash. 124.

PROOF.—A divorce will not be denied because the evidence is conflicting as to the misconduct of the wife being the cause of the husband's jealousy and mistreatment of her: *Dennison v. Dennison*, supra.

A decree should not be granted when the evidence discloses no other ground for divorce than that the parties will not live together as husband and wife: *McDougall v. McDougall*, 5 Wash. 802.

It is proper to reject proof as to a matter not alleged, or not in issue: See *Branscheid v. Branscheid*, 27 Wash. 368; *Poler v. Poler*, 32 Wash. 400.

A wife can be a witness in her own behalf in an action for divorce, and is not required to prove every material fact alleged in her complaint by testimony in addition to her own: *Lee v. Lee*, supra.

This section, subdivision 7, lodges a discretionary power in the court which must be exercised in a sound and legal manner so as to conduce to domestic harmony and the peace and morality of society: *Colvin v. Colvin*, 15 Wash. 490.

A court is warranted in refusing a divorce, although finding that the parties cannot live peaceably together, when such failure is due to their own obstinacy and stubbornness, and both parties are equally in fault: *Id.*

Plaintiff is not entitled to a divorce upon the ground of abuse, when the only evidence to support the action is proof, in the most general terms, of abusive language on the part of defendant, and plaintiff's own testimony shows that he was alike culpable: *Luce v. Luce*, 15 Wash. 608.

Weight and sufficiency of evidence to establish cause for divorce: See 1 *Remington's Digest*, p. 962, §§ 32-39; *Van Alstine v. Van Alstine*, 23 Wash. 310; *Summerville v. Summerville*, 31 Wash. 411; *O'Sullivan v. O'Sullivan*, 35 Wash. 481; *Richardson v. Richardson*, 36 Wash. 272; *Page v. Page*, 43 Wash. 293; *Stanley v. Stanley*, 24 Wash. 460; *Long v. Long*, 38 Wash. 18.

It is error to deny the wife a divorce on the ground of cruelty, where it appears from the testimony of disinterested witnesses that the husband habitually accused her of infidelity, that he struck her in the face and kicked her until she was black and blue, and he admitted that he slapped her and administered corporal punishment when he considered it merited: *Guerin v. Guerin*, 45 Wash. 486.

Where, in an action for a divorce, the evidence shows an absolute abandonment for more than one year, and failure to provide any support for wife or children, by a man of capacity and well able so to do, bringing the case completely within the terms of the statute, there is no discretion, and it is error to refuse a divorce on the ground that the wife had not demanded support, or urged his return, and appeared indifferent as to his maintaining or living with her: *Swain v. Swain*, 45 Wash. 184.

§ 983. (5717.) Annulment of Marriage.

When there is any doubt as to the facts rendering a marriage void, either party may apply for, and on proof obtain, a decree of nullity of marriage. [Cf. L. '54, p. 406, § 2; Cd. '81, § 2001; L. '91, p. 42, § 2; 2 H. C., § 765.]

See *infra*, § 7151 et seq., marriage, how contracted.

Cited in 50 Wash. 216.

See 2 *Remington's Digest*, p. 1800, § 11; *Arey v. Arey*, 22 Wash. 61.

The statute providing for summons by publication against nonresidents in actions for divorce authorizes such summons in actions for annulment of the marriage, the legislature having invariably treated the two actions as belonging to one subject and established the same practice in both; and a legislative act treating of the same together does not embrace more than one

subject, annulment being germane to a title which referred only to divorce: *Piper v. Piper*, 46 Wash. 671.

Where it appears that a woman entered into a contract of marriage in good faith without knowledge that the man was incompetent by reason of having another wife, the court has power to annul the marriage without regard to the form of action commenced by her for redress: *Buckley v. Buckley*, 50 Wash. 213.

§ 984. (5718.) Resident may Apply, When.

Any person who has been a resident of the state for one year may file his or her complaint for a divorce or decree of nullity of marriage, under oath, in the superior court of the county where he or she may reside, and like proceedings shall be had thereon as in civil cases. [L. '54, p. 406, § 3; Cd. '81, § 2002; 2 H. C., § 766.]

See *supra*, § 281, verification of pleadings.

Cited in 7 Wash. 534; 14 Wash. 116; 23 Wash. 311; 30 Wash. 640; 46 Wash. 672; 50 Wash. 216.

Sufficiency of residence or domicile of parties to give jurisdiction: See 1 Remington's Digest, p. 959, § 16; *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132; *Van Alstine v. Van Alstine*, 23 Wash. 310; *Kane v. Kane*, 35 Wash. 517.

If the husband has been domiciled in the state for one year, the wife may maintain an action for divorce, though she did not come to the state until some months after her husband, as her residence dates from the commencement of his: *Prouty v. Prouty*, 4 Wash. 174.

In an action for divorce plaintiff must affirmatively plead, and satisfactorily prove, prior residence in the state for the period of a year or more: *Luce v. Luce*, 15 Wash. 608.

The fact that plaintiff left his home in the East and came to the state of Washington in search of a location, afterward going to the state of California in pursuit of the same object, and then returning to the state of Washington, where he settled and went into business, is not sufficient to establish his residence here before his return from California, in the

absence of proof of any intention to make a definite location in this state prior to his actual settlement: *Id.*

As to venue: See 1 Remington's Digest, p. 960, § 17; *Bachelor v. Bachelor*, 30 Wash. 639; *State ex rel. Clark v. Neal*, 19 Wash. 642; *Kane v. Kane*, 35 Wash. 517.

This section requiring an action for divorce to be commenced in the county in which the plaintiff resides, the defendant is not entitled, under § 207, *supra*, to have the cause removed for trial to another county, in which he maintains his residence: *Pfueller v. Superior Court*, 14 Wash. 115.

A verification of a complaint for divorce to the effect that plaintiff believes its contents to be true is a sufficient compliance with the requirements of this section, that it be made "under oath": *Burdick v. Burdick*, 7 Wash. 533.

An action for divorce is purely personal, and abates upon the death of either party: *Dwyer v. Nolan*, 40 Wash. 459.

An allegation of plaintiff's residence in this state for one year, and in the county at the time suit is brought, is essential to jurisdiction in an action for divorce: *Ramsdell v. Ramsdell*, 47 Wash. 444.

§ 985. (5719.) Proof Required.

When the defendant does not answer, or, answering, admits the allegations in the complaint, the court shall require proof before granting a divorce or a decree of nullity. [L. '54, p. 406, § 4; Cd. '81, § 2003; 2 H. C., § 767.]

See notes to § 982, *supra*.

Cited in 23 Wash. 312; 46 Wash. 672.

§ 986. (5720.) Defendant may File Cross-complaint.

The defendant may, in addition to his or her answer, file [a] cross-complaint for divorce, and the court may, in such case, grant a divorce, if any, in favor of either party, or as an [on] application of both. [L. '54, p. 406, § 5; Cd. '81, § 2004; 2 H. C., § 768.]

Cited in 23 Wash. 312; 34 Wash. 646.

§ 987. (5721.) Both Parties Deemed Applying.

Both parties shall be considered as applying for a divorce when the complaints of both are filed in the same action, and when the defendant, by his or her cross-complaint, also applies for divorce. [Cf. L. '54, p. 406, § 6; Cd. '81, § 2005; L. '91, p. 42, § 3; 2 H. C., § 769.]

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§ 988. (5722.) Interlocutory Orders.

Pending the action for divorce the court, or judge thereof, may make, and by attachment enforce, such orders for the disposition of the persons, property and children of the parties as may be deemed right and proper, and such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof; and on decreeing or refusing to decree a divorce, the court may, in its discretion, require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action, when such divorce has been granted or refused, and give judgment therefor. [Cf. L. '54, p. 406, § 7; Cd. '81, § 2006; L. '91, p. 43, § 4; 2 H. C., § 770.]

See *infra*, § 5932, custody of children.

See notes to § 1063.

Cited in 4 Wash. 182; 21 Wash. 199; 22 Wash. 264; 42 Wash. 596; 47 Wash. 318; 49 Wash. 499, 501, 505.

Alimony and allowances pendente lite: See 1 Remington's Digest, p. 968, §§ 62-68; Bachelor v. Bachelor, 30 Wash. 639; Trumble v. Trumble, 26 Wash. 132; Kane v. Kane, 35 Wash. 517; Arey v. Arey, 22 Wash. 261; In re Cave, 26 Wash. 213; State ex rel. Clark v. Neal, 19 Wash. 642; Willey v. Willey, 22 Wash. 115.

If the wife has been decreed a monthly allowance for support of herself and children, and the same made a lien on husband's real estate, upon failure of husband to make the payments, the lien may be foreclosed and the monthly payments converted into a gross sum: King v. Miller, 10 Wash. 274; and the decree may direct such gross sum to be paid the wife without restriction as to its disposition: *Id.*

The supreme court will not review the action of the trial court in refusing to order the defendant husband to pay as costs the fees of officers and of all witnesses of plaintiff, and a sufficient amount to enable her to prosecute her appeal: Lee v. Lee, 3 Wash. 236.

If a decree of divorce adjudges the wife a certain sum of money, upon which her attorneys file a lien for their fees, the court may summon the attorneys before it to determine what liens they have, and what would be a reasonable fee for their services: State ex rel. Trumbull v. Sachs, 3 Wash. 371.

An action does not lie in this state to recover temporary alimony upon an order therefor made in an action of divorce in another state, although appealable as a final order under the laws of such state; since it is subject at all times to modification in the foreign court: Van Horn v. Van Horn, 48 Wash. 388.

Counsel fees are a part of the costs in divorce proceedings and the court may allow them as such, and may also allow other reasonable expenses incurred by the wife in preparing for trial: Thorndyke v. Thorndyke, 1 W. T. 175.

Expenses contemplated by this chapter may be allowed by the court in any dis-

position it may make of the case: *Id.*; and when the action has been dismissed without trial, the appellate court will sometimes reduce the counsel fees allowed, but will not reduce other allowances of costs peculiarly within the knowledge of the lower court: *Id.*

A judgment for attorneys' fees against defendants charged, in an action for divorce, with conspiring with the husband to prevent plaintiff from obtaining alimony is unwarranted; the statute only authorizes an attorney's fee as against the husband: Prouty v. Prouty, 4 Wash. 174.

The allowance by the court of three hundred dollars as counsel fees to the wife, in refusing the husband's petition for divorce, is not an abuse of the discretion reposed in the court in such matters, even though it may appear that a division of property had been made between the parties and that the wife was amply able to bear the expenses attending the action: Colvin v. Colvin, 15 Wash. 490.

Wife's traveling expenses and disbursements may be allowed: Thorndyke v. Thorndyke, *supra*. See Madison v. Madison, 1 W. T. 60.

A proper case for the allowance of suit money and alimony pending appeal is shown where the wife secured a judgment of divorce, with alimony, which was superseded on the husband's appeal from the allowance of alimony, and the wife was without means of support for herself and child: Holcomb v. Holcomb, 49 Wash. 498.

In fixing suit money and attorney's fees pending appeal in a divorce case, the supreme court will grant only a fair amount for necessary expenses, leaving the ultimate amount of the attorney's fees to the final adjudication of the case: *Id.*

A sufficient showing is made for the allowance of alimony and suit money to a wife, pending the husband's appeal from a judgment disposing of community property, where he has control of a substantial amount of property and the wife is without means of support for herself and minor children, or for legal services: Sullivan v. Sullivan, 49 Wash. 508.

What are sufficient allowances for suit money and temporary alimony: See *Id.*

CUSTODY AND SUPPORT OF CHILDREN: See 1 Remington's Digest, pp. 975-977, §§ 96-107; *Goore v. Goore*, 24 Wash. 139; *Gibson v. Gibson*, 18 Wash. 489; *Ditmar v. Ditmar*, 27 Wash. 13; *Richardson v. Richardson*, 36 Wash. 272; *Kane v. Miller*, 40 Wash. 125; *State v. Rhoades*, 29 Wash. 61; *Fickett v. Fickett*, 39 Wash. 38; *Smith v. Smith*, 18 Wash. 158; *Koontz v. Koontz*, 25 Wash. 336; *Irving v. Irving*, 26 Wash. 122; *In re Neff*, 20 Wash. 652.

An order of the district court awarding the custody and fixing the allowance for the support of a child is merely interlocutory and not subject to review: *Tierney v. Tierney*, 1 W. T. 568.

A decree awarding the custody of the children to the wife, although her conduct may not be entirely blameless, will be upheld where it is shown that the husband is dissipated and has treated his wife harshly and cruelly: *Fields v. Fields*, 2 Wash. 441.

Where, after rendition of decree of divorce awarding the minor children to the mother, a stipulation for modification of the decree so as to award custody to the father has been executed between the parents and possession of the children given the father thereunder, he is rightfully entitled to the children, although in fact the modification of decree has never been secured: *Ackley v. Burchard*, 11 Wash. 128.

A child of the parties is a ward of the court: *Tierney v. Tierney*, supra; and the welfare of the children is the only thing to be considered in their disposition by the court: *Kentzler v. Kentzler*, 3 Wash. 166, 170.

In an action of habeas corpus for the possession of minor children brought by the mother against the father, based upon an alleged decree of divorce in another state awarding her the custody of the children, where it appears that the father is better suited and able to care for them and that the mother is unsuited morally and is financially unable to care for them, a decree awarding her the custody is erroneous: *Id.*

The care and custody of children of tender years should be awarded to the mother upon the granting of a divorce, when it is not made to appear that the mother is not a proper person to have the care and control of her children: *Smith v. Smith*, 15 Wash. 237.

Upon application of a mother for modification of a decree of divorce awarding the custody of a child to a stranger, to which she had consented owing to her then poor health, proof that she is now able to provide for the child authorizes the court to award her its custody without any showing that the welfare of the child demands the change: *Curtis v. Curtis*, 46 Wash. 664.

Specific acts which occurred long before her marriage, and then known to her husband, are not sufficient to show her unfitness to have custody of the child: *Id.*

A stipulation in a divorce case as to the custody of a child amounts to no more than evidence, and does not estop the party from subsequently moving for a modification of the decree: *Id.*

An order of the trial court refusing to change the custody of a child awarded to plaintiff by a decree of divorce, but modifying the same to permit visits, will not be disturbed on appeal where it does not clearly appear that the best interests of the child were not served by such modification: *Chappell v. Chappell*, 45 Wash. 652.

In granting a divorce on the ground of adultery of the wife, a decree granting the custody of the children to the husband is warranted where the wife's conduct showed that she was not a proper person to have their custody: *Cozard v. Cozard*, 48 Wash. 124.

Order or decree to support children: See *Fickett v. Fickett*, 39 Wash. 38.

In an action brought by a wife for a divorce, the custody of a minor child, with permanent alimony for its support, should be awarded to the mother, where it affirmatively appears from the father's testimony that he is not qualified to have control of the child, and affidavits for a new trial show the mother to be a fit person, and there is no showing to the contrary: *Guerin v. Guerin*, 45 Wash. 486.

A wife, divorced upon the ground of adultery, cannot complain that the court had no power to award one-half of the community property to four minor children, whose custody was awarded to the husband, since the court could have awarded it to the husband for their support: *Cozard v. Cozard*, 48 Wash. 124.

The husband is not liable upon the contract of his wife to pay attorney's fees for the prosecution of a divorce, the same not being "necessaries" in view of the liberal provisions of this section: *Zent v. Sullivan*, 47 Wash. 315.

§ 989. (5723.) Decree—Disposition of Property.

In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was

acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage. [Cf. L. '54, p. 406, § 8; Cd. '81, § 2007; L. '91, p. 43, § 5; 2 H. C., § 771.]

See *infra*, § 5915 et seq., property rights of husband and wife.

Cited in 2 Wash. 419, 443; 21 Wash. 32, 200; 26 Wash. 217; 27 Wash. 371; 34 Wash. 237; 36 Wash. 278; 38 Wash. 606; 43 Wash. 424, 426; 46 Wash. 465; 47 Wash. 201; 49 Wash. 499, 501; 50 Wash. 216, 223, 224, 302.

Disposition of property: See 1 Remington's Digest, p. 971, §§ 78-83; Richardson v. Richardson, 36 Wash. 272; O'Sullivan v. O'Sullivan, 35 Wash. 481; Goore v. Goore, 24 Wash. 139; Cave, *In re*, 26 Wash. 213; Adams v. Abbott, 21 Wash. 29; Carney v. Simpson, 15 Wash. 277; Van Brocklin v. Wood, 38 Wash. 384; Mitchell v. Mitchell, 39 Wash. 431; Miller v. Miller, 38 Wash. 605; Clemans v. Western, 39 Wash. 290; Budlong v. Budlong, 43 Wash. 359; State ex rel. Brown v. Brown, 31 Wash. 397.

In decreeing a divorce, the court has power, under this section, to make such division of the joint and separate property of husband or wife as shall, in its discretion, appear just and equitable: Webster v. Webster, 2 Wash. 417; followed in Fields v. Fields, 2 Wash. 443; Morgan v. Morgan, 10 Wash. 118.

In order to obtain a division of the property of the spouses the parties must bring into court all their property, and property not so brought in cannot be distributed: Webster v. Webster, *supra*, 420; Philbrick v. Andrews, 8 Wash. 8.

A decree can make no disposition of the property of the spouses where it is not brought before the court, and failure to do so renders community property the common property of the divorced parties, and waives the right to which the parties might be entitled on considering the merits in the divorce action: Ambrose v. Moore, 46 Wash. 463.

The law does not require an equal division of the property, but that it be "just and equitable": Webster v. Webster, *supra*.

If the property of the husband has not been brought into the case, a decree of divorce in the wife's favor for alimony creates no specific lien on the property; and the husband's right to homestead exemption is paramount to the lien created by an execution levy thereunder: Philbrick v. Andrews, 8 Wash. 7.

The separate property of the spouses is simply a circumstance for the court to take into consideration in making the division: Webster v. Webster, *supra*, 420.

The court has power to divide all the property, whether it be community or separate property, and it will consider through whom it was acquired merely as a circum-

stance to aid it in making an equitable division: Fields v. Fields, 2 Wash. 441.

Where the only property of the husband within the jurisdiction of the court is land which he has fraudulently conveyed, the same may be adjudged to plaintiff on decree of divorce: Prouty v. Prouty, 4 Wash. 174.

Injunction against disposition of property: See Groen, *In re*, 22 Wash. 53.

Upon awarding a divorce to a husband on the ground of abandonment, the husband is liberally provided for in the division of the property, having regard to the respective merits of the parties, their condition, and the party through whom the property was acquired, as required by this section, where it appears that at the time of their marriage, he was a young man in good health, able to work and worth \$2,000, while the wife was considerably older and possessed of an estate worth \$70,000; that she provided all his living expenses for five years, while he did nothing but look after investments, and the parties having separated, the husband was awarded an estate valued at \$23,000 and the wife an estate valued at \$92,000: Kolbe v. Kolbe, 50 Wash. 298.

Where the courts of a sister state grant a divorce to a wife domiciled there without disposing of the property of the husband situated in this state, where the husband resides, the courts of this state may thereafter, in any appropriate action, divide the property as authorized by this section, in the case of a divorce granted here; and the wife cannot claim an absolute right to one-half thereof as between tenants in common: Buckley v. Buckley, 50 Wash. 213.

A decree of divorce procured by the wife, which includes a division of property, will not be set aside on the ground of fraud in that the division was based upon the valuation thereof represented by the husband as true, while in fact it was but one-fifth of the actual value, when the wife was fully acquainted with the various parcels and could have readily discovered their value by inquiry: Ferry v. Ferry, 9 Wash. 239.

Although a decree of divorce may conclude property rights between the parties, a proceeding may be subsequently brought to obtain an allowance or provision for the support of minor children: King v. Miller, 10 Wash. 274.

The conveyance by the husband to his brother prior to an action for divorce of all his real and personal property, including his home, without sufficient considera-

tion, is fraudulent as against the wife: *Fields v. Fields*, 2 Wash. 441, 444.

The court below in the disposition of the property may require the husband to pay the wife's counsel fees, and decree that a certain sum of money shall be put in the hands of a trustee, the interest to be paid her at intervals, during her life, and at her death the principal to revert to the husband: *Madison v. Madison*, 1 W. T. 60, 62.

The right of a wife under § 4 of the donation act is merely inchoate, and a divorce prior to a compliance with the requirements of the act dispossesses her of any interest in the property: *Maynard v. Valentine*, 2 W. T. 3; see *McSorley v. Hill*, 2 Wash. 638; *Maynard v. Hill*, 125 U. S. 216.

Upon granting a divorce to the wife, the court may award all the community property, of the value of \$1,150, to the wife, where such provision is necessary for her support: *Markowski v. Markowski*, 44 Wash. 594.

Upon granting a wife a divorce, the court may award all the property, community and separate, to the wife: *Ramsdell v. Ramsdell*, 47 Wash. 444.

Upon granting a divorce to the wife, who is awarded the custody of a minor child, the court may, although there is no property, give judgment for monthly alimony for the support of both wife and child, under this section: *Claiborne v. Claiborne*, 47 Wash. 200.

Upon granting a divorce to a husband and awarding him the custody of four children, it is not an abuse of discretion to award to him one-half of the community property, valued at \$2,500, and one-half to the children, he to pay the wife \$250: *Cozard v. Cozard*, 48 Wash. 124.

Modification, vacating or setting aside of decree: See 1 Remington's Digest, p. 971, §§ 75, 76; *Trumble v. Trumble*, 26 Wash. 133; *Mahncke v. Mahncke*, 43 Wash. 425.

Where a decree of divorce awards all the community personal property in the state to the wife, the jurisdiction over all of the property so awarded must be presumed in the absence of a showing to the contrary, and replevin by the husband will not lie to recover a portion of such personal property sold by the wife to a third party: *Carney v. Simpson*, 15 Wash. 227.

Where the wife has sold community personal property before the entry of a decree of divorce awarding it to her, and the husband has begun an action to recover same pending the divorce proceedings, he is merely entitled to a judgment for the costs of his action and for damages for detention of the property, when the decree in the divorce proceedings awards the property to the wife: *Id.*

The statutes for the allowance of alimony in an action for divorce are not exclusive: *Kimble v. Kimble*, 17 Wash. 75.

Enforcement of order or decree: See 1 Remington's Digest, p. 973, §§ 85-91; *State ex rel. Smith v. Smith*, 17 Wash. 430; *State ex rel. Smith v. McClinton*, 17 Wash. 45; *State ex rel. Ditmar v. Ditmar*, 19 Wash. 324; *In re Cave*, 26 Wash. 213; *In re Van Alstine*, 21 Wash. 194; *State ex rel. Geiger v. Geiger*, 20 Wash. 181; *Metler v. Metler*, 32 Wash. 494; *Trumble v. Trumble*, 26 Wash. 133.

In an action for the annulment of a marriage entered into in good faith by the woman without knowledge that the defendant had another wife, the court has jurisdiction to dispose of the property as in the case of a divorce, under this section, awarding the plaintiff such proportion as would be just and equitable, where she materially helped to acquire and save it: *Buckley v. Buckley*, 50 Wash. 213.

An oral announcement for a decree of divorce and disposition of property, followed by the clerk's minutes thereof, which did not state the grounds for the divorce or the disposition of the property, cannot be regarded as a decree, where written findings and a decree were prepared but not signed by the judge or entered because the parties had made up their differences and resumed their marriage relations: *State ex rel. Tufton v. Superior Court*, 46 Wash. 395.

Permanent alimony: See 1 Remington's Digest, p. 969, §§ 68-74; *In re Cave*, 26 Wash. 213; *Turner v. Turner*, 33 Wash. 118; *Timm v. Timm*, 34 Wash. 228; *Richardson v. Richardson*, 36 Wash. 272; *Adams v. Abbott*, 21 Wash. 29; *Trumble v. Trumble*, 26 Wash. 132; *Kane v. Kane*, 35 Wash. 517.

As to opening or setting aside default decree, see 1 Remington's Digest, p. 965, §§ 45-49; *McCord v. McCord*, 24 Wash. 529; *Metler v. Metler*, 32 Wash. 494; *McDonald v. McDonald*, 34 Wash. 292; *State ex rel. Weidert v. Superior Court*, 36 Wash. 81; *Peyton v. Peyton*, 28 Wash. 278; *Turner v. Turner*, 33 Wash. 118; *Winstone v. Winstone*, 40 Wash. 272; *Dwyer v. Nolan*, 40 Wash. 459.

A plaintiff in a divorce case, who, after oral announcement of a decree in her favor, settled her differences with her husband and requested that the decree be not entered, and three years later secured another decree of divorce making a different disposition of the property, is not entitled to have a nunc pro tunc order for the entry of the first decree; since such an order to correct a record is discretionary, and since she abandoned her right thereto, and third persons have acquired interests under the subsequent decree which would be injuriously affected: *State ex rel. Tufton v. Superior Court*, 46 Wash. 395.

§ 990. (5724.) Divorce Dissolves Marriage as to Both Parties.

Whenever judgment of divorce from the bonds of matrimony is granted by the courts in this state, the court shall order a full and complete dissolution of the marriage as to both parties. [Cf. L. '54, p. 407, § 9; Cd. '81, § 2008; L. '91, p. 43, § 6; 2 H. C., § 772.]

Cited in 4 Wash. 703, 705; 22 Wash. 116.

As to effect given foreign divorces, see 1 Remington's Digest, p. 978, § 110; Dormitzer v. German Sav. & Loan Soc., 23 Wash. 132; Trowbridge v. Spinning, 23 Wash. 48.

Where, upon service of summons by publication, a divorce is secured in a sis-

ter state, which was the domicile of the marital relation and the actual bona fide home of the plaintiff, the decree is entitled to recognition in every other state, under the full faith and credit clause of the constitution, or at least will be accorded credit in this state as a matter of comity: Buckley v. Buckley, 50 Wash. 213.

§ 991. (5725.) Remarriage Pending Appeal Unlawful.

Whenever a judgment or decree of divorce from the bonds of matrimony is granted by the courts in this state, neither party thereto shall be capable of contracting marriage with a third person until the period in which an appeal may be taken has expired; and in case an appeal is taken then neither party shall intermarry with a third person until the cause has been fully determined; and it shall be unlawful for any divorced person to intermarry with any third person within six months from the date of the entry of the judgment or decree granting the divorce, or in case an appeal is taken it shall be unlawful to contract such marriage until judgment be rendered on said appeal in the supreme court. All marriages contracted in violation of the provisions of this section, whether contracted within or without this state, shall be void. [L. '93, p. 225, § 1.]

Compare 1 Hill's Code, § 772, "proviso."
See notes to next section.

§ 992. (5726.) Decree to Prohibit Remarriage Within Six Months.

Whenever judgment or decree of divorce from the bonds of matrimony is granted by any court in this state, such judgment or decree shall expressly prohibit the plaintiff and defendant named therein from contracting any marriage with third parties within the period of six months from the date of the entry of such judgment or decree, and in case either party to said decree shall remarry within said period, he or she shall be deemed guilty of contempt of the court granting such judgment or decree, and shall be proceeded against and punished in like manner as in other cases of contempt of court. [L. '93, p. 226, § 2.]

If a divorce has been granted and the parties have caused a marriage between them to be solemnized within six months thereafter, they are not husband and wife, although living together as such after the period within which they could lawfully contract marriage: *In re Smith*, 4 Wash. 702.

But the statute has no extraterritorial effect: See *Willey v. Willey*, 22 Wash. 115.

The preceding section prohibiting divorced parties from remarrying within six months after the decree, either within or

without the state, renders a remarriage during such period void, if contracted in this state, or if contracted in a foreign country by persons domiciled in this state with the purpose of evading the laws of this state; but if the parties were, at the time of the remarriage, domiciled in the foreign country, the marriage would be valid here if valid in such country, our statute having no extraterritorial force as to marriage by nonresidents: *State v. Fenn*, 47 Wash. 561.

§ 993. (5727.) Prosecuting Attorney to Prosecute for Contempt.

It shall be the duty of the prosecuting attorney of each county to prosecute for contempt any person violating the provisions of any decree men-

tioned in the last section rendered by any superior court of his county. [L. '93, p. 226, § 3.]

See notes to § 989, *supra*.

§ 994. (5728.) Name of Wife Changed.

In all actions for a divorce, if a divorce be granted, the court may, for just and reasonable cause, change the name of the female, who shall thereafter be known and called by such name as the court shall in its order or decree appoint. [Cf. L. '54, p. 407, § 9; Cd. '81, § 2009; L. '91, p. 43, § 7; 2 H. C., § 773.]

See *infra*, § 998, change of name.

§ 995. (5729.) Prosecuting Attorney to Resist Undefended Actions.

Whenever a complaint for divorce remains undefended, it shall be the duty of the prosecuting attorney to resist such complaint; but no prosecuting attorney shall be employed in or allowed to conduct any action for a divorce on the part of the plaintiff or applicant in the courts of this state; nor shall any prosecuting attorney be allowed to resist a complaint for divorce in those cases where the defendant does not appear, or appearing admits the allegations of the complaint, if the attorney for the applicant is a partner of such prosecuting attorney in the practice of law, or keeps his office with such prosecuting attorney; but in all such cases the court or judge before whom the case is to be heard shall appoint an attorney to resist the complaint, who shall be entitled to the compensation allowed by law to prosecuting attorneys in such cases. [Cf. L. '54, p. 407, § 10; L. '79, p. 94, § 10; Cd. '81, § 2010; L. '85, p. 62, § 10; L. '91, p. 43, § 8; 2 H. C., § 774.]

Compare § 229, 1 Hill's Code, omitted as superseded by the above section.

§ 996. (5730.) Trial—Appeal—Proceedings.

In all instances where the superior court shall grant a divorce, it shall be for cause distinctly stated in the complaint, and proved, and found by the court, and the court shall state the facts found upon which the decree is rendered; and when either party shall signify a desire to appeal from any of the orders of the court, in the disposition of the property or of the children, the court shall certify the evidence adduced on the trial, and the supreme court shall be possessed of the whole case as fully as the superior court was, and may reverse, modify, or affirm said judgment, according to the real merits of the case. [L. '60, p. 320, § 12; Cd. '81, § 2011; 2 H. C., § 775.]

See *supra*, § 982, notes.

Cited in 23 Wash. 312; 46 Wash. 398; 49 Wash. 500.

An action for divorce is a proceeding at law; the findings of the lower court stand as the verdict of the jury, not to be set aside unless manifestly contrary to the evidence: *Tierney v. Tierney*, 1 W. T. 568.

The divorce act of 1863, forbidding the reversal of any final order of the district court in divorce, is to such extent in violation of § 9 of the organic act and void: *Id.*

The question of former alleged marriage of wife cannot be reviewed on appeal in a divorce case where the husband bases his motion for a new trial upon an affidavit of

newly discovered evidence which does not show how or by whom he expects to prove such facts: *Id.*

Appeal: See 1 Remington's Digest, p. 966, §§ 51-54; *McDonald v. McDonald*, 34 Wash. 293; *McCord v. McCord*, 24 Wash. 529; *Lee v. Lee*, 19 Wash. 355; *Poler v. Poler*, 32 Wash. 400; *Bounds v. Bounds*, 23 Wash. 593; *Swift v. Swift*, 39 Wash. 600; *Wainwright v. Wainwright*, 40 Wash. 117; *Mitchell v. Mitchell*, 39 Wash. 431; *Miller v. Miller*, 38 Wash. 605.

Appeal from decree as to disposition of property or payment of alimony: See 1 Remington's Digest, p. 974, § 93; *McAllister v. McAllister*, 28 Wash. 613; *In re*

Cave, 26 Wash. 213; Mahncke v. Mahncke, 43 Wash. 425.

Where, upon appeal in an action for divorce, the supreme court remanded the case with directions to take further evidence as to the value of the property, and either make division thereof or award the wife a money judgment for her share, it is error to decree the division of a tract of land, the value of which was dependent upon an irrigating ditch carrying an insufficient supply of water, which it would be impractical to use jointly for separate portions of the tract, as such di-

vision would be detrimental to the interests of both parties; and a proper money judgment should be awarded to the wife in lieu of a share in such real estate: Richardson v. Richardson, 44 Wash. 431.

Upon appeal from that portion of a decree of divorce awarding alimony and directing the surrender of property, the appellant has a statutory right to a supersedeas pending appeal; and mandamus will lie to compel the superior court to fix the amount of the supersedeas bond: State ex rel. Holcomb v. Yakey, 48 Wash. 419.

§ 997. (5731.) Practice—Trial Without Jury.

The practice in civil actions shall govern all proceedings in the trial of actions for divorce, except that trial by jury is dispensed with. [L. '60, p. 320, § 13; Cd. '81, § 2012; L. '91, p. 44, § 9; 2 H. C., § 776.]

Trial or hearing: See 1 Remington's Digest, p. 964, §§ 40-42.

Under the provision of the statute dispensing with trial by jury in divorce cases, fraudulent vendees of the husband are not entitled to have the charge of their conspiracy with him to defraud his wife tried by a jury: Prouty v. Prouty, 4 Wash. 174.

The requirement in the practice act of 1854, that in case of waiver of a jury the trial court shall render its decision in writing, stating conclusions of law and facts separately, does not apply in divorce cases: Madison v. Madison, 1 W. T. 60; neither party can demand a jury in a divorce case: Id. 61.

CHAPTER XIII.

CHANGE OF NAME.

§ 998. (5733.) Name may be Changed upon Petition.

Any person desiring a change of his name or that of his child or ward may apply therefor to the superior court of the county in which he resides, by petition setting forth the reasons for such change; thereupon such court, in its discretion, may order a change of the name, and thenceforth the new name shall be in place of the former. [L. '77, p. 132, § 638; Cd. '81, § 635; 2 H. C., § 777.]

See supra, § 994, change of name in divorce.

Cited in 17 Wash. 47.

TITLE VII. SPECIAL PROCEEDINGS.

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CHAPTER I.

CERTIORARI, MANDAMUS AND PROHIBITION.

§ 999. (5738.) Parties, How Designated.

The party prosecuting a special proceeding may be known as the plaintiff and the adverse party as the defendant. [L. '95, p. 114, § 1.]

Cited in 15 Wash. 92; 16 Wash. 353; 21 Wash. 454; 24 Wash. 546; 50 Wash. 96.

As to statutory use of the term "proceeding," see *State v. Gordon*, 8 Wash. 488, 490.

Under this section, it is not error to refuse to quash a proceeding commenced in

the name of the real party in interest, instead of in the name of the state on his relation according to sanctioned practice, especially where the plaintiff was required to amend the complaint to cure the objection made: *State ex rel. Cicoria v. Corgiat*, 50 Wash. 95.

§ 1000. (5739.) Judgment and Order in a Special Proceeding, Defined.

A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding. [L. '95, p. 115, § 2.]

See *supra*, § 405, motions and orders defined.

Cited in 21 Wash. 255, 261.

§ 1001. (5740.) Certiorari, Defined.

The writ of certiorari may be denominated the writ of review. [L. '95, p. 115, § 3.]

Cited in 21 Wash. 149; 28 Wash. 51.

§ 1002. (5741.) When and by What Courts Granted.

A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial func-

tions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law. [L. '95, p. 115, § 4.]

Cited in 18 Wash. 510; 19 Wash. 315; 26 Wash. 281; 32 Wash. 695; 34 Wash. 249; 35 Wash. 36, 126; 46 Wash. 304; 47 Wash. 509; 50 Wash. 655.

Nature and scope of remedy: See 1 Remington's Digest, p. 464, §§ 1, 2; Wilson v. Seattle, 2 Wash. 543; State ex rel. Spokane Terminal Co. v. Superior Court, 40 Wash. 453; State ex rel. Grady v. Lockhart, 18 Wash. 531; Gregory v. Dixon, 7 Wash. 27.

Assailing a judgment by certiorari is not a collateral attack upon it: State v. Superior Court, 6 Wash. 352, 357.

Time of making application for writ: See 1 Remington's Digest, p. 469, § 16; State ex rel. Lowary v. Superior Court, 41 Wash. 450; State ex rel. Alexander v. Superior Court, 42 Wash. 684.

The writ of certiorari, being in the nature of an appeal, should be applied for within a reasonable time after the act complained of has been done, though the statute does not fix the time within which it must be applied for, and two years is not a reasonable time: Spooner v. Seattle, 6 Wash. 370, 371.

Under §§ 1621, 1630, 2 Hill's Code, certiorari and appeal from justices' courts were concurrent remedies either of which could be resorted to by any person who conceived himself injured by error in any proceeds, proceeding or judgment of a justice of the peace: Woodbury v. Henningsen, 11 Wash. 12; for extent of authority of superior court in such proceedings, see McEneaney v. Dart, 9 Wash. 682; but this article supersedes the provisions of the old code relating to certiorari in justices' courts.

WHEN WRIT WILL LIE.—Where there is no adequate remedy by appeal: See 1 Remington's Digest, p. 465, § 6; Gabriel v. Seattle & M. R. Co., 7 Wash. 515; State ex rel. Pacific Coast S. S. Co. v. Superior Court, 12 Wash. 548; Lewis v. Bishop, 19 Wash. 312; State ex rel. Smith v. Superior Court, 26 Wash. 278; State ex rel. Cann v. Moore, 23 Wash. 276; State ex rel. Meredith v. Tallman, 24 Wash. 426; Parker v. Superior Court, 25 Wash. 544; State ex rel. Sprague v. Superior Court, 32 Wash. 693; Sullivan's Estate, In re, 36 Wash. 217; State ex rel. Oudin v. Superior Court, 28 Wash. 584; State ex rel. Carran v. Superior Court, 30 Wash. 700; State ex rel. Nelson v. Superior Court, 31 Wash. 32; State ex rel. Young v. Denney, 34 Wash. 56.

Expense and delay does not affect adequacy of remedy by appeal: See State ex rel. Oudin v. Superior Court, 28 Wash.

584; State ex rel. Carran v. Superior Court, 30 Wash. 700; State ex rel. Nelson v. Superior Court, 31 Wash. 32; State ex rel. Young v. Denney, 34 Wash. 56.

There is no adequate remedy by appeal, and certiorari lies, where an administrator with the will annexed has been authorized to pay out \$500 per month to the widow of the deceased, and during six months has paid out over \$3,500 in costs of administration and other larger sums for other purposes: State ex rel. Speckart v. Superior Court, 48 Wash. 141.

Jurisdictional amount affecting the right: See 1 Remington's Digest, p. 466, § 8; State ex rel. Hamilton v. Superior Court, 8 Wash. 271; Warner v. Cowie, 15 Wash. 696; State ex rel. Corbin v. Superior Court, 35 Wash. 201; State ex rel. Gillette v. Superior Court, 22 Wash. 496.

The jurisdiction of the supreme court to issue writs of certiorari does not depend upon the amount in controversy, as questions of jurisdiction, illegality, and those concerning the existence of an appeal, or other plain, speedy, and adequate remedy at law are generally the only ones considered: State v. Superior Court, 6 Wash. 352 [but see later cases, supra]; and while it may issue the writ in aid of its appellate jurisdiction, it may also award it in a proper case, where its appellate power is called into exercise: Id.; see Wilson v. Seattle, 2 Wash. 543. The writ will be awarded to reverse a judgment of the superior court rendered without service of summons: Id.; and it was held that it would lie for the removal of criminal actions from a justice of the peace to a superior court under § 1621 of 2 Hill's Code: State v. White, 8 Wash. 230; and from the judgment of municipal courts: Seattle v. Pearson, 15 Wash. 575; Falsetto v. Seattle, 18 Wash. 509; State ex rel. Weymouth v. Lockhart, 28 Wash. 460; and it is the proper remedy to review the action of the court in fixing the amount of a supersedeas bond in a sum other than that required by statute: State v. Superior Court, 11 Wash. 366; distinguished in State v. Superior Court, 14 Wash. 365, 366.

WHEN WRIT WILL NOT LIE.—It will not lie to review street assessment proceedings, where the only method of collecting is by foreclosure suit: Spooner v. Seattle, 6 Wash. 370; nor to review the proceedings of inferior courts or officers, where a remedy by appeal, writ of error, or other mode of review is given by statute: Gregory v. Dixon, 7 Wash. 27, 28; nor to review the action of the trial court in granting a new trial: State v. Superior

Court, 6 Wash. 201; nor to review a judgment, when the remedy by appeal was available and fully adequate to protect defendant's rights: *Lewis v. Gilbert*, 5 Wash. 534; nor to review a judgment, though the time limited for appeal thereof had expired before motion to vacate judgment was decided: *Id.*; nor will it lie to review the action of the superior court in denying plaintiff's motion for judgment after a finding in his favor upon a plea in abatement and granting defendant leave to further plead: *State v. Superior Court*, 9 Wash. 366; nor to review the action of the superior court when the original amount in controversy does not exceed two hundred dollars, and the action does not involve the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute, there being no appeal under § 4, Article 4, of the Constitution: *State v. Superior Court*, 8 Wash. 271; nor to review the action of the superior court in adjudging the proposed appropriation of certain rights of way a public use: *Seattle etc. Ry. Co. v. State*, 5 Wash. 807; nor to review the proceedings of the county school superintendent in establishing a new school district, where the party aggrieved has failed to appeal as provided in § 784, 1 Hill's Code (§ 4427, *infra*); *Gregory v. Dixon*, 7 Wash. 27; nor will the writ lie to a justice of the peace where the application shows that the justice had lost jurisdiction over the person of a defendant by a continuance without notice to defendant: *Taylor v. Ringer*, 3 W. T. 539; nor to set aside an order vacating a judgment of a justice and affirming it as originally rendered, so as to cut off the other party from a trial on the merits: *McEneaney v. Dart*, 9 Wash. 682; nor to determine the sufficiency of a supersedeas bond: *State v. Superior Court*, 14 Wash. 365.

Certiorari does not lie where there is a remedy by appeal: See 1 Remington's Digest, p. 464, § 5; *Falsetto v. Seattle*, 18 Wash. 509; *State ex rel. Richardson v. Superior Court*, 28 Wash. 677; *State ex rel. Weymouth v. Lockhart*, 28 Wash. 460; *State ex rel. Smith v. Superior Court*, 30 Wash. 219; *State ex rel. Sprague v. Superior Court*, 32 Wash. 693; *Sweeney v. County Commissioners*, 43 Wash. 138; *Parker v. Superior Court*, 25 Wash. 544.

There is an adequate remedy by appeal and therefore certiorari will not lie to review an order in an action of unlawful detainer, quashing a writ of restitution for

insufficiency of the notice set out in the complaint; since the plaintiff may stand upon the notice and forthwith appeal from the final judgment, securing a supersedeas and review of the order; or may amend the complaint and secure another writ: *State ex rel. Wilkeson Coal & Coke Co. v. Superior Court*, 49 Wash. 203.

Particular proceedings in civil actions—Special proceedings: See 1 Remington's Digest, p. 467, §§ 11, 12; *State ex rel. Harris v. Superior Court*, 34 Wash. 248; *State ex rel. Young v. Superior Court*, 43 Wash. 34; *State ex rel. Reser v. Superior Court*, 13 Wash. 25; *Falsetto v. Seattle*, 18 Wash. 509; *State ex rel. Richardson v. Superior Court*, 28 Wash. 677; *State ex rel. Young v. Denney*, 34 Wash. 56; *State ex rel. Oudin v. Superior Court*, 28 Wash. 584; *State ex rel. Norris Safe etc. Co. v. Superior Court*, 30 Wash. 177; *State ex rel. Whitehouse v. Superior Court*, 38 Wash. 23.

As to acts of public officers, proceedings of boards, etc.: See 1 Remington's Digest, p. 468, § 13; *Browne v. Gear*, 21 Wash. 147; *Wilsey v. Cornwall*, 40 Wash. 250; *Lewis v. Bishop*, 19 Wash. 312; *State ex rel. Schroeder v. Superior Court*, 29 Wash. 1.

In certiorari proceedings for the review of an assessment of the cost of a local improvement, the city is a proper party in interest, no matter what its ultimate responsibility may be, since it is primarily responsible for the collection of assessment: *Frederick v. Seattle*, 13 Wash. 428.

An ordinance of a city council granting a franchise for the use of a street is a legislative act, and is not subject to review by writ of certiorari: *Tenny v. Seattle Electric Co.*, 48 Wash. 150.

Certiorari will lie for the purpose of reviewing the action of a municipal court in a proceeding brought therein for the purpose of securing the conviction and punishment of one guilty of violating a city ordinance: *Seattle v. Pearson*, 15 Wash. 575; following *Woodbury v. Henningsen*, 11 Wash. 12.

Certiorari does not lie to review the denial of a motion to dismiss an action upon stipulation, under this section: *State ex rel. Smith v. Superior Court*, 47 Wash. 508.

Certiorari to review an order respecting a commission to take testimony in a pending cause will be dismissed, where, before the hearing in the supreme court, the action has been dismissed: *State ex rel. Clifford v. Superior Court*, 47 Wash. 35.

§ 1003. (5742.) Application for, How Made.

The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice. [L. '95, p. 115, § 5.]

Cited in 15 Wash. 578; 23 Wash. 281.
Application, parties, form, issuance, etc.:
See 1 Remington's Digest, pp. 468, 469,
§§ 14-20; Leavitt v. Chambers, 16 Wash.
353; Frederick v. Seattle, 13 Wash. 428;
Seattle v. Pearson, 15 Wash. 575; State

ex rel. Casedy v. Inter-State etc. Co., 36
Wash. 80; State ex rel. Grady v. Lock-
hart, 18 Wash. 531; Corbett v. Civil Ser-
vice Com., 33 Wash. 190; State ex rel.
Cann v. Moore, 23 Wash. 276.

§ 1004. (5743.) Writ, How Directed.

The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal the clerk, if there be one, must return the writ with the transcript required. [L. '95, p. 115, § 6.]

§ 1005. (5744.) Contents of Writ.

The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court, and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed. [L. '95, p. 115, § 7.]

Cited in 23 Wash. 282; 46 Wash. 171.

Under this section, a writ is sufficient without containing a recital of the errors to be reviewed, when they are stated in the affidavit: State ex rel. Cann v. Moore, 23 Wash. 276.

Certiorari to review a judgment of the superior court, will be dismissed for want of due diligence in prosecution, where the record was not certified for more than two months after the time fixed therefor in the writ, no application for an exten-

sion was asked until nearly one month after the time had expired, and no appearance was made at the date set for considering the extension of time, but a return made sixteen days thereafter without leave; since the return is necessary to confer jurisdiction, and this section provides that the court shall fix the time, which thereupon becomes the law of the case: State ex rel. North Shore Boom and Driv-
ing Co. v. Superior Court, 46 Wash. 169.

§ 1006. (5745.) Stay of Proceedings.

If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ. These words may be inserted or omitted, in the sound discretion of the court, but if omitted the power of the inferior court or office is not suspended or the proceedings stayed. [L. '95, p. 115, § 8.]

§ 1007. (5746.) Bill of Exceptions—Judgment on.

Questions of fact not apparent of record may be presented by bill of exception, and the court shall review the same, and, in case there is error, shall render such judgment in the case as of right ought to be entered, or reverse and remand the cause for further proceedings. [L. '95, p. 115, § 9.]

Sufficient bill of exceptions: See 1 Remington's Digest, p. 470, § 22; Corbett v. Civil Service Com., 33 Wash. 190.

§ 1008. (5747.) Service of Writ.

The writ may be served as follows, except where different directions respecting the mode of service thereof are given by the court granting it:—

1. Where it is directed to a person or persons by name or by his or her official title or titles, or to a municipal corporation, it must be served upon each officer or other person to whom it is directed, or upon the corporation, in the same manner as a summons;

2. Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court or the judges thereof may be made by filing the writ with the clerk. [L. '95, p. 116, § 10.]

§ 1009. (5748.) Defective Return—How Perfected—Hearing, Judgment.

If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling or modifying the proceedings below. [L. '95, p. 116, § 11.]

Cited in 18 Wash. 534; 46 Wash. 171.

Return and record, quashing or dismissal: See 1 Remington's Digest, p. 469, § 21; Swope v. Seattle, 35 Wash. 69; State ex rel. Cann v. Moore, 23 Wash. 276.

If the writ is directed to the judge of the superior court, requiring him to certify to the supreme court a transcript of the record in a certain action, the judge must make the return, and if made by the clerk it is insufficient: State v. Sachs, 3 Wash. 496.

Where a superior judge neglects or refuses obedience to a writ of certiorari from the supreme court directing him to certify

a transcript of record in a certain action, a rule will issue requiring him to show cause why he should not be punished for a contempt: Id.

Although a writ of certiorari may have been issued, it may be dismissed without a hearing when, in the opinion of the court, it was improvidently issued: Gregory v. Dixon, 7 Wash. 27.

Defendant, before compliance with the directions of the writ, may move to quash it, and his motion may be amended or supplemented by the allegation of additional grounds before the matter is finally disposed of: Spooner v. Seattle, 6 Wash. 370.

§ 1010. (5749.) Questions Involving Merits—What are.

The questions involving the merits to be determined by the court upon the hearing are,—

1. Whether the body or officer had jurisdiction of the subject matter of the determination under review;

2. Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination;

3. Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator;

4. Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination;

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence thereof, rendered in an action in a court, triable by a jury, would be set aside by the court, as against the weight of evidence. [L. '95, p. 116, § 12.]

Cited in 24 Wash. 543.

Scope and extent of review: See 1 Remington's Digest, p. 470, § 25; State ex rel. Grady v. Lockhart, 18 Wash. 531; Bringgold v. Spokane, 19 Wash. 333; State ex

rel. McCormick v. Superior Court, 43 Wash. 91; Browne v. Gear, 21 Wash. 147; State v. Van Brocklin, 8 Wash. 557; McEaney v. Dart, 9 Wash. 682; Hays v. Merchants' Bank, 10 Wash. 573.

§ 1011. (5750.) Copy of Judgment Transmitted to Inferior Tribunal.

A copy of the judgment signed by the clerk, must be transmitted to the inferior tribunal, board or officer having the custody of the record or proceeding certified up. [L. '95, p. 117, § 13.]

§ 1012. (5751.) Judgment-roll.

A copy of the judgment signed by the clerk, entered upon or attached to the writ and return, constitute the judgment-roll. [L. '95, p. 117, § 14.]

Statutory attorney's fees may be taxed: See *State ex rel. Spokane Terminal Co. v. Superior Court*, 40 Wash. 453.

§ 1013. (5754.) Mandamus, Defined.

The writ of mandamus may be denominated a writ of mandate. [L. '95, p. 117, § 15.]

§ 1014. (5755.) When and by What Court Issued.

It may be issued by any court, except a justice's or a police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person. [L. '95, p. 117, § 16.]

The provisions of the old code of procedure covered by §§ 734-746, 2 Hill's Code, were superseded by this chapter; hence the citations here given are in part adjudications under the old law.

See *infra*, § 1031, when writ returnable.

Cited in 15 Wash. 432; 16 Wash. 277; 19 Wash. 386, 525, 676; 20 Wash. 44, 636; 24 Wash. 543; 28 Wash. 6; 30 Wash. 599; 31 Wash. 541; 32 Wash. 553; 33 Wash. 392; 35 Wash. 45; 36 Wash. 169; 38 Wash. 313; 46 Wash. 477; 50 Wash. 103.

Mandamus: See 2 Remington's Digest, pp. 1775, 1796, §§ 1-90.

Our statutes have rendered the technical learning of the old writs of mandamus and prohibitions mainly obsolete: *County of Clark v. Brazee*, 1 W. T. 199.

The writ of mandamus goes from the supreme court only in aid of its appellate jurisdiction, and while not properly a step in the main cause before the latter has reached this court, yet it bears sufficient relation to it to permit a showing to be considered therein when the latter has reached us by the intervention of the appellee: *Norager v. Norwald*, 3 W. T. 246, 247.

Irregularity in the preliminary proceedings in respect to writ of mandate is sometimes cured by appearance of defendant, and his failure to object to the regularity of the proceedings: *Clark County v. Brazee*, *supra*.

Noncompliance with the mandate of the supreme court is corrigible by further mandate, upon application of any party aggrieved, as in a case whereof this court has still jurisdiction: *Waterman & Katz v. Lemon*, 3 W. T. 15.

The public being interested, a mandamus proceeding is properly instituted in the name of the state upon the relation of the town: *N. P. Ry. Co. v. Territory*, 3 W. T. 303. See *State ex rel. Grinsfelder v. Spokane St. R. Co.*, 19 Wash. 518.

The prosecuting attorney is a proper relator in prohibition or mandamus where the public is interested: *State v. Superior Court*, 4 Wash. 30.

Pending applications for a writ of mandate to compel a trial judge to settle a statement of facts, a motion to affirm judgment for failure to file transcript will be held over: *Norager v. Norwald*, 3 W. T. 246.

Jurisdiction: See 2 Remington's Digest, p. 1791, §§ 69-71; *State ex rel. Shannon v. Hunter*, 3 Wash. 92, 27 Wash. 1076; *State ex rel. McIntyre v. Superior Court*, 21 Wash. 108; *State ex rel. Gillette v. Superior Court*, 22 Wash. 496; *State ex rel. Wallace v. Superior Court*, 24 Wash. 605; *State ex rel. Brown v. Superior Court*, 15 Wash. 314; *Spokane v. Smith*, 37 Wash. 583.

Parties plaintiff or petitioners: See 2 Remington's Digest, p. 1792, §§ 72-75; *State ex rel. Weinberg v. Pacific Brew. etc. Co.*, 21 Wash. 451; *State ex rel. Richardson v. Superior Court*, 41 Wash. 439; *State ex rel. Ross v. Headlee*, 22 Wash. 126; *American Bridge Co. v. Wheeler*, 35 Wash. 40; *State ex rel. Starrett v. James*, 14 Wash. 82; *State ex rel. Grinsfelder v. Spokane St. R. Co.*, 19 Wash. 518; *State ex rel. Romano v. Yakey*, 43 Wash. 15; *State ex rel. Evers v. Byrne*, 32 Wash. 264.

Two persons who have been elected to a town council may join as plaintiffs in a proceeding to compel the canvass of the election returns: *State ex rel. Howe v. Kendall*, 44 Wash. 542.

Parties defendant or respondents: See 2 Remington's Digest, p. 1792, §§ 76, 77; *Espy Estate Co. v. Pacific County*, 40 Wash. 67; *State ex rel. Hill v. Superior*

Court, 4 Wash. 327; *State ex rel. Witherop v. Brown*, 19 Wash. 383; *State ex rel. Race v. Cranney*, 30 Wash. 594; *Savage v. Sternberg*, 19 Wash. 679.

In a proceeding to compel the canvass of election returns by the town board of canvassers, there is no defect of parties defendant, where the writ runs against the council and the mayor, who is a member of the board, and was served on him and on a majority of the council, although members of the council not recognized were not joined or served: *State ex rel. Howe v. Kendall*, 44 Wash. 542.

Existence of other adequate remedy: See 1 Remington's Digest, pp. 1776, 1777, §§ 2-4; *Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259; *State ex rel. Krutz v. Washington Irr. Co.*, 41 Wash. 283; *Morris & Whitehead v. Williams*, 23 Wash. 459; *State ex rel. Davey v. Cheetham*, 20 Wash. 64; *State ex rel. Miller v. Superior Court*, 40 Wash. 555; *State ex rel. Barbo v. Hadley*, 20 Wash. 520; *State ex rel. Hibbard & Co. v. Superior Court*, 21 Wash. 631; *State ex rel. Banks v. Snohomish County*, 18 Wash. 160; *State ex rel. Porter v. Headlee*, 19 Wash. 477; *Ilwaco v. Ilwaco R. & Nav. Co.*, 17 Wash. 652; *State ex rel. Townsend Gas etc. Co. v. Superior Court*, 20 Wash. 502; *State ex rel. Barbo v. Hadley*, 20 Wash. 520; *State ex rel. McIntyre v. Superior Court*, 21 Wash. 108; *State ex rel. Stratton v. Tallman*, 29 Wash. 317; *State ex rel. Stratton v. Tallman*, 25 Wash. 295; *State ex rel. Hibbard & Co. v. Superior Court*, 21 Wash. 631; *State ex rel. Hubbard v. Superior Court*, 24 Wash. 438; *State ex rel. Dudley v. Daggett*, 28 Wash. 1; *Chapin v. Port Angeles*, 31 Wash. 535; *State ex rel. Washington Dredg. etc. Co. v. Moore*, 21 Wash. 629; *State ex rel. Superior Court v. Strohl*, 20 Wash. 545; *State ex rel. Smith v. Ross*, 42 Wash. 439; *Achey v. Creech*, 21 Wash. 319; *State ex rel. Kinnear v. Bridges*, 21 Wash. 591; *State ex rel. Drasdo v. Frater*, 39 Wash. 594; *Northwest Warehouse Co. v. Oregon R. & Nav. Co.*, 32 Wash. 218.

Conflict or interference with other proceeding: See 2 Remington's Digest, p. 1777, § 7; *State ex rel. Drasdo v. Frater*, 39 Wash. 594; *State ex rel. Anderson v. Bell*, 36 Wash. 196; *State ex rel. Cook v. Fairley*, 45 Wash. 52; *German-American Sav. Bank v. Spokane*, 17 Wash. 315.

Successive writs: See *State ex rel. King v. Trimbell*, 12 Wash. 440.

Nature of rights to be protected or questions involved: See 2 Remington's Digest, p. 1778, §§ 10, 11; *Northwest Warehouse Co. v. Oregon R. & N. Co.*, 32 Wash. 218; *State ex rel. Evers v. Byrne*, 32 Wash. 264; *State ex rel. Brown v. McQuade*, 36 Wash. 579; *Hindman v. Boyd*, 42 Wash. 17.

MANDATE WILL LIE: To require a superior judge to whom has been apportioned the equity business to proceed to hear and determine a suit in partition:

State v. Lichtenberg, 4 Wash. 553; or to compel a court to take jurisdiction of a case which it has wrongfully dismissed, and to proceed to hear it on its merits: *State v. Hunter*, 3 Wash. 92; followed in *State v. Superior Court*, 7 Wash. 224; or to compel the vacation of an order suspending an attorney when the order of suspension is void: *State v. Sachs*, 2 Wash. 373, 26 Am. St. Rep. 857; or to compel a judge of the superior court to settle and certify a proper statement of facts on appeal: *State v. Allen*, 2 Wash. 470; *In re Rosner*, 5 Wash. 488; or to correct or amend his certificate to a statement of facts to conform to law: *State v. Arthur*, 7 Wash. 358; or to compel the superior court to entertain jurisdiction of an appeal from a justice's court which is properly taken: *State v. Superior Court*, 7 Wash. 223; *State v. Hunter*, 3 Wash. 92; but see *State v. Superior Court*, 12 Wash. 548; or to compel the clerk of the superior court to file a transcript on appeal from a justice's court without tendering the fee required for the institution of an original action: *State v. Gordon*, 8 Wash. 488; or to compel the clerk to send up a transcript on appeal which he withholds on the ground that the appeal bond is defective: *State v. Armstrong*, 5 Wash. 123; or to the clerk of the lower court on behalf of a person convicted of murder to send up the transcript on appeal at public expense on a showing that defendant is unable to pay for same: *State v. Fenimore*, 2 Wash. 370; or to compel the attorney general to approve the bond of a state land commissioner: *State v. Jones*, 6 Wash. 452; or against the state auditor to compel the issuance of warrants for the payment of salaries and expenses of the state board of land commissioners: *State v. Grimes*, 7 Wash. 191; or to compel the issuance by the state auditor of a warrant against the permanent school fund in favor of a school district to pay the purchase price of school district bonds: *State v. Grimes*, 7 Wash. 270; or against the board of state land commissioners to compel the issuance of a certificate of purchase to tide lands, where the formalities of law have been complied with: *State v. Forrest*, 8 Wash. 610; or to compel the sheriff to make return of an order of sale under foreclosure, without tendering sheriff's commission when the property has been bought in by the judgment creditor: *State v. Prince*, 9 Wash. 107; *State v. Pugh*, 9 Wash. 694; or to compel the county auditor to give notice of an election as provided by law: *State v. Twichell*, 4 Wash. 715; or to compel a canvassing board to declare the result of an election: *State v. Denny*, 4 Wash. 135; and to compel a canvassing board to make a proper canvass and issue the necessary certificates, although certificates have been issued to persons other than those entitled: *State v. Trimbell*, 12 Wash. 440; to compel the city treasurer to pay a municipal war-

rant in its order and questions affecting the legality of the warrant can be tried therein: *Cloud v. Town of Sumas*, 9 Wash. 399; and when a claim against a city has been allowed and an irregular warrant issued therefor, which the treasurer refuses to pay, the claimant cannot sue upon the original contract, but must first move the ministerial officers, by mandamus, to issue proper warrants: *Abernathy v. Town of Medical Lake*, 9 Wash. 112.

MANDAMUS WILL NOT LIE, WHEN.

Section 4, Article 4, of the Constitution confers upon the supreme court original jurisdiction in mandamus as to all state officers; but a member of the board of regents of the agricultural college is not a "state officer" within the meaning of this section: *State v. Smith*, 6 Wash. 496.

Mandamus will not lie to compel a judge to enter a judgment when it appears from the application that he will proceed to hear and determine the action at the next session of the court: *State v. Hunter*, 4 Wash. 651; nor will the writ be granted where the application fails to show that such proof had been offered before the court as to authorize an entry of judgment: *State v. Hunter*, supra; nor will it lie to compel a superior court to take cognizance of an appeal from a judgment by default entered by a justice of the peace upon a complaint and notice personally served upon defendant, to which he had failed to plead: *State v. Superior Court*, 12 Wash. 548; nor under the act of 1893 to compel the trial judge to certify that a statement of facts "contains what the parties have agreed and accepted to be all the material facts, etc.," when in fact only a part of the testimony has been incorporated therein: *State v. Parker*, 9 Wash. 653; see *In re Rosner*, 5 Wash. 488.

Mandamus to compel a judge to proceed with the trial of a cause does not lie where he refused to proceed for supposed want of jurisdiction, and did not refuse to enter an order of dismissal of the action, since there was an adequate remedy by appeal from the order of dismissal: *State ex rel. Piper v. Superior Court*, 45 Wash. 196.

A writ of mandate to compel a superior court to entertain an appeal from a justice of the peace will not issue, where application for relief by mandamus was not made until after a lapse of four months from the date the ruling complained of was made: *State v. Superior Court*, 15 Wash. 314; nor to compel the lower court to enter a judgment not authorized by the supreme court: *Mansfield v. First Nat. Bank*, 6 Wash. 603; nor to compel the superior court to fix the amount of a supersedeas bond on appeal from an order which is not appealable: *State v. Parker*, 6 Wash. 411; nor to a judge of a superior court whose term of office has expired to compel him to certify and settle a statement of facts on appeal under the act of January

21, 1893: *State v. Allen*, 7 Wash. 285; nor to compel two of the three judges of the superior court of a county to perform certain acts, because if it takes all of the judges to do the act, all must be necessary parties, while if one could do it, that one whose duty it was to act should have been proceeded against alone: *State v. Superior Court*, 4 Wash. 327; nor to compel the lower court to set aside a judgment and reinstate a cause and proceed with its trial where plaintiff has appealed from a judgment dismissing his action: *State v. Lichtenberg*, 4 Wash. 653; nor to compel action on the part of an inferior court until it is made clearly to appear that such court has been regularly and properly moved to take the required action, and has unwarrantably refused to act: *State v. Hunter*, 4 Wash. 651; nor to compel the state treasurer to pay warrants drawn by the auditor on funds which have been exhausted: *State v. Lindsley*, 3 Wash. 125; nor against the state auditor to compel the issuance of a warrant for payment of a voucher for services rendered where the appropriation cannot be disbursed without further legislation: *Parrish v. Reed*, 2 Wash. 491.

Where a mandamus is sought to compel the state auditor to allow certain items contained in a cost bill in a criminal case, the rejection of a portion of the items carries with it a denial of the writ, as the application cannot be refused in part and granted as to the rest: *State v. Grimes*, 7 Wash. 445, 449.

It will not lie against the secretary of state to certify to the proper officers the nominee of a political party of one county for an office, where the nomination can only be made by the joint action of all the counties: *State v. Weir*, 5 Wash. 82; nor to compel the commissioner of public lands to issue a certificate of purchase to an applicant for tide land, when the petition for the writ fails to show any erroneous application by the commissioner of the law to the facts before him for determination: *State v. Forrest*, 11 Wash. 158; nor to compel a mayor to sign bonds which purport to make the city liable for indebtedness in excess of its power to create: *Chalk v. White*, 4 Wash. 156; nor against the mayor and clerk of a city to pay an attorney's lien filed on a judgment for a client against the city, where no judicial proceedings have been had to determine the amount or validity of the lien: *Chamber v. Territory*, 3 W. T. 280; nor to compel levy of special tax by city where it has already levied taxes to the authorized limit: *Portland Sav. Bank v. Montezano*, 14 Wash. 570.

Nor to recover moneys misapplied by public officers, as the public has another different and exclusive remedy: *Elder v. Territory*, 3 W. T. 438; nor to compel a municipal corporation to enter into a con-

tract with one who shows himself to have been the lowest bidder in response to a call for a bid for city advertising: *Times Pub. Co. v. Everett*, 9 Wash. 518, 43 Am. St. Rep. 865; distinguishing *Baum v. Sweeney*, 5 Wash. 712; *State v. Milligan*, 3 Wash. 144; nor to compel the county commissioners to make an award for county printing, since an appeal from their order furnishes an adequate remedy: *State v. Allen*, 8 Wash. 168; nor to compel appraisers to survey and appraise tide lands of the third class before the harbor lines of the county have been established: *State v. Sharpstein*, 4 Wash. 68; nor to compel the canvassing board to canvass the returns of an election upon a proposition to remove the county seat, as the county commissioners are charged with that duty: *Swerdfiger v. Whitney*, 12 Wash. 420; nor to compel the county auditor to draw a warrant for expenses incurred by sheriff in providing and furnishing rooms for the superior court and officers on the court's order, where at the time the county commissioners were making suitable provision therefor: *Barnett v. Ashmore*, 5 Wash. 163.

Mandamus will not be issued where not necessary: See *State ex rel. Bauer v. Sunset Tel. & Tel. Co.*, 30 Wash. 676.

Mandamus will not be granted to secure a supersedeas on appeal from an order denying an intervenor leave to appear and defend a foreclosure action, as no further action can be taken thereon to enforce the order and there is nothing to supersede: *Hindman v. Colvin*, 46 Wash. 317.

Under the rule that mandamus will lie only at the instance of parties in interest, the writ will not issue at the suit of two directors of a school district against the third director to compel him to sign warrants for the payment of the salaries of certain teachers: *State v. James*, 14 Wash. 82.

Mandamus will not lie to compel a county treasurer to pay over moneys collected by his predecessor and which have never come into his possession: *State v. Mish*, 13 Wash. 302.

A certified return by a county treasurer of moneys collected as penalty and interest upon taxes levied for the benefit of a city will not be enforced by mandamus, where it appears that such return would be incidental merely to the principal relief, which can be righted only by an action against the county rather than against the officer: *Id.*

Mandamus to compel a judge to settle a statement of facts will not lie, when he has not refused to settle same, but has continued the matter until he could have an opportunity to examine the statement and the objections thereto: *State v. Superior Court*, 13 Wash. 514.

Mandamus does not lie to control the exercise of discretion by a trial judge in refusing to proceed with the trial of an

action for damages upon an injunction bond, until after a second action between the same parties to determine the rights of the parties in and to the property damaged is first brought to an issue and tried, or the two actions tried together, where the business of the court so requires or would be facilitated thereby: *State ex rel. McDonald v. Steiner*, 44 Wash. 150.

Mandamus will not lie to compel the board of school examiners of a county to issue a teacher's certificate to an applicant entitled thereto, a remedy in such cases being provided by §§ 4542, 4547, authorizing appeal to the superintendent of public instruction: *State v. Hitt*, 13 Wash. 547.

Mandamus will not lie to compel the court to enter a nunc pro tunc order substituting one attorney for another in a pending action; but the litigant is entitled to such order only as of the date when application is made: *State v. Langley*, 13 Wash. 636.

The supreme court has jurisdiction by means of a writ of mandate, to compel the superior court to proceed to final determination of a cause properly before it, to the end that the right of appeal from such determination may be made effective: *State v. Parker*, 12 Wash. 685; following *State v. Hunter*, 3 Wash. 92.

A writ of mandate will not lie for the refusal of the commissioner of public lands to issue a certificate of purchase to an applicant for tide lands, when the petition for the writ fails to show any erroneous application by the commissioner of the law to the facts before him for determination: *State v. Forrest*, 11 Wash. 158.

If the defendant in mandamus demands a jury the court is warranted in issuing a special venire: *State v. Trimbell*, 12 Wash. 440.

Mandamus will not lie to compel a street railway company to resume the operation of a line which it has discontinued, without any prior demand for the performance of its duty to the public in that respect: *State ex rel. Grinsfelder v. Spokane St. R. Co.*, 19 Wash. 518.

And will not issue where the case has been determined on appeal, or where the subject matter of the suit is destroyed before the hearing: See *State ex rel. Oudin etc. Co. v. Superior Court*, 37 Wash. 30; *State ex rel. Wheeler v. Irwin*, 40 Wash. 413.

The discretion of a court cannot be controlled by mandamus: *State ex rel. Romano v. Yakey*, 43 Wash. 15.

Mandamus will not lie to compel a sheriff to return an execution, when: See *State ex rel. Commercial Inv. Co. v. Hartman*, 26 Wash. 524.

Nor to compel the secretary of state to do clerical work not imposed by law: *State ex rel. Rogers v. Jenkins*, 21 Wash. 364. Nor to file insufficient articles: *State*

ex rel. Osborne etc. Co. v. Nichols, 38 Wash. 309.

Mandamus does not lie to compel a general course of official conduct: *State ex rel. Hawes v. Brewer*, 39 Wash. 65.

It will not lie to control discretion of ministerial officers: See *Morris & Whitehead v. Williams*, 23 Wash. 459; *State ex rel. Bussell v. Callvert*, 33 Wash. 380; *State ex rel. Brown v. Board of Dental Examiners*, 38 Wash. 325; *State ex rel. Atkinson v. Dunlap*, 49 Wash. 385.

Mandamus is not the proper remedy when the title to an office is in controversy: *Lynde v. Dibble*, 19 Wash. 328.

Nor where legality of removal from office is disputed: See *Kimball v. Olmsted*, 20 Wash. 629.

Mandamus does not lie on the demand of a private citizen for general inspection of public books and records: See *State ex rel. Cook v. Reed*, 36 Wash. 638.

Mandamus will not lie to compel a city to levy a special tax for the payment of a judgment in tort against the city: See *Lorence v. Bean*, 18 Wash. 37.

Mandamus to courts: See 2 Remington's Digest, p. 1781, §§ 22-24; *Mansfield v. First Nat. Bank*, 6 Wash. 603; *State ex rel. Stratton v. Tallman*, 25 Wash. 295; *State ex rel. Jefferson County v. Hatch*, 36 Wash. 164; *State ex rel. Commercial Inv. Co. v. Hartman*, 26 Wash. 524; *State v. Creech*, 18 Wash. 186; *State ex rel. Hill v. Gardner*, 32 Wash. 550; *American Paper Co. v. Sullivan*, 34 Wash. 391; *State ex rel. Denham v. Superior Court*, 28 Wash. 590.

Preparation and transmission of record, etc., on appeal: See 2 Remington's Digest, p. 1782, § 27; *State ex rel. Klein v. Superior Court*, 36 Wash. 44; *State ex rel. Richardson v. Superior Court*, 41 Wash. 439; *Scott v. Bourn*, 13 Wash. 471.

Acts and proceedings of public officers: See 2 Remington's Digest, pp. 1783, 1791, §§ 30-68.

Official character of acts or proceedings: See 2 Remington's Digest, p. 1783, §§ 31-33; *State v. Snohomish County*, 18 Wash. 160; *State ex rel. Porter v. Headlee*, 18 Wash. 220; *State ex rel. Porter v. Headlee*, 19 Wash. 477; *Townsend Gas & Elec. Light Co. v. Hill*, 24 Wash. 469; *Chapin v. Port Angeles*, 31 Wash. 535; *Hester v. Thomson*, 35 Wash. 119.

As to ministerial acts and matters of discretion: See 2 Remington's Digest, p. 1784, §§ 34, 35; *State ex rel. Rogers v. Jenkins*, 20 Wash. 78; *American Bridge Co. v. Wheeler*, 35 Wash. 40; *Morris & Whitehead v. Williams*, 23 Wash. 459; *State ex rel. Hawes v. Brewer*, 39 Wash. 65; *Bussell v. Calvert*, 33 Wash. 380.

Under the code, it is immaterial whether mandamus to a state officer is sought to review the exercise of judgment and discretion or acts done in a purely ministerial capacity, as the proceeding is a form of civil action in which any appropriate re-

lief may be awarded: *State ex rel. Gillette v. Clausen*, 44 Wash. 437.

Elections and proceedings relating thereto: See 2 Remington's Digest, p. 1784, §§ 38-40; *State ex rel. King v. Trimbell*, 12 Wash. 440; *State ex rel. Cann v. Moore*, 23 Wash. 115.

Mandamus is the proper remedy to secure a canvass of the returns of a town election, where the canvassing board refuses to act, whether the act is ministerial or there is a refusal to exercise a discretion in a quasi-judicial capacity: *State ex rel. Howe v. Kendall*, 44 Wash. 542.

Public improvements—Levy and collection of assessments, issuance of warrants, etc.: See 2 Remington's Digest, p. 1786, §§ 47-52; *Waldron v. Snohomish*, 41 Wash. 566; *Hawes v. Brewer*, 39 Wash. 65; *State ex rel. Hellar v. Young*, 18 Wash. 21; *State ex rel. Barber Asphalt Co. v. Seattle*, 42 Wash. 370; *American Bridge Co. v. Wheeler*, 35 Wash. 40; *German-Am. Sav. Bank v. Spokane*, 17 Wash. 315; *Bardsley v. Sternberg*, 17 Wash. 243; *State ex rel. Dudley v. Daggett*, 28 Wash. 1; *State ex rel. Brown v. McQuade*, 36 Wash. 579; *State ex rel. Porter v. Headlee*, 18 Wash. 220; *State v. Neal*, 25 Wash. 264; *State ex rel. Hellar v. Young*, 21 Wash. 391.

Mandamus is the proper remedy to secure the issuance by drainage commissioners of warrants in payment of services, although the right thereto is denied and plaintiff might proceed by ordinary action for breach of contract; since, under the code, mandamus is but a form of civil action wherein appropriate relief may be given, and is specially authorized by this section and by § 4179: *State ex rel. Barto v. Board of Drainage Commrs.*, 46 Wash. 474.

Mandamus lies in favor of the holder of warrants, issued in part payment for the construction of a ditch, to compel the county commissioners to borrow money or levy a special assessment to establish a fund to pay the principal and interest due on the warrants, where the commissioners had abandoned the project and refuse or fail to take any steps to complete the ditch or levy the assessment: *State ex rel. Ames v. Lewis County*, 45 Wash. 423.

Demand and default: See 2 Remington's Digest, p. 1779, § 15; *Northern Pac. R. Co. v. Territory*, 3 W. T. 303; *State ex rel. Witherop v. Brown*, 19 Wash. 383; *State ex rel. Evers v. Byrne*, 32 Wash. 264; *State ex rel. Grinsfelder v. Spokane St. Ry. Co.*, 19 Wash. 518.

Subjects and purposes of relief: See 2 Remington's Digest, pp. 1779-1783, §§ 18-29; *State ex rel. Townsend Gas etc. Co. v. Superior Court*, 20 Wash. 502; *State ex rel. Barbo v. Hadley*, 20 Wash. 520; *McIntyre v. Superior Court*, 21 Wash. 108; *State ex rel. Smith v. McClinton*, 17 Wash. 45; *State ex rel. Romano v. Yakey*, 43 Wash. 15; *Stratton v. Tallman*, 29 Wash.

317; *State ex rel. Stockman v. Superior Court*, 15 Wash. 366; overruled in *State ex rel. Miller v. Superior Court*, 40 Wash. 555; *State ex rel. Hubbard v. Superior Court*, 24 Wash. 438; *State ex rel. Wyman etc. Co. v. Superior Court*, 40 Wash. 443.

To recover interest on street improvement warrants, see *Philadelphia Mtg. & T. Co. v. New Whatcom*, 19 Wash. 225.

Compelling county commissioners to levy assessment for interest on bonds of irrigation district: See *State ex rel. Witherop v. Brown*, 19 Wash. 383.

Compelling assessment of taxes wrongfully omitted from the tax-rolls: See *State ex rel. Evers v. Byrne*, 32 Wash. 264.

Sufficient tender of taxes to compel treasurer to issue redemption certificate: See *State ex rel. McClaine v. Reed*, 29 Wash. 383.

Insufficient defenses of public officials for refusing to draw warrants: See *State ex rel. Porter v. Headlee*, 18 Wash. 220; *State ex rel. Porter v. Headlee*, 19 Wash. 477; *Smith v. Ormsby*, 20 Wash. 396; *Savage v. Sternberg*, 19 Wash. 679.

A county auditor required to issue warrants for the payment of county funds is authorized to inquire whether a law requiring such payment is valid, and to attack the same for invalidity in mandamus proceedings brought against him to compel issuance of a warrant: *State ex rel. Egbert v. Blumberg*, 46 Wash. 270.

If judgment against the state dental board may be enforced by mandamus proceedings, under this section, it is no more than a concurrent remedy, and does not exclude proceedings supplementary to the judgment: *Stern v. State Board of Dental Examiners*, 50 Wash. 100.

§ 1015. (5756.) Writ, When and upon What Issued.

The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit on the application of the party beneficially interested. [L. '95, p. 117, § 17.]

See supra, §§ 179, 180, party beneficially interested.

Cited in 20 Wash. 44, 397; 32 Wash. 552; 36 Wash. 168; 39 Wash. 409.

A mandamus proceeding may be commenced by the filing and service of a summons and complaint, rather than by motion and affidavit: *State ex rel. Cicoria v. Corgiat*, 50 Wash. 95.

Petition or complaint, or other application: See 2 Remington's Digest, p. 1793, § 78; *Chapin v. Port Angeles*, 31 Wash. 535; *State ex rel. Evers v. Byrne*, 32 Wash. 264; *Smith v. Ormsby*, 20 Wash. 396.

§ 1016. (5757.) Writ, Alternative or Peremptory.

The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a specified time and place, why he has not done so. The peremptory writ must be in some similar form, except the words requiring the party to show cause why he has not done as commanded must be omitted and a return inserted. [L. '95, p. 117, § 18.]

See notes to § 1014.

Cited in 31 Wash. 539.

In an application for mandamus, no alternative writ will be issued, unless the allegations in the petition therefor make out a prima facie case for the issuing of a peremptory writ: *Parrish v. Reed*, 2 Wash. 291.

It seems that under our statute (2 Hill's Code, § 734 et seq.), it is unnecessary in an alternative writ to recite any of the facts relied upon by the plaintiff, if the affidavit upon which it is founded is referred to therein and served therewith: *King v. Trimbell*, 12 Wash. 440.

The writ of mandamus must contain the allegations, or refer to the affidavit to be

served with the writ: *Chapin v. Port Angeles*, 31 Wash. 535.

A complaint for mandamus and for injunction not separating the causes of action is sufficient against a demurrer for misjoinder where it states a good cause of action for injunction, although deficient in its allegations for mandamus: *Times Pub. Co. v. Everett*, 9 Wash. 518.

When the alternative writ has been quashed, a second writ may issue in the original proceedings, if defendants are served with the alias writ: *King v. Trimbell*, supra.

An objection that an alternative writ of mandate does not show upon its face that

the petitioner therefor is entitled to any relief is waived, when the respondents, without demurring thereto, answer and take issue upon the matters alleged in the petition: *State v. Moss*, 13 Wash. 42.

Demurrer proper to writ against city to compel payment of judgment: See *Chapin v. Port Angeles*, 31 Wash. 535.

§ 1017. (5758.) Notice.

When the application to the court is made without notice to the party, and the writ be allowed, the alternative must be first issued; and if the application be upon due notice and the writ be allowed, the peremptory writ may be issued in the first instance. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not. [L. '95, p. 117, § 19.]

§ 1018. (5759.) Return of Writ—Answer.

On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action. [L. '95, p. 118, § 20.]

Cited in 14 Wash. 204; 15 Wash. 677; 19 Wash. 676.

Motion to quash and demurrer: See 2 Remington's Digest, p. 1794, §§ 83, 84; *Hester v. Thomson*, 35 Wash. 119; State

ex rel. *Sheehan v. Headlee*, 17 Wash. 637; State ex rel. *Hawes v. Brewer*, 39 Wash. 65; State ex rel. *Wolfe v. Parmenter*, 50 Wash. 164; State ex rel. *Jefferson County v. Hatch*, 36 Wash. 164.

§ 1019. (5760.) Question of Fact, How Determined.

If an answer be made which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the appellant [applicant] may have sustained, in case they find for him. [L. '95, p. 118, § 21.]

Cited in 14 Wash. 204; 15 Wash. 677; 19 Wash. 676; 25 Wash. 619; 30 Wash. 599.

Demurrer to answer should be interposed before cause assigned for trial by jury: See *Wilson v. Aberdeen*, 25 Wash. 614.

Scope of inquiry and powers of court: See 2 Remington's Digest, p. 1795, § 88; *Bardsley v. Sternberg*, 17 Wash. 243; *Bacon v. Tacoma*, 19 Wash. 674; State ex rel. *Romano v. Yakey*, 43 Wash. 15.

§ 1020. (5761.) Applicant may Demur to Answer or Countervail It by Proof.

On the trial the applicant is not precluded by the answer from any valid objections to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance. [L. '95, p. 118, § 22.]

Cited in 25 Wash. 618.

It is not necessary to reply to a return or answer: See 2 Remington's Digest, p.

1795, § 87; State ex rel. *Brown v. McQuade*, 36 Wash. 579.

§ 1021. (5762.) Motion for New Trial, Where Made.

The motion for new trial must be made in the court in which the issue of fact is tried. [L. '95, p. 118, § 23.]

§ 1022. (5763.) Certification of Verdict—Hearing.

If no notice of a motion for a new trial be given, or if given, the motion be denied, the clerk, within five days after rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial, after which either party may bring on the argument of the application, upon reasonable notice to the adverse party. [L. '95, p. 118, § 24.]

§ 1023. (5764.) Court to Proceed to Hearing, When—Answer.

If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements not affecting the substantial rights of the party, the court must proceed to hear or fix a day for hearing the argument of the case. [L. '95, p. 118, § 25.]

Cited in 14 Wash. 205.

Affidavits submitted by respondent upon the return of an alternative writ of prohibition cannot be considered where the respondent has not answered in the man-

ner required by statute, as, under this section, the cause must be heard on the papers of the applicant if no answer be made: *State v. Superior Court*, 14 Wash. 203.

§ 1024. (5765.) Damages Awarded, When—Peremptory Mandate.

If judgment be given for the applicant he may recover the damages which he has sustained, as found by the jury or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and a peremptory mandate must also be awarded without delay. [L. '95, p. 118, § 26.]

Cited in 21 Wash. 321.

Where a writ of prohibition is granted against the superior court to prevent its trying a cause for want of jurisdiction, costs should be taxed against the plaintiff in the lower court, as the real party in interest: *State v. Superior Court*, 5 Wash. 518. See, *Achey v. Creech*, 21 Wash. 320; *State v. Reid*, 17 Wash. 267.

Mandamus is subject to review by writ of error or appeal, as in other cases: *State ex rel. Nooksack River Boom Co. v. Superior Court*, 2 Wash. 9; *State ex rel. Dudley v. Daggett*, 28 Wash. 1.

Mandamus is a civil remedy in which the costs may be awarded against the defendants: *State ex rel. Howe v. Kendall*, 44 Wash. 542.

§ 1025. (5766.) Service of Writ.

The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not. [L. '95, p. 119, § 27.]

See *supra*, § 220 et seq., service of summons in civil actions.

Cited in 44 Wash. 544.

§ 1026. (5767.) Penalty for Disobeying Writ.

When a temporary mandate has been issued and directed to any inferior tribunal, corporation, board or person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal or disobedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ. [L. '95, p. 119, § 28.]

§ 1027. (5769.) Prohibition, Defined.

The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. [L. '95, p. 119, § 29.]

Cited in 15 Wash. 675; 23 Wash. 121; 24 Wash. 543; 31 Wash. 99; 39 Wash. 408; 47 Wash. 157.

§ 1028. (5770.) Where and When Issued.

It may be issued by any court, except police or justices' courts, to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested. [L. '95, p. 119, § 30.]

See supra, § 1013 et seq., mandamus.

See supra, notes to § 1014, mandamus to try title to office.

Cited in 15 Wash. 675; 47 Wash. 157.

Prohibition: See 2 Remington's Digest, pp. 2368-2378, §§ 1-41.

NATURE OF REMEDY.—Prohibition is the converse of mandamus, but the same degree of strictness as to parties is not maintained: *State v. Superior Court*, 4 Wash. 30, 35.

The prosecuting attorney of a county is the proper relator in an application for a writ of prohibition to prevent a court enforcing payment of stenographer's fees against a county in a civil case: *State v. Superior Court*, 4 Wash. 30.

The object of the writ is to restrain inferior courts from acting without or in excess of jurisdiction in cases where such action will result in injury to the party complaining: *State v. Superior Court*, 3 Wash. 705, 708. It should only be granted in a clear case, and when no other remedy is available: *Harbor Line Commr. v. State*, 2 Wash. 530, 536; *State v. Superior Court*, 3 Wash. 705; *State ex rel. Townsend Gas etc. Co. v. Superior Court*, 20 Wash. 502. It is only to be resorted to in cases where the usual and ordinary forms of remedy are insufficient to afford redress. It will not be allowed to take the place of an appeal or writ of error: *State v. Jones*, 2 Wash. 662, 665, 26 Am. St. Rep. 897. It will not lie unless it appears from the petition therefor that there is some threatened injury for which the petition has no other adequate remedy: *Harris v. Brooker*, 8 Wash. 138; *State ex rel. West Seattle v. Superior Court*, 36 Wash. 566.

Although an appeal may lie from the action of the lower court, yet, upon an application for a writ of prohibition, the court will look into the record presented, and if the action threatened is apparently an unwarranted interference with a judgment of the supreme court, the writ will be granted: *State v. Superior Court*, 10 Wash. 168; *State v. Superior Court*, 8 Wash. 591.

The fact that no appeal can be taken from the judgment of the superior court because of the amount involved, affords no ground for relief by prohibition: *State v. Superior Court*, 3 Wash. 705.

To justify the issuance of a writ of prohibition from a superior to an inferior court it must clearly appear that the inferior court is about to take jurisdiction of a matter of which by law it has no jurisdiction; that there is still something which the inferior court is about to do under its claim of jurisdiction; that an application has been made to the inferior court that it has not jurisdiction thereof, and refused; and that there is no other proper remedy: *State v. Superior Court*, 2 Wash. 9, 14; *State v. Superior Court*, 4 Wash. 36.

The objection to the jurisdiction of a court must be raised in that court before it can be subjected to a writ of prohibition on the ground of want of jurisdiction: *Harris v. Brooker*, 8 Wash. 138; *State v. Superior Court*, 2 Wash. 9.

The supreme court has power, under Article 4, § 4, of the Constitution, in aid of its appellate jurisdiction, to issue a writ of prohibition against a lower court, where it threatens to act in excess of its jurisdiction in a matter affecting all parties' right of appeal, and there is no other speedy and adequate remedy at law: *State v. Superior Court*, 3 Wash. 696; distinguished in *State v. Superior Court*, 3 Wash. 702, 703.

Injunction and not prohibition is the proper remedy to prevent the drawing of a warrant by order of the superior court in favor of the sheriff to pay expenses incurred for court and court officers: *State v. Hunter*, 4 Wash. 712.

Jurisdiction: See 2 Remington's Digest, p. 2376, §§ 30-32; *State ex rel. McLeod v. Superior Court*, 24 Wash. 725; *State ex rel. Foster v. Superior Court*, 30 Wash. 156; *State ex rel. Fuller v. Superior Court*,

31 Wash. 96; State ex rel. White v. Board of State Land Commrs., 23 Wash. 700; Winsor v. Bridges, 24 Wash. 540; State ex rel. Pelton v. Ross, 39 Wash. 399; State ex rel. Alladio v. Superior Court, 17 Wash. 54.

PROHIBITION WILL LIE, WHEN.—

A peremptory writ will issue from the supreme court to prevent the superior court from trying and determining an action of which it has no jurisdiction: State v. Superior Court, 5 Wash. 639, 641.

And a writ will issue to prevent a court enforcing orders in a proceeding wherein it is without jurisdiction: State v. Langhorn, 12 Wash. 588; and where a cause has been appealed and judgment rendered by the appellate court, interference therewith will be prohibited: State v. Superior Court, 8 Wash. 591.

And the writ will issue to restrain the lower court from modifying a judgment of the supreme court in an equity cause: State v. Superior Court, 7 Wash. 234; or from further trying an issue disposed of by the verdict: See State ex rel. Holgate v. Superior Court, 21 Wash. 33; or to prevent a superior court from setting aside a sale of real estate in the administration of a decedent's estate, when the proceedings have been set up in an action of ejectment by the purchaser, as the basis of his title, and an appeal from the judgment in ejectment is pending in the supreme court: State v. Superior Court, 10 Wash. 168.

It will lie to restrain the superior court in appointing a receiver in excess of its jurisdiction: State v. Superior Court, 15 Wash. 668.

PROHIBITION WILL NOT LIE to prevent the discretionary action of the lower court in allowing amendments to pleadings on appeals from a justice of the peace where it has jurisdiction of the subject matter: State v. Superior Court, 3 Wash. 705; nor for the purpose of controlling the exercise of the court's discretion in the matter of the dismissal of an appeal from a justice of the peace for failure to file transcript as prescribed by law: State v. Superior Court, 9 Wash. 307; State v. Campbell, 5 Wash. 517; nor to restrain courts of original jurisdiction in equity from issuing injunction in excess of their jurisdiction, when there is a complete remedy by appeal: State v. Jones, 2 Wash. 662, 26 Am. St. Rep. 897; State ex rel. Fisher v. Kennan, 35 Wash. 52; nor to restrain an order on the clerk of the court which has no binding force: State v. Superior Court, 3 Wash. 702; nor to restrain the superior court from further proceedings in mandamus, where the superior court has already exercised jurisdiction and issued the writ, and no further application is made at the hearing before the lower court to test its jurisdiction: State v. Superior Court, 2 Wash. 9; nor to prevent the re-

straining of a sale under execution against an insolvent corporation, when the judgment creditor has been made a party in the injunction suit and the order therein protects and preserves its rights: State v. Superior Court, 11 Wash. 63; nor to correct errors of the superior court which should be corrected on appeal: State v. Superior Court, 11 Wash. 111; nor at the instance of an attaching creditor to prevent a receiver, whose appointment is void, from taking possession of property other than that held under the attachment levy, and which the creditor is seeking to have seized under his attachment: State v. Superior Court, 7 Wash. 77; nor to restrain a court from summoning before it attorneys who have filed a lien on a judgment for their fees, to determine what lien they may have, and what would be a reasonable fee: State v. Sachs, 3 Wash. 371; nor to prevent harbor line commission from defining harbor lines: Harbor Line Commrs. v. State, 2 Wash. 530; State v. Harbor Line Commrs., 4 Wash. 7, 11, 816; nor to prevent further proceedings in the prosecution of a defendant charged with a felony who has been discharged for want of a speedy trial: State v. Caldwell, 9 Wash. 336.

Existence and adequacy of other remedy: See 2 Remington's Digest, pp. 2368-2371, §§ 2-12; State ex rel. Hibbard & Co. v. Superior Court, 21 Wash. 631; State ex rel. Lewis v. Hogg, 22 Wash. 646; State ex rel. Sligh v. Superior Court, 19 Wash. 118; State ex rel. Zent v. Neal, 30 Wash. 702; State ex rel. Cann v. Moore, 23 Wash. 115; State ex rel. Port Orchard Irr. Co. v. Superior Court, 31 Wash. 410; State ex rel. Stetson & Post Mill Co. v. Superior Court, 32 Wash. 498; State ex rel. Miller v. Superior Court, 40 Wash. 555; State ex rel. West Seattle v. Superior Court, 36 Wash. 566; State ex rel. Carrau v. Superior Court, 30 Wash. 700; State ex rel. Goupille v. Superior Court, 41 Wash. 128; State ex rel. Post v. Superior Court, 31 Wash. 53; State ex rel. Newland v. Superior Court, 16 Wash. 444; State ex rel. Twigg v. Superior Court, 34 Wash. 643; State ex rel. Barnard v. Board of Education, 19 Wash. 8; State ex rel. Cleek v. Tallman, 38 Wash. 132; State ex rel. Oudin v. Superior Court, 34 Wash. 481; State ex rel. Vincent v. Benson, 21 Wash. 571; Hindman v. Colvin, 46 Wash. 317; State ex rel. Korsstrom v. Superior Court, 48 Wash. 671; State ex rel. La Furgey v. Superior Court, 47 Wash. 154; State ex rel. Martin v. Hinkle, 47 Wash. 156.

A writ of prohibition will not issue to restrain the superior court and county officers from summoning and impaneling a jury for the trial of criminal cases, although the county is beyond its constitutional limit of indebtedness, and the expenses of such jury would still further increase its legal indebtedness: Clifford v.

Parker, 13 Wash. 518; following *State v. Superior Court*, 2 Wash. 9; *Harbor Line Commrs. v. State*, 2 Wash. 530.

A writ of prohibition will lie to restrain a court from making an order depleting a fund in the hands of the clerk, which is claimed by a receiver and by creditors who had obtained possession thereof prior to his appointment by means of execution and attachment levies, when the court has made one order authorizing a certain amount to be paid out of such fund, and has stated, upon a motion pending asking for another order, that if the circumstances are the same as disclosed on the former application it will grant the order; it further appearing that, at the time of granting the first order for the depletion of the fund, it had denied the relator's request for three hours' time to perfect an appeal and give a supersedeas bond, before such order should be carried into effect: *State v. Superior Court*, 13 Wash. 639.

Upon the issuance of a writ of prohibition restraining action on the part of the superior court, the costs should be taxed against the party in the original action at whose instance the court was proceeding unlawfully: *State v. Superior Court*, 15 Wash. 500.

Grounds for relief: See 2 Remington's Digest, pp. 2372, 2376, §§ 18-29; *State ex rel. White v. Board of State Land Commrs.*, 23 Wash. 700; *State ex rel. Foster v. Superior Court*, 30 Wash. 156; *State ex rel. Fisher v. Kennan*, 35 Wash. 52; *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248; *State ex rel. Townsend Gas etc. Co. v. Superior Court*, 20 Wash. 502; *State ex rel. Reed v. Jones*, 2 Wash. 662; *State ex rel. Vincent v. Benson*, 21 Wash. 571; *State ex rel. Hibbard & Co. v. Superior Court*, 21 Wash. 631; *State ex rel. Lewis v. Hogg*, 22 Wash. 646; *State ex rel. Cann v. Moore*, 23 Wash. 115; *State ex rel. Carrau v. Superior Court*, 30 Wash. 700; *State ex rel. Port Orchard Irr. Co. v. Superior Court*, 31 Wash. 410; *State ex rel. Zent v. Neal*, 30 Wash. 702; *State ex rel. Post v. Superior Court*, 31 Wash. 53; *State ex rel. Stetson & Post Mill Co. v. Superior Court*, 32 Wash. 498; *State ex rel. Twigg v. Superior Court*, 34 Wash. 643; *State ex rel. West Seattle v. Superior Court*, 36 Wash. 566; *State ex rel. Miller v. Superior Court*, 40 Wash. 555; *State ex rel. Hartman v. Superior Court*, 21 Wash. 469; *State ex rel. Jensen v. Bell*, 34 Wash. 185; *State ex rel. Olson v. Christopher*, 43 Wash. 72; *Burrows v. Superior Court*, 43 Wash. 225; *State ex rel. Warren v. Ayer*, 17 Wash. 127; *State ex rel. Belt v. Kennan*, 25 Wash. 621; *State ex rel. Quandt v. Superior Court*, 30 Wash. 197; *In re Sullivan's Estate*, 36 Wash. 217; *Parker v. Superior Court*, 25 Wash. 544.

Prohibition will not lie if ineffectual: See 1 Remington's Digest, p. 2375, § 28; *State ex rel. Hart Lum. Co. v. Superior Court*, 16 Wash. 347; *State ex rel. Gordon*

v. Superior Court, 3 Wash. 702; *State ex rel. Cleek v. Tallman*, 38 Wash. 132.

Where an application for a change of venue is addressed to the discretion of the court an order denying the motion will not be restrained by prohibition where such discretion has not been abused: *State v. Superior Court*, 9 Wash. 673.

The giving of a supersedeas bond on appeal from an order removing one receiver and appointing another will not authorize the issuance of a writ of prohibition to prevent the carrying of such an order into effect: *State v. Superior Court*, 7 Wash. 74.

Upon an application for a writ of prohibition to restrain proceedings by a court of general jurisdiction, it will be presumed, where the subject matter of the litigation was within the jurisdiction of the court, that the particular facts which authorized it to assert its jurisdiction existed, unless a contrary showing is made: *State v. Superior Court*, 14 Wash. 203; citing *Munch v. McLaren*, 9 Wash. 676; *Rogers v. Miller*, 13 Wash. 82.

Prohibition issues only in cases of extreme necessity and when there is a clear case of want of jurisdiction in the court whose action it is sought to prohibit, and should never be granted until the aggrieved party has applied in vain to the inferior tribunal for relief: *State v. Superior Court*, 13 Wash. 226.

Prohibition will not lie to prevent a private person from acting under a judgment or invoking legal proceeding: *State v. Superior Court*, 13 Wash. 226.

Prohibition will not issue as to a matter within the discretion of the court below: See *State ex rel. Burrows v. Superior Court*, 43 Wash. 225.

The writ of prohibition will not issue to prevent the superior court from proceeding to enforce the collection of a judgment against sureties on a bond for the stay of execution, when notice of appeal has been given and supersedeas bond filed by the sureties: *State v. Superior Court*, 6 Wash. 112; also where it is proceeding in the appointment of a receiver, when an appeal had been taken from such order, and a sufficient stay bond filed by appellant: *State v. Superior Court*, 12 Wash. 677; or to stay proceedings where the relator in mandamus has appealed from the judgment rendered and presented a proper bond: *State v. Hunter*, 4 Wash. 637; or to prevent a trial by the court before whom a proper application has been made for a change of venue: *State v. Superior Court*, 5 Wash. 518; *North Yakima v. Superior Court*, 4 Wash. 655; *State v. Superior Court*, 7 Wash. 306; *State v. Superior Court*, 9 Wash. 668; *State ex rel. Miller v. Superior Court*, 40 Wash. 555; *State ex rel. Wyman etc. Co. v. Superior Court*, 40 Wash. 443; or assuming jurisdiction of the subject matter of an action which should be tried in another county: *State v. Superior Court*, 5 Wash.

639; or against a court which threatens to enforce by contempt proceedings the issuance of a county warrant in payment of stenographers' fees which are not a proper charge against the county: *State v. Superior Court*, 4 Wash. 30.

An alternative writ against a superior judge will be made perpetual to prevent his carrying into effect a void judgment of contempt where he has refused to set aside the judgment, although the returns to the alternative writ may recite that the court has no intention of proceeding further in the matter: *State v. Langhorn*, 8 Wash. 447.

The writ will issue to prevent a receiver of an insolvent corporation from taking possession, under a general order, of property upon which other creditors had previously acquired an attachment lien: *State*

v. Superior Court, 8 Wash. 210; see *State v. Superior Court*, 7 Wash. 77; *State v. Graham*, 9 Wash. 528.

The remedy by appeal is inadequate, and prohibition lies to prevent the superior court from proceeding to review the action of a city council on certiorari from the revocation of a liquor license, where it appears that the license would expire before the case could be heard on appeal: *State ex rel. Puyallup v. Superior Court*, 50 Wash. 650.

Where the remedy by appeal is inadequate because the right would expire before an appeal could be heard, prohibition lies notwithstanding a remedy by certiorari where the result would be the same whether determined on certiorari or prohibition: *Id.*

§ 1029. (5771.) Writ may be Alternative or Peremptory.

The writ must be either alternative or peremptory. The alternative writ must state generally the allegations against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein until the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted and a return day inserted. [L. '95, p. 119, § 31.]

§ 1030. (5772.) Provisions Relating to Mandate Applicable.

The provisions of sections 1013 to 1026, relating to writ of mandate, apply to this proceeding. [L. '95, p. 120, § 32.]

The fact that the affidavit for a writ of prohibition was made by the attorney for petitioner does not render the application insufficient: See *State ex rel. Alladio v. Superior Court*, 17 Wash. 54.

§ 1031. (5774.) Writs of Review, Mandate and Prohibition Made Returnable, When.

Writs of review, mandate, and prohibition issued by the supreme court, or by a superior court, may, in the discretion of the court issuing the writ, be made returnable, and a hearing thereon be had at any time. [L. '95, p. 120, § 33.]

§ 1032. (5775.) Rules of Practice and Proceedings.

Except as otherwise provided in this chapter, the provisions of the Code of Procedure concerning civil actions are applicable to and constitute the rules of practice in the proceedings in this chapter. [L. '95, p. 120, § 34.]

Cited in 15 Wash. 93; 21 Wash. 454; 25 Wash. 618; 30 Wash. 599.

§ 1033. (5776.) Appeals.

From a final judgment in the superior court, in any such proceeding, an appeal shall lie to the supreme court. [L. '95, p. 120, § 35.]

See *infra*, §§ 1716-1754, appeals.

On an appeal from a judgment directing the issuance of a writ of mandate, it is error to deny defendant's motion for a supersedeas of the writ pending appeal,

and to fix the amount of the bond therefor: *State v. Superior Court*, 2 Wash. 9; *State v. Superior Court*, 3 Wash. 696.

CHAPTER II.

INFORMATION IN THE NATURE OF QUO WARRANTO.

§ 1034. (5780.) **Against Whom Filed.**

An information may be filed against any person or corporation in the following cases:—

1. When any person shall usurp, intrude upon [into], or unlawfully hold or exercise any public office or franchise within the state, or any office in any corporation created by the authority of the state;

2. When any public officer shall have done or suffered any act, which, by the provisions of law, shall work a forfeiture of his office;

3. When several persons claim to be entitled to the same office or franchise, one information may be filed against any or all such persons in order to try their respective rights to the office or franchise;

4. When any association or number of persons shall act within this state as a corporation, without being legally incorporated;

5. Or where any corporation do or omit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or where they exercise powers not conferred by law. [Cf. L. '54, p. 216, §§ 468, 477; L. '77, p. 143, § 706; Cd. '81, § 702; 2 H. C., § 679.]

See *supra*, § 146, word "person" defined.

See Const., Art. IV, §§ 4, 6, jurisdiction of supreme and superior courts.

See *supra*, §§ 1, 15, jurisdiction of supreme and superior courts.

Cited in 2 Wash. 569, 571; 8 Wash. 400, 558; 10 Wash. 350; 14 Wash. 263; 16 Wash. 162; 20 Wash. 632; 28 Wash. 492, 507; 31 Wash. 103; 34 Wash. 164; 48 Wash. 198; 52 Wash. 640.

NATURE AND GROUNDS OF WRIT: See 2 Remington's Digest, p. 2428, §§ 1-8; *State ex rel. Attorney-General v. Seattle Gas etc.*, 28 Wash. 488; *Kimball v. Olmstead*, 20 Wash. 629; *Standard Gold Min. Co. v. Byers*, 31 Wash. 100; *State ex rel. Pros. Atty. v. South Park*, 34 Wash. 162; *State ex rel. Hyland v. Peters*, 21 Wash. 243.

NATURE AND HISTORY OF WRIT discussed in *Mills v. State*, 2 Wash. 566.

Quo warranto, and not certiorari, is the proper remedy for reviewing the legality of proceedings before the mayor of the city removing an appointive officer: *State v. Van Brocklin*, 8 Wash. 557; *State v. Kirkwood*, 15 Wash. 298.

If the dispute is as to the validity of an election, the election laws provide the means of redress: *State v. Van Brocklin*, *supra*, 559; in such an action judgment for damages against the defendant is unwarranted, where there is no showing that he had collected any of the salary of the office: *Id.*

An information in the name of the territory is the proper method of ousting a

United States army officer unlawfully holding a civil office under the laws of the territory: *Hill v. Territory*, 2 W. T. 147.

Quo warranto will not lie to oust one illegally holding office under a corporation: *State ex rel. Mitchell v. Horan*, 22 Wash. 197.

IT WILL LIE to oust municipal officers from office and to dissolve the corporation: *Territory v. Stewart*, 1 Wash. 98; *State v. New Whatcom*, 3 Wash. 7; to determine the right of possession of an office: *State v. Smith*, 4 Wash. 651; *State v. Cronin*, 5 Wash. 398.

Quo warranto will not lie to oust a duly elected and qualified road overseer because of the fact that the county commissioners have so changed his road district as to leave his residence outside thereof: *State v. Nelson*, 7 Wash. 114.

The health officer appointed by the board of health for the collection district of Puget Sound has no prescribed tenure of office, and his appointment and removal is at the pleasure of the board, although by law required to file a bond and take an oath of office: *State v. Seavey*, 7 Wash. 562.

An appointee of the governor to fill a vacancy caused by the removal of a state capitol commissioner, without a hearing on the charges for removal, may qualify and

hold the office: *State v. Burke*, 8 Wash. 412.

A prosecuting attorney of a county being a county officer, a person appointed by the governor to fill a vacancy therein cannot oust the appointee of the board of county commissioners, as the appointing power resides in the latter: *State v. Whitney*, 9 Wash. 377.

The failure of a person elected to office to qualify within fifteen days after notice of election as required by § 3916, *infra*, does not work an absolute forfeiture of the office, under Bal. Code, § 1543, relating to vacancies, as the right to the office under our statute is dependent upon the election, and not upon the qualification: *State v. Ruff*, 4 Wash. 234.

The failure to qualify is merely a ground of forfeiture authorizing the proper authorities to declare a vacancy and fill the same: *Id.*

The right of a justice of the peace who rendered a judgment to hold his office cannot be questioned by a motion for a new trial, and an attempted accompanying quo warranto proceeding, in an action for damages and wrongful execution of the justice's judgment: *Eaid v. Connolly*, 48 Wash. 584.

Although charges preferred against a public officer by the mayor of a city may

be somewhat indefinite, objection thereto on that ground cannot be raised in the superior court, when the person removed from office had gone to trial on them before the mayor without objection and without any motion to make more specific and certain: *State v. Kirkwood*, 15 Wash. 298.

The jurisdiction to entertain quo warranto to determine who is entitled to the office of councilman of a city, under Article 4, § 6 of the Constitution, providing that the superior court shall have original jurisdiction of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court, is not ousted by Bal. Code, § 1031, providing that the city council shall judge of the qualifications of its members and of all election returns, as the latter statute affords merely a cumulative remedy: *State v. Morris*, 14 Wash. 262.

A dissolution of a corporation is authorized under this and §§ 1043, 1044, *infra*, where it appears that the owner of one-half of the stock assumed to represent the corporation without authority, destroyed its business through negligence, is conducting a rival business, and refuses to elect or help elect a trustee, by reason whereof no business can be legally transacted: *State ex rel. Conlan v. Oudin & Bergman Fire Clay Mining etc. Co.*, 48 Wash. 196.

§ 1035. (5781.) By Whom Filed.

The information may be filed by the prosecuting attorney in the superior court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office, franchise, or corporation which is the subject of the information. [L. '54, p. 216, § 469; Cd. '81, § 703; 2 H. C., § 680.]

Cited in 2 Wash. 572; 22 Wash. 198; 28 Wash. 494, 503; 42 Wash. 412; 52 Wash. 640.

Parties plaintiff or petitioners: See 2 Remington's Digest, p. 2429, §§ 10-13; *State ex rel. White v. Point Roberts etc. Co.*, 42 Wash. 409; *State ex rel. Atty. Gen. v. Seattle Gas etc. Co.*, 28 Wash. 488;

State ex rel. Mitchell v. Horan, 22 Wash. 197.

The mayor of the city as such has not sufficient interest in the office of councilman to entitle him to appear as relator in quo warranto proceedings to oust an alleged usurper from that office: *Mills v. State*, 2 Wash. 566.

§ 1036. (5782.) Information, Contents of.

The information shall consist of a plain statement of the facts which constitute the grounds of the proceedings, addressed to the court. [L. '54, p. 216, § 470; Cd. '81, § 704; 2 H. C., § 681.]

Cited in 8 Wash. 558.

Pleading—Information or petition: See 2 Remington's Digest, p. 2430, § 14; *State ex rel. Atty. Gen. v. Seattle Gas etc. Co.*, 28 Wash. 488.

SUFFICIENCY OF INFORMATION.—The information under the code is a plain statement of facts like that in a complaint in any other cause of action, and the only difference between this proceeding and an ordinary civil action is the formal requirement that it be filed on the relation of

some one: *State v. Van Brocklin*, 8 Wash. 557.

An information for the purpose of ousting an officer for malfeasance must state the fact upon which the action is based as definitely as in an information in a criminal action: *State v. Friars*, 10 Wash. 348.

An information to obtain possession of the office of town marshal and to oust the prior incumbent thereof, is sufficient when it alleges the latter's appointment by the common council to hold office at its pleas-

ure, his due removal for cause deemed sufficient, the due appointment by the relator to fill the vacancy, his acceptance of the

office and due qualification therefor in accordance with law: *State v. McQuade*, 12 Wash. 554.

§ 1037. (5783.) What Information shall State.

Whenever an information shall be filed against a person for usurping an office by the prosecuting attorney, he shall also set forth therein the name of the person rightfully entitled to the office, with an averment of his right thereto; and when filed by any other person, he shall show his interest in the matter, and he may claim the damages he has sustained. [L. '54, p. 216, § 471; Cd. '81, § 705; 2 H. C., § 682.]

Cited in 2 Wash. 572; 52 Wash. 640.

§ 1038. (5784.) Summons, Pleadings, Proceedings.

Whenever an information is filed, a notice signed by the relator shall be served and returned, as in other actions. The defendant shall appear and answer, or suffer default, and subsequent proceeding be had as in other cases. [L. '54, p. 217, § 472; Cd. '81, § 706; 2 H. C., § 683.]

Cited in 2 Wash. 571; 52 Wash. 640.

§ 1039. (5785.) Judgment and Damages.

In every case wherein the right to an office is contested, judgment shall be rendered upon the rights of the parties, and for the damages the relator may show himself entitled to, if any, at the time of the judgment. [L. '54, p. 217, § 473; Cd. '81, § 707; 2 H. C., § 684.]

Cited in 2 Wash. 573; 43 Wash. 606; 52 Wash. 640.

Trial or hearing, and enforcement, operation and effect of judgment: See 2 Remington's Digest, p. 2431, §§ 16-19; *State ex rel. Mullen v. Doherty*, 16 Wash. 382; *State ex rel. Orr v. Fawcett*, 17 Wash. 188.

On appeal from judgment of ouster appellant is entitled to file a bond staying proceedings: *State v. Sachs*, 3 Wash. 96; distinguished in *Fawcett v. Superior Court*, 15 Wash. 342, 348.

The fact that plaintiff in an action of quo warranto has been removed from office to which he seeks possession cannot be urged on appeal, when the matters establishing that fact do not appear in the record: *State v. McQuade*, 12 Wash. 554.

A judgment of ouster in a proceeding in the nature of quo warranto divests the person ousted of all official authority whatever, and fully and completely excludes him from the office as long as the judgment remains in force: *Fawcett v. Superior Court*, 15 Wash. 342.

A judgment in favor of a relator in a proceeding by information to try the title to a public office is, from its very nature, self-executing, and, without the aid of process or further action of the court, it accomplishes the object sought to be attained, so that there is nothing upon which a stay bond can operate, except an execution for costs: *Id.*

Where one excluded from office by judgment of ouster refuses to yield possession

on the ground that he has appealed from the judgment and filed a stay bond, and proceedings for contempt are instituted against him, he is not entitled to a writ of prohibition to restrain the court from further proceeding to punish him for contempt, inasmuch as he has a remedy by appeal from any judgment of conviction that may be rendered against him, and such proceeding for contempt is not for the purpose of enforcing the judgment of ouster, but is an independent proceeding to compel obedience to a lawful order of the superior court: *Id.*

A de jure officer who has recovered judgment against a de facto officer for the salary paid to him, under this section and § 1042, *infra*, has elected his remedy and cannot recover the same from the town on failure to collect the judgment: *Samuels v. Harrington*, 43 Wash. 603.

A municipality which pays the salary of a de facto officer while he is in possession of the office is not liable to the de jure officer for such salary, on his establishing his right to the office: *Id.*

A judgment of ouster is not so suspended by an appeal therefrom as to entitle appellant to the possession of the office during the pendency of the appeal: *State v. Superior Court*, 15 Wash. 376.

After an appeal has been perfected from a judgment of ouster, the superior court has no jurisdiction in that proceeding, on any ground, to order plaintiff, who had been placed in possession of the office, to surrender possession to defendant: *Id.*

§ 1040. (5786.) Judgment for Relator.

If judgment be rendered in favor of the relator, he shall proceed to exercise the functions of the office, after he has been qualified as required by law, and the court shall order the defendant to deliver over all books and papers in his custody or within his power, belonging to the office from which he has been ousted. [L. '54, p. 217, § 474; Cd. '81, § 708; 2 H. C., § 685.]

Cited in 2 Wash. 573; 15 Wash. 346; 22 Wash. 199; 52 Wash. 640.

§ 1041. (5787.) Order, How Enforced.

If the defendant shall refuse or neglect to deliver over the books and papers pursuant to the order, the court, or judge thereof, shall enforce the order by attachment and imprisonment. [L. '54, p. 217, § 475; Cd. '81, § 709; 2 H. C., § 686.]

Cited in 52 Wash. 640.

§ 1042. (5788.) Action for Damages—Limitation.

When judgment is rendered in favor of the plaintiff, he may, if he has not claimed his damages in the information, have his action for the damages at any time within one year after the judgment. [L. '54, p. 217, § 476; Cd. '81, § 710; 2 H. C., § 687.]

Cited in 2 Wash. 573; 43 Wash. 606; 52 Wash. 640.

§ 1043. (5789.) Judgment of Ouster or Forfeiture.

Whenever any defendant shall be found guilty of any usurpation of or intrusion into or unlawfully exercising any office or franchise within this state, or any office in any corporation created by the authority of this state, or when any public officer thus charged shall be found guilty of having done or suffered any act which by the provisions of the law shall work a forfeiture of his office, or when any association or number of persons shall be found guilty of having acted as a corporation without having been legally incorporated, the court shall give judgment of ouster against the defendant or defendants, and exclude him or them from the office, franchise, or corporate rights, and in case of corporations, the same shall be dissolved, and the court shall adjudge costs in favor of the plaintiff. [L. '54, p. 217, § 478; Cd. '81, § 711; 2 H. C., § 688.]

See notes to § 1039, supra.

Cited in 15 Wash. 676; 16 Wash. 162;
48 Wash. 198; 49 Wash. 242; 52 Wash.
640.

Dissolution of a corporation is authorized
under this section and §§ 1034 and 1044,
when: State ex rel. Conlan v. Oudin etc.
Co., 48 Wash. 196.

§ 1044. (5790.) Judgment Against Corporation.

If judgment be rendered against any corporation, or against any persons claiming to be a corporation, the court may cause the costs to be collected by executions against the persons claiming to be a corporation, or by attachment against the directors or other officers of the corporation, and shall restrain the corporation, appoint a receiver of its property and effects, take an account and make a distribution thereof among the creditors. The prosecuting attorney shall immediately institute proceedings for that purpose. [L. '54, p. 217, § 479; Cd. '81, § 712; 2 H. C., § 689.]

See note to last section.

Cited in 15 Wash. 675; 48 Wash. 198;
49 Wash. 242.

The superior court has no power to ap-
point a receiver for a corporation, upon the

institution by the state of quo warranto
proceedings seeking to oust it from the
exercise of corporate powers, since, under
the provisions of this section authority to

appoint receivers in such cases is specially provided in event of judgment against the corporation: *State v. Superior Court*, 15 Wash. 668.

Whether the corporation is one *de jure* or merely *de facto*, it is entitled to the possession of its property until deprived thereof by the judgment of a court of competent jurisdiction, and the question of corporate existence cannot properly be raised in a prohibition proceeding, which

seeks to restrain the action of the superior court in appointing a receiver in excess of its jurisdiction: *Id.*

The last sentence of this section is only directory, and does not preclude the institution of proceedings by an interested party: *Conlan v. Oudin*, 49 Wash. 240.

Under this section, a receiver may be appointed upon the involuntary dissolution of a corporation without a showing as to any necessity therefor: *Id.*

§ 1045. (5791.) Action to Recover Escheated or Forfeited Property.

Whenever any property shall [escheat or] be forfeited to the state for its use, the legal title shall be deemed to be in the state from the time of the [escheat or] forfeiture, and an information may be filed by the prosecuting attorney in the superior court for the recovery of the property, alleging the ground on which the recovery is claimed, and like proceedings and judgment shall be had as in civil action for the recovery of the property. [L. '54, p. 218, § 480; Cd. '81, § 713; 2 H. C., § 690.]

The first enactment of this section contained the words in brackets, "escheated or," which were omitted from the Code of 1881.

§ 1046. (5792.) Costs.

When an information is filed by the prosecuting attorney, he shall not be liable for the costs, but when it is filed upon the relation of a private person such person shall be liable for costs unless the same are adjudged against the defendant. [L. '54, p. 218, § 481; Cd. '81, § 714; 2 H. C., § 691.]

§ 1047. (5793.) Information to Annul Patent, etc.

An information may be prosecuted for the purpose of annulling or vacating any letters patent, certificate, or deed granted by the proper authorities of this state, when there is reason to believe that the same were obtained by fraud, or through mistake or ignorance of a material fact, or when the patentee or those claiming under him have done or omitted an act in violation of the terms on which the letters, deeds, or certificates were granted, or have by any other means forfeited the interests acquired under the same. [L. '54, p. 218, § 482; Cd. '81, § 715; 2 H. C., § 692.]

§ 1048. (5794.) Proceedings to Annul.

In such cases, the information may be filed by the prosecuting attorney upon his relation, or by any private person upon his relation, showing his interest in the subject matter; and the subsequent proceedings, judgment of the court, and awarding of costs shall conform to the above provisions, and such letters patent, deed, or certificate shall be annulled or sustained, according to the right of the case. [L. '54, p. 218, § 483; Cd. '81, § 716; 2 H. C., § 693.]

CHAPTER III.

CONTEMPTS AND THEIR PUNISHMENT.

§ 1049. (5798.) Contempts, Defined.

The following acts or omissions, in respect to a court of justice or proceedings therein, are deemed to be contempts of court:—

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

2. A breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceeding;

3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, clerk, sheriff, or other person appointed or selected to perform a judicial or ministerial service;

4. Deceit, abuse of the process, or proceedings of the court by a party to an action, suit, or special proceeding;

5. Disobedience of any lawful judgment, decree, order, or process of the court;

6. Assuming to be an attorney or other officer of the court, and acting as such without authority in a particular instance;

7. Rescuing any person or property in the lawful custody of an officer, held by such officer under an order or process of such court;

8. Unlawfully detaining a witness or party to an action, suit, or proceeding while going to, remaining at, or returning from the court where the same is for trial;

9. Any other unlawful interference with the process or proceedings of a court;

10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

11. When summoned as a juror in a court, improperly conversing with a party to an action, suit, or proceeding to be tried at such court, or with any other person in relation to the merits of such action, suit, or proceeding, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

12. Disobedience by an inferior tribunal, magistrate, or officer of the lawful judgment, decree, order, or process of a superior court, or proceeding in an action, suit, or proceeding contrary to law, after such action, suit, or proceeding shall have been removed from the jurisdiction of such inferior tribunal, magistrate, or officer. [L. '69, p. 167, § 667; Cd. '81, § 725; 2 H. C., § 778.]

See supra, § 53, of power to punish for contempt.

See supra, § 58, power of judicial officer in contempt cases.

See supra, § 249, provisions relating to service of summons, etc., not applicable.

See supra, § 630, contempt in proceedings supplemental to execution.

See supra, § 696, contempt for failure of garnishee to deliver property to sheriff.

See supra, §§ 732-734, contempt for violating injunction.

See supra, § 746, contempt for failure to deposit money, etc.

See supra, § 992, contempt for remarrying in violation of decree.

See supra, § 1026, penalty for disobeying writ of mandate.

See infra, notes to § 1216, contempt for failure to produce books, etc.

See infra, § 1220, contempt for failure to obey subpoena.

See infra, § 1891 et seq., contempt and punishment in justice court.

See infra, § 2040, contempt by grand jurors or other officers in disclosing facts.

Cited in 19 Wash. 242; 25 Wash. 528; 29 Wash. 577; 40 Wash. 220.

CONTEMPTS, ACTS CONSTITUTING IN GENERAL: See 1 Remington's Digest, pp. 545-548, §§ 1-12; State ex rel. Ditmar v. Ditmar, 19 Wash. 324; State ex rel. Stevens v. Catlin, 21 Wash. 423; State ex rel. Martin v. Pendergast, 39 Wash. 132; Savage v. Sternberg, 19 Wash. 679; State ex rel. Brown v. McFaul, 27 Wash. 286; State v. Denham, 30 Wash. 643; In re Groen, 22 Wash. 53; Metler v. Metler, 32 Wash. 494; State ex rel. Victor Boom Co. v. Peterson, 29 Wash. 571; State ex rel. Smith v. Smith, 17 Wash. 430; State ex rel. Henry v. McDonald, 25 Wash. 122; State v. Tugwell, 19 Wash. 238.

If the superior court has fined an attorney for contempt and ordered his suspension from practice, until such contempt is purged by apology, the supreme court may intervene by mandamus to compel the vacation of the order of suspension: State v. Sachs, 2 Wash. 373.

If the inferior court is directed by certiorari to certify to the supreme court a transcript of the records in a certain action a return to the writ must be made in any event, and, on failure so to do, a rule will issue to show cause why he should not be punished for contempt: State v. Sachs, 3 Wash. 496.

If a court is without jurisdiction of the subject matter of an action, its order imposing a fine for contempt is void: State v. Milligan, 3 Wash. 144.

The disobedience of a void order of court is not punishable as for a contempt: State v. Ball, 5 Wash. 387; State v. Winder, 14 Wash. 144; Barnett v. Ashmore, 5 Wash. 163, 166.

Where, in a proceeding supplemental to execution, a person residing in another county has been summoned and has refused to obey the summons, he cannot be guilty of a contempt of court, until it has been made to appear that his residence is within twenty miles of such court: State v. Trounce, 5 Wash. 804.

Prohibition will lie against a court which threatens to enforce by contempt proceedings the issuance of a county warrant in payment of stenographer's fees which are not a proper county charge: State v. Superior Court, 4 Wash. 31.

An alternative writ of prohibition against a superior judge will be made perpetual to prevent his carrying into effect a void judgment of contempt where he has refused to set aside the judgment, although the return to the alternative writ may recite that the court has no intention of proceeding further in the matter: State v. Langhorn, 8 Wash. 447.

The discharge of the defendant will cast the costs upon the county where the proceeding is brought in the name of the state on the relation of parties in interest in a suit out of which the contempt arose, as such proceedings are of a criminal nature: State v. Milligan, 4 Wash. 29.

Defenses to proceedings for contempt: See 1 Remington's Digest, p. 547, § 11; State ex rel. Sander v. Jones, 20 Wash. 576; State ex rel. Stevens v. Catlin, 21 Wash. 423.

Existence of other remedy than punishment for contempt: See 1 Remington's Digest, p. 549, § 15; State ex rel. Ditmar v. Ditmar, 19 Wash. 324; In re Cave, 26 Wash. 213; Drasdo v. Beck, 37 Wash. 363.

§ 1050. (5799.) Punishment for.

Every court of justice and every judicial officer has power to punish contempt by fine or imprisonment, or both. But such fine shall not exceed three hundred dollars, nor the imprisonment six months; and when the contempt is not [one] of those mentioned in subdivisions one and two of the last section, it must appear that the right or remedy of a party to an action, suit, or proceeding was defeated or prejudiced thereby, before the contempt can be punished otherwise than by a fine not exceeding one hundred dollars. [L. '69, p. 168, § 688; Cd. '81, § 726; 2 H. C., § 779.]

Cited in 40 Wash. 220.

Punishment: See 1 Remington's Digest, p. 551, §§ 28-31; State v. Tugwell, 19 Wash. 238; State ex rel. Dye v. Reilly, 40 Wash. 217; In re Van Alstine, 21 Wash.

194; In re Cave, 26 Wash. 213; State ex rel. Rohde v. Sachs, 21 Wash. 373; State ex rel. Martin v. Pendergast, 39 Wash. 132; State v. Ditmar, 19 Wash. 324.

§ 1051. (5800.) Contempts in Presence of Court, How Punished.

When a contempt is committed in the immediate view and presence of the court or officer, it may be punished summarily, for which an order must be made reciting the facts as occurring in such immediate view and presence, determining that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed. [L. '69, p. 168, § 669; Cd. '81, § 727; 2 H. C., § 780.]

Cited in 25 Wash. 528; 26 Wash. 70; 39 Wash. 136; 40 Wash. 524, 526.

Misconduct of attorneys or jurors: See 1 Remington's Digest, p. 545, §§ 2, 4, 12;

In re Lambuth, 18 Wash. 478; Hedican v. Penn. Fire Ins. Co., 21 Wash. 488; State ex rel. Martin v. Pendergast, 39 Wash. 132.

§ 1052. (5801.) Procedure in Other Cases.

In cases other than those mentioned in the preceding section, before any proceedings can be taken therein, the facts constituting the contempt must be shown by an affidavit presented to the court or judicial officer, and thereupon such court or officer may either make an order upon the person charged to show cause why he should not be arrested to answer, or issue a warrant of arrest to bring such person to answer in the first instance. [L. '69, p. 169, § 670; Cd. '81, § 728; 2 H. C., § 781.]

Cited in 25 Wash. 528; 26 Wash. 70; 29 Wash. 577; 40 Wash. 524, 526.

Preliminary affidavit or information: See 1 Remington's Digest, p. 549, § 18; State ex rel. Sander v. Jones, 20 Wash. 576; State v. Canutt, 26 Wash. 68; In re Coulter, 25 Wash. 526; State ex rel. Victor

Boom Co. v. Peterson, 29 Wash. 571; State ex rel. Martin v. Pendergast, 39 Wash. 132; State ex rel. Dye v. Reilly, 40 Wash. 217.

Affidavit, when not necessary to obtain jurisdiction of attorney admitting a contempt: See State v. Nicoll, 40 Wash. 517.

§ 1053. (5802.) Defendant may be Produced if in Custody.

If the party charged be in custody of an officer by virtue of a legal order or process, civil or criminal, except upon a sentence for a felony, an order may be made for the production of such person by the officer having him in custody that he may answer, and he shall thereupon be produced and held until an order be made for his disposal. [L. '69, p. 169, § 671; Cd. '81, § 729; 2 H. C., § 782.]

§ 1054. (5803.) How Prosecuted.

In the proceeding for a contempt, the state is the plaintiff. In all cases of public interest, the proceeding may be prosecuted by the prosecuting attorney on behalf of the state, and in all cases where the proceeding is commenced upon the relation of a private party, such party shall be deemed a coplaintiff with the state. [L. '69, p. 169, § 672; Cd. '81, § 730; 2 H. C., § 783.]

Cited in 15 Wash. 349; 39 Wash. 134.

State is plaintiff in an independent proceeding to punish for contempt: Fawcett v. Superior Court, 15 Wash. 342, 349.

Parties: See 1 Remington's Digest, p. 549, § 16; State ex rel. Martin v. Pendergast, 39 Wash. 132; State v. Nicoll, 40 Wash. 517; State ex rel. Dye v. Reilly, 40 Wash. 217.

§ 1055. (5804.) Warrant, How Executed.

Whenever a warrant of arrest is issued pursuant to this chapter, the court or judicial officer shall direct therein whether the person charged may be let to bail for his appearance upon the warrant, or detained in custody without bail, and if he may be bailed, the amount in which he may be let to bail. Upon executing the warrant of arrest, the sheriff must keep the person in actual custody, bring him before the court or judicial officer, and detain him until an order be made in the premises, unless the person arrested execute and deliver to the sheriff, at any time before the return day of the warrant, a bond, with two sufficient sureties, to the effect that he will appear on such return day and abide the order or judgment of the court or officer thereupon. [L. '69, p. 169, § 673; Cd. '81, § 731; 2 H. C., § 784.]

Attachment is not necessary where defendant voluntarily appears: State ex rel. Ditmar v. Ditmar, 19 Wash. 324.

§ 1056. (5805.) Return of Warrant—Investigation.

The sheriff shall return the warrant of arrest and the bond, if any, given him by the defendant, by the return day therein specified. When the defendant has been brought up or appeared, the court or judicial officer shall proceed to investigate the charge by examining such defendant and witnesses for or against him, for which an adjournment may be had from time to time, if necessary. [L. '69, p. 169, § 674; Cd. '81, § 732; 2 H. C., § 785.]

Cited in 40 Wash. 220.

Upon a contempt proceeding for violating an order as to the obstruction of a highway the question as to whether the

judgment was void because no highway existed cannot be considered when the judgment was not appealed from: State ex rel. Dye v. Reilly, 40 Wash. 217.

§ 1057. (5806.) Judgment and Sentence.

Upon the evidence so taken, the court or judicial officer shall determine whether or not the defendant is guilty of the contempt charged; and if it be determined that he is so guilty, shall sentence him to be punished as provided in this chapter. [L. '69, p. 170, § 675; Cd. '81, § 733; 2 H. C., § 786.]

Sufficiency of evidence to support judgment: See 1 Remington's Digest, p. 550, § 12; In re Lewis, 24 Wash. 723; State ex rel. Olson v. Allen, 14 Wash. 684.

Quashing or vacating proceedings: See State ex rel. Smith v. Smith, 17 Wash. 430.

§ 1058. (5807.) Indemnity to Injured Party.

If any loss or injury to a party in an action, suit, or proceeding, prejudicial to his rights therein, have been caused by the contempt, the court or judicial officer, in addition to the punishment imposed for the contempt, may give judgment that the party aggrieved recover of the defendant a sum of money sufficient to indemnify him, and to satisfy his costs and disbursements, which judgment, and the acceptance of the amount thereof, is a bar to any action, suit, or proceeding by the aggrieved party for such loss or injury. [L. '69, p. 170, § 676; Cd. '81, § 734; 2 H. C., § 787.]

§ 1059. (5808.) Imprisonment, When.

When the contempt consists in the omission or refusal to perform an act which is yet in the power of the defendant to perform, he may be imprisoned until he shall have performed it, and in such case the act must be specified in the warrant of commitment. [L. '69, p. 170, § 677; Cd. '81, § 735; 2 H. C., § 788.]

Cited in 21 Wash. 200; 26 Wash. 216.

Imprisonment to compel payment of money: See 1 Remington's Digest, p. 551, § 30; In re Van Alstine, 21 Wash. 194.

Under this section, a defendant who refuses to pay a decree of alimony awarded against him may be imprisoned

for contempt without being cited therefor, when he is personally before the court and it appears that he has money in his possession and under his control with which to pay the same: In re Cave, 26 Wash. 213.

§ 1060. (5809.) Offender Liable to Indictment, When.

Persons proceeded against according to the provisions of this chapter are also liable to indictment [or information] for the same misconduct, if it be an indictable offense, but the court before which a conviction is had on the indictment [or information] in passing sentence shall take into consideration the punishment before inflicted. [L. '69, p. 170, § 678; Cd. '81, § 736; 2 H. C., § 789.]

Cited in 19 Wash. 243.

§ 1061. (5810.) Alias Warrant—Prosecution of Bond.

When the warrant of arrest has been returned served, if the defendant do not appear on the return day, the court or judicial officer may issue another warrant of arrest, or may order the bond to be prosecuted, or both. If the bond be prosecuted and the aggrieved party join in the action, and the sum specified therein be recovered, so much thereof as will compensate such party for the loss or injury sustained by reason of the misconduct for which the warrant was issued shall be deemed to be recovered for such party exclusively. [L. '69, p. 170, § 679; Cd. '81, § 737; 2 H. C., § 790.]

§ 1062. (5811.) Appeal.

Either party to a judgment in a proceeding for a contempt may appeal therefrom in like manner and with like effect as from judgment in an action, but such appeal shall not have the effect to stay the proceedings in any other action, suit, or proceeding, or upon any judgment, decree, or order therein, concerning which or wherein such contempt was committed. Contempts of justices' courts are punishable in the manner specially provided for in the chapter relating to justices of the peace and to their practice and jurisdiction. [L. '69, p. 171, § 680; Cd. '81, § 738; 2 H. C., § 791.]

See *infra*, § 1716 et seq., appeals to supreme court.

See *infra*, § 1891 et seq., contempts and punishment in justice courts.

Cited in 14 Wash. 685; 20 Wash. 182; 28 Wash. 591.

Appeal: See 1 Remington's Digest, p. 550, § 25; *State ex rel. Geiger v. Geiger*, 20 Wash. 181; *State ex rel. Sander v. Jones*, 20 Wash. 576; *State v. Nicoll*, 40

Wash. 517; *State ex rel. Denham v. Superior Court*, 28 Wash. 590; *State ex rel. Victor Boom Co. v. Peterson*, 29 Wash. 571.

An order adjudging a person guilty of a contempt of court is appealable under this section: *State v. Allen*, 14 Wash. 684.

CHAPTER IV.**HABEAS CORPUS.****§ 1063. (5814.) Who may Prosecute Writ.**

Every person restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal. [L. '54, p. 212, § 434; Cd. '81, § 666; 2 H. C., § 711.]

See *supra*, § 988, in divorce.

Privilege of, not suspended except in cases of rebellion or invasion: Const. Wash., Art. I, § 13; Const. U. S., Art. I, § 9.

Nature of remedy: See 1 Remington's Digest, p. 1346, § 1.

The supreme court has original jurisdiction in habeas, in all cases, and the provisions of § 4, Article 4, of the Constitution, do not confine its jurisdiction to state officers: *In re Rafferty*, 1 Wash. 382; *In re Graham*, 7 Wash. 237; *In re Lybarger*, 2 Wash. 131.

Under the authority of the supreme court to issue writs of habeas corpus, the court, or one of its judges, can grant an order nisi to show cause why the writ should not issue. In such case the writ should be issued by the clerk: *In re Rafferty*, *supra*.

The provision of the constitution giving the supreme court original jurisdiction is

self-executing; and in the absence of legislation it has authority to establish rules defining the course to be pursued in issuing the writ: *Id.*

The provisions of this chapter are applicable to the supreme court: *Id.* 384.

Where the writ is made returnable by the supreme court before a superior court or judge, the subsequent proceedings should be had in such court: *Id.* 385.

The supreme court cannot, upon an application for habeas corpus, pass upon the question of former jeopardy of petitioner, but such plea must be raised and tried in the lower court; nor can jurisdiction to determine such question be conferred upon the supreme court by stipulation accom-

panying the petition: *Steiner v. Nerton*, 6 Wash. 23.

Grounds of remedy and proceedings reviewable: See 1 Remington's Digest, p. 1347, §§ 2-10; *In re Nolan*, 21 Wash. 395; *In re Casey*, 27 Wash. 686; *State ex rel. Zenner v. Graham*, 34 Wash. 81; *In re Van Alstine*, 21 Wash. 194; *In re Coulter*, 25 Wash. 526; *In re Cave*, 26 Wash. 213; *Packenham v. Reed*, 37 Wash. 258.

Habeas corpus will not lie to secure the release of a prisoner on the ground that he has been committed under the judgment of the supreme court, until a certain fine and costs are paid, and the judgment for costs is in fact in favor of the territory and not of the state, when the commitment does not require the payment of such costs as a prerequisite for the prisoner's discharge: *Way v. Woolery*, 6 Wash. 157.

Habeas corpus will lie to release a child unlawfully detained in a reform school: *In re Mason*, 3 Wash. 609; or in behalf of a defendant transported to the penitentiary pending an appeal from a judgment of conviction to restore him to the custody of the sheriff of the county in which convicted: *Ex parte Jones*, 2 Wash. 551; or to release a prisoner held under a judgment of court which had no jurisdiction: *In re Permstick*, 3 Wash. 672, 674.

And under § 2120, *infra*, a person charged with a crime is entitled to discharge where the only reason for failure to try him is that no term of court for which a jury had been called had been in session since the filing of the information: *State v. Brodie*, 7 Wash. 442. This provision, however, does not apply to a new trial: *In re Murphy*, 7 Wash. 257; nor does § 2125, *infra*, providing that such discharge shall not bar further prosecution, violate the constitutional guaranty of a speedy public trial: *State v. Caldwell*, 9 Wash. 336.

Where a defendant convicted in a criminal prosecution applies to the federal court for a writ of habeas corpus, and also appeals from the judgment of the superior court, the settlements of a statement of facts at his request is not a "proceeding against the person," etc., within the provisions of § 766, Rev. Stats. U. S., so as to render the acts of the court in settling the statement null and void: *State v. Humason*, 4 Wash. 413.

Scope of inquiry and powers of court: See 1 Remington's Digest, p. 1349, §§ 15-18; *In re Barbee*, 19 Wash. 306; *In re Nolan*, 21 Wash. 395; *Smith v. Sullivan*, 33 Wash. 30.

Determination of particular issues or questions: See 1 Remington's Digest, p. 1349, §§ 19-22; *In re Russell*, 40 Wash. 244; *In re Coulter*, 25 Wash. 526; *In re Van Alstine*, 21 Wash. 194.

CUSTODY OF CHILD: See 1 Remington's Digest, p. 1349, § 19; *In re Clifford*,

37 Wash. 460. If a person or corporation has no legal right to the custody of a minor child, it cannot uphold its custody as against the parents, on the ground that they are not proper and competent to have its care and custody: *Lovell v. House of Good Shepherd*, 9 Wash. 419.

The mere fact that the mother is coarse, vulgar, passionate and pugnacious, and that the father excessively uses intoxicants, is not sufficient grounds for depriving them of the society and comfort of their child: *Id.*

Although the mother may have placed her child in the hands of another for care and education, and deserted it, under a promise that it remain there until eighteen years old, such act will not estop her from afterward claiming control and custody of it before the expiration of such period: *Id.*

In an action for the possession of minor children brought by the mother against the father, based upon an alleged decree of divorce in another state awarding the custody of the children to her, where it appears from the evidence that the father is the more suitable person to have the care and custody of the children, being better prepared to care for and educate them, and that the mother is unsuited morally to have the control of the children, and is financially unable to care for them, a decree giving the mother the custody of the children is erroneous: *Kentzler v. Kentzler*, 3 Wash. 166.

The assumption of custody of a minor child, under order of the superior court in a habeas corpus proceeding, will not constitute false imprisonment, although the appellate court on a review of the habeas corpus proceedings may reverse the judgment of the superior court as erroneous: *Lovell v. House of Good Shepherd*, 14 Wash. 211.

A party who successfully brings an action for the custody of a child in habeas corpus proceedings cannot subsequently bring another action to recover the expenses incident to the first case: *Id.*

Where, after the rendition of a decree of divorce in which the custody of the minor children has been awarded to the mother, a stipulation for the modification of the decree so as to award custody to the father has been entered into by the father and mother, and possession of the children given to the father under such stipulation, the father is rightfully entitled to the children, although in fact the modification of the decree has never been secured: *Ackley v. Burchard*, 11 Wash. 128.

Determination of questions in extradition: See 1 Remington's Digest, p. 1350, § 20; *In re Foy*, 21 Wash. 250; *Armstrong v. Van De Vanter*, 21 Wash. 682; *In re Sylvester*, 21 Wash. 263; *Poor v. Cudihee*, 37 Wash. 609; *In re Gillis*, 38 Wash. 156; *In re Baker*, 21 Wash. 259; *In re Lillis*, 38 Wash. 366; *In re Maney*, 20 Wash. 509.

§ 1064. (5815.) Parents, etc., may have Writ.

Writs of habeas corpus shall be granted in favor of parents, guardians, masters, and husbands, and to enforce the rights and for the protection of infants and insane persons; and the proceedings shall in all cases conform to the provisions of this chapter. [L. '54, p. 214, § 456; Cd. '81, § 688; 2 H. C., § 733.]

See notes to last section.

In an application for a writ of habeas corpus by a father to recover the custody of children who had been surrendered by the mother to defendant for the purpose of having him provide homes for them, an order of the court directing defendant to make application under the provisions of the statute for the disposition of said children, being advisory merely, is not an appealable order: *St. Clair v. Williams*, 23 Wash. 552.

§ 1065. (5816.) Application for, How Made.

Application for the writ shall be made by petition, signed and verified either by the plaintiff or by some person in his behalf, and shall specify,—

1. By whom the petitioner is restrained of his liberty, and the place where (naming the parties if they are known, or describing them if they are not known);

2. The cause or pretense of the restraint, according to the best of the knowledge and belief of the applicant;

3. If the restraint be alleged to be illegal, in what the illegality consists. [L. '54, p. 212, § 422; Cd. '81, § 667; 2 H. C., § 712.]

§ 1066. (5817.) By Whom Granted.

Writs of habeas corpus may be granted by the supreme court or superior court, or by any judge of either court, and upon application the writ shall be granted without delay. [L. '54, p. 212, § 436; Cd. '81, § 668; 2 H. C., § 713.]

See Const., Art. IV, §§ 4, 6, jurisdiction of supreme and superior courts.

See supra, §§ 1, 15, jurisdiction of courts to issue.

See § 1063, and notes, who may prosecute writ.

Cited in 37 Wash. 260.

The supreme court will not take original jurisdiction of an application of a writ after the denial of the matter by the superior court: *In re Graham*, 7 Wash. 237.

The object in giving every judge original jurisdiction was to place the remedy within easy reach, and insure speedy relief, but not to give a multiplicity of trials: *Id.* 238.

§ 1067. (5818.) To Whom Directed—Contents of.

The writ shall be directed to the officer or party having the person under restraint, commanding him to have such person before the court or judge at such time and place as the court or judge shall direct to do and receive what shall be ordered concerning him, and have then and there the writ. [L. '54, p. 212, § 437; Cd. '81, § 669; 2 H. C., § 714.]

§ 1068. (5819.) Delivery of Writ to Sheriff—Service.

If the writ be directed to the sheriff, it shall be delivered by the clerk to him without delay. [L. '54, p. 212, § 438; Cd. '81, § 670; 2 H. C., § 715.]

§ 1069. (5820.) Service of Writ Directed to Person Other than Sheriff.

If the writ be directed to any other person, it shall be delivered to the sheriff, and shall be by him served by delivering the same to such person without delay. [L. '54, p. 212, § 439; Cd. '81, § 671; 2 H. C., § 716.]

§ 1070. (5821.) Service When Person not Found.

If the person to whom such writ is directed cannot be found or shall refuse admittance to the sheriff, the same may be served by leaving it at the residence of the person to whom it is directed, or by posting the same on [in] some conspicuous place, either on his dwelling-house or where the party is confined or under restraint. [L. '54, p. 212, § 440; Cd. '81, § 672; 2 H. C., § 717.]

§ 1071. (5822.) Return—Attachment for Refusal.

The sheriff or other person to whom the writ is directed shall make immediate return thereof, and if he refuses after due service to make return, the court shall enforce obedience by attachment. [L. '54, p. 213, § 441; Cd. '81, § 673; 2 H. C., § 718.]

§ 1072. (5823.) Substance and Form of Return.

The return must be signed and verified by the person making it, who shall state,—

1. The authority or cause of the restraint of the party in his custody;
2. If the authority shall be in writing, he shall return a copy and produce the original on the hearing;
3. If he has had the party in his custody, or under his restraint, and has transferred him to another, he shall state to whom, the time, place, and cause of the transfer. He shall produce the party at the hearing, unless prevented by sickness or infirmity, which must be shown in the return. [L. '54, p. 213, § 442; Cd. '81, § 674; 2 H. C., § 719.]

§ 1073. (5824.) Proceedings—Pleadings.

The court or judge, if satisfied of the truth of the allegation of sickness or infirmity, may proceed to decide on the return, or the hearing may be adjourned until the party can be produced, or for other good cause. The plaintiff may except to the sufficiency of or controvert the return, or any part thereof, or allege any new matter in evidence. The new matter shall be verified, except in cases of commitment on a criminal charge. The return and pleadings may be amended without causing a [any] delay. [L. '54, p. 213, § 443; Cd. '81, § 675; 2 H. C., § 720.]

§ 1074. (5825.) Hearing and Determination.

The court or judge shall thereupon proceed in a summary way to hear and determine the cause, and if no legal cause be shown for the restraint or for the continuation thereof, shall discharge the party. [L. '54, p. 213, § 444; Cd. '81, § 676; 2 H. C., § 721.]

If a prisoner, rearrested after a release on a conditional pardon, is entitled to trial in habeas corpus proceedings to determine whether he has violated the conditions of the pardon, he cannot complain if he is awarded a trial before the court and the burden of proof is placed on the state: *Spencer v. Kees*, 47 Wash. 276.

§ 1075. (5826.) Restrictions upon Inquiry.

No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:—

1. Upon any process issued on any final judgment of a court of competent jurisdiction;

2. For any contempt of any court, officer or body having authority in the premises to commit; but an order of commitment, as for a contempt upon proceedings to enforce the remedy of a party, is not included in any of the foregoing specifications;

3. Upon a warrant issued from the superior court upon an indictment or information. [L. '54, p. 213, § 445; Cd. '81, § 677; L. '91, p. 82, § 1; 2 H. C., § 722.]

See notes to § 1063, *supra*.

Cited in 6 Wash. 158; 19 Wash. 308; 21 Wash. 198, 398; 25 Wash. 530; 33 Wash. 35; 40 Wash. 246, 247, 249.

Under this section, defendant is restricted to his remedy by appeal touching the legality of any commitment issued on a final judgment of a court of competent jurisdiction; and the writ will only lie where the court has no jurisdiction in the premises: *In re Rafferty*, 1 Wash. 382; distinguished in *In re Permstick*, 3 Wash. 674.

The provisions of this section precludes the supreme court, in habeas corpus proceedings, from questioning the judgment of a court of general jurisdiction fair upon its face: *In re Lybarger*, 2 Wash. 131; such statute does not transgress the constitutional provision securing the right to the writ: *Id*.

The fact that a party can appeal from a judgment against him in a criminal action does not estop him from maintaining an application for the writ where the court rendering the judgment had no jurisdiction over the subject matter: *In re Permstick*,

3 Wash. 672; *In re Rafferty*, 1 Wash. 382; *In re Lybarger*, 2 Wash. 131.

The trial of a case by a court of competent jurisdiction is not reviewable on this writ: *Ex parte Williams*, 1 W. T. 240. The remedy is by appeal: *In re Rafferty*, 1 Wash. 388.

A prisoner is entitled to his discharge upon proceedings in habeas corpus, when it appears that he was imprisoned under a regularly certified judgment and commitment for the term of one year, which had expired, although another judgment by the same court on the same day ordered his commitment for a term of five years, which was the proper penalty for the offense of which he had been convicted: *Davis v. Catron*, 22 Wash. 183.

Appeal and error: See 1 Remington's Digest, p. 1351, § 25; *In re Foye*, 21 Wash. 250; *In re Baker*, 21 Wash. 259; *In re Sylvester*, 21 Wash. 263; *State ex rel. Roberts v. Superior Court*, 32 Wash. 143; *St. Clair v. Williams*, 23 Wash. 552; *In re Garfinkle*, 37 Wash. 650.

§ 1076. (5827.) Admission to Bail Instead of Discharge.

No person shall be discharged from an order of commitment issued by any judicial or peace officer for want of bail, or in cases not bailable on account of any defect in the charge or process, or for alleged want of probable cause; but in all cases the court or judge shall summon the prosecuting witnesses, investigate the criminal charge, and discharge, admit to bail, or recommit the prisoner, as may be just and legal, and recognize witnesses when proper. [L. '54, p. 213, § 446; Cd. '81, § 678; 2 H. C., § 723.]

Cited in 1 Wash. 384; 43 Wash. 20.

The provisions of this section apply to the supreme court regardless of its consequential

inconvenience and expense: *In re Rafferty*, 1 Wash. 382, 384.

§ 1077. (5828.) Writ for Purpose of Bail.

The writ may be had for the purpose of admitting a prisoner to bail in civil and criminal actions. When any person has an interest in the detention, [and] the prisoner shall not be discharged until the person having such interest is notified. [L. '54, p. 214, § 447; Cd. '81, § 679; 2 H. C., § 724.]

The word "and" in brackets was interpolated in the Code of 1881.

See § 775 et seq., bail bond.

See *infra*, § 1951, bail in examination before magistrates.

See *infra*, § 1957, recognizance, conditions of.

See *infra*, § 2078, right of accused to give bail.

Cited in 37 Wash. 260.

There is no authority to admit to bail a person held on an extradition warrant, pending an appeal from a judgment in habeas

corpus proceedings, and the order granting a supersedeas and admitting to bail will be vacated by the supreme court on motion: *In re Foye*, 21 Wash. 250.

§ 1078. (5829.) Compelling Attendance of Witnesses.

The court or judge shall have power to require and compel the attendance of witnesses, and to do all other acts necessary to determine the case. [L. '54, p. 214, § 448; Cd. '81, § 680; 2 H. C., § 725.]

§ 1079. (5830.) Officer not Liable, When.

No sheriff or other officer shall be liable to a civil action for obeying any writ of habeas corpus, or order of discharge made thereon. [L. '54, p. 214, § 449; Cd. '81, § 681; 2 H. C., § 726.]

§ 1080. (5831.) Warrant to Prevent Removal.

Whenever it shall appear by affidavit that anyone is illegally held in custody or restraint, and that there is good reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ can be enforced, such court or judge may cause a warrant to be issued reciting the facts, and directed to the sheriff or any constable of the county, commanding him to take the person thus held in custody or restraint, and forthwith bring him before the court or judge, to be dealt with according to the law. [L. '54, p. 214, § 450; Cd. '81, § 682; 2 H. C., § 727.]

§ 1081. (5832.) What Warrant may Include.

The court or judge may also, if the same be deemed necessary, insert in the warrant a command for the apprehension of the person charged with causing the illegal restraint. [L. '54, p. 214, § 451; Cd. '81, § 683; 2 H. C., § 728.]

§ 1082. (5833.) Warrant, How Executed.

The officer shall execute the writ by bringing the person therein named before the court or judge, and the like return of proceedings shall be required and had as in case of writs of habeas corpus. [L. '54, p. 214, § 452; Cd. '81, § 684; 2 H. C., § 729.]

§ 1083. (5834.) Temporary Orders.

The court or judge may make any temporary orders in the cause or disposition of the party during the progress of the proceedings that justice may require. The custody of any party restrained may be changed from one person to another, by order of the court or judge. [L. '54, p. 214, § 453; Cd. '81, § 685; 2 H. C., § 730.]

§ 1084. (5835.) Writ Issued on Sunday, When.

Any writ or process authorized by this chapter may be issued and served, in cases of emergency, on Sunday. [L. '54, p. 214, § 454; Cd. '81, § 686; 2 H. C., § 731.]

See Const., Art. IV, § 6.

See *supra*, § 61, legal holidays.

§ 1085. (5836.) Writs—Issuance, Service and Return—Amendments.

All writs and other process authorized by this chapter shall be issued by the clerk of the court, and sealed with the seal of such court, and shall be served and returned forthwith, unless the court or judge shall specify a

particular time for such return. And no writ or other process shall be disregarded for any defect therein, if enough is shown to notify the officer or person of the purport of the process. Amendments may be allowed and temporary commitments, when necessary. [L. '54, p. 214, § 455; Cd. '81, § 687; 2 H. C., § 732.]

Cited in 1 Wash. 385.

CHAPTER V.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

§ 1086. (5841.) **Must be General—Effect of.**

No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims; and after the payment of the costs and disbursements thereof, including the attorney fees allowed by law in case of judgment, out of the estate of the insolvent, such claim or claims shall be deemed as presented, and shall share pro rata with other claims as hereinafter provided. [Cf. L. '90, p. 83, § 1; 1 H. C., § 2741; L. '93, p. 247, § 1.]

See notes to § 741, receivers in case of.

See notes to § 1104, leave to foreclose mortgage covered by assignment.

See notes to § 1104, priority, delivery, etc.

For former provisions see §§ 2014-2051, Code of 1881.

Cited in 4 Wash. 259, 784; 5 Wash. 340, 345; 5 Wash. 668, 669, 670, 672; 6 Wash. 42; 9 Wash. 64, 455; 24 Wash. 97; 44 Wash. 46, 516.

Requisites and validity of assignment: See 1 Remington's Digest, pp. 286-288, §§ 1-11; Degginger v. Seattle Brewing & Malt-ing Co., 41 Wash. 385; Smith v. Cullen, 18 Wash. 398; Bloomingdale v. Weil, 29 Wash. 611.

The assignment law of 1881 was repealed in all its provisions by the act covered by this chapter: Mansfield v. First Nat. Bank, 5 Wash. 665.

The state insolvency act is not suspended or superseded by the federal bankruptcy law when no bankruptcy proceedings are instituted: Jensen-King-Byrd Co. v. Williams, 35 Wash. 161.

WHO MAY HAVE BENEFIT OF.—This statute governing assignments for benefit of creditors has no application to insolvent corporations: McKay v. Elwood, 12 Wash. 579, 582; following Nyman v. Berry, 3 Wash. 734. Compare Schloss & Co. v. Wallace, 14 Wash. 249. But an insolvent corporation may make a common-law deed of assignment of all of its property to a trustee for the benefit of all of its creditors unless restrained by statute or by charter: Nyman v. Berry, 3 Wash. 734; cited in McKay v. Elwood, 12 Wash. 583.

Foreign assignments and extraterritorial effect of assignments: See 1 Remington's Digest, p. 289, § 16; Bloomingdale v. Weil, 29 Wash. 611; Happy v. Prickett, 24 Wash. 290.

An assignment in Minnesota for the benefit of creditors of all debtor's property is a voluntary assignment and will pass title to

property in this state: Whitman v. Mast, 11 Wash. 318; and a receiver subsequently appointed in the insolvency proceedings succeeds to all the rights and title of the original assignee and may maintain action in this state for debts due him as trustee of the insolvent estate: Id.

A husband may make a valid assignment, which operates to transfer community real and personal property, although the wife fails to join therein: Thygesen v. Neufelder, 9 Wash. 455.

Administration of assigned estate: See 1 Remington's Digest, pp. 289, 291, §§ 17-27; Boston Nat. Bank v. Hammond, 21 Wash. 158; Thompson v. Sines, 18 Wash. 359; Moore v. Terry, 17 Wash. 185; Bloomingdale v. Weil, 29 Wash. 611; Happy v. Prickett, 24 Wash. 690.

Property in possession of an assignee is in custodia legis, and cannot be seized under a writ of attachment, although the assignment may be alleged to be fraudulent: Hamilton Brown Shoe Co. v. Adams, 5 Wash. 333.

Where goods in the hands of an assignee for the benefit of creditors have been attached by a creditor of the assignor, the proper practice is for the assignee to bring his proceeding for possession in the matter of assignment, instead of intervening in the attachment suit: Sabin v. Adams, 5 Wash. 768.

Where a debtor in failing circumstances, contemplating assignment, makes a chattel mortgage in fraud of his creditors, and subsequently makes an assignment for their benefit, his assignee is entitled to and may recover possession of the goods thus fraudulently transferred: Mansfield v. First

Nat. Bank, 5 Wash. 665; *Mansfield v. First Nat. Bank*, 6 Wash. 603; *Sabin v. Adams*, 5 Wash. 769.

If an insolvent debtor makes a general assignment, the assignee cannot maintain an action against an attaching creditor and sheriff for injuries resulting from alleged malicious levy of attachment prior to assignment: *Slauson v. Schwabacher*, 4 Wash. 783.

When an assignment for the benefit of creditors has been made, a creditor cannot, during the pendency of the insolvent proceedings, maintain another form of action against the assignor: *Cosh-Murray Co. v. Bothell*, 10 Wash. 314.

Nor can a mechanic's lien be enforced against property in the hands of an assignee for benefit of creditors; the claim must be presented in the insolvency proceedings: *Quinby v. Slipper*, 7 Wash. 475.

EFFECT OF ASSIGNMENT: See 1 *Remington's Digest*, p. 288, §§ 12-15; *Jensen-King-Byrd Co. v. Williams*, 35 Wash. 161; *Thompson v. Sines*, 18 Wash. 359; *Bloomington v. Weil*, 29 Wash. 611. The assigned estate is in the possession of the court for pro rata distribution, and no one can interfere with it except at his peril: *Sabin v. Adams*, 5 Wash. 768.

The discharge in insolvency proceedings from the lien of a judgment by the same court which rendered it is without effect on a judgment creditor, when the court had no jurisdiction over him in the insolvency proceedings: *Weber v. Yancy*, 7 Wash. 84.

A party appearing and accepting a dividend cannot impeach the discharge of the debtors years thereafter, when no objection was made at the time: *Boston Nat. Bank v. Hammond*, 21 Wash. 158.

If proceedings in insolvency were begun under the provisions of the Code of 1881, and a receiver appointed to take charge of the estate, the repeal by act of March 6, 1890, while the proceedings were pending, will not affect the title of an assignee appointed subsequent to the repeal: *Ewing v. Van Wagoner*, 6 Wash. 39.

The lien of an attachment is not discharged under the amendment of March 10, 1893, by the subsequent filing of an assignment: *Bierer v. Blurock*, 9 Wash. 63; cited in *State v. Superior Court*, 14 Wash. 329.

The assignee of an insolvent debtor is not entitled to the possession of his assignor's property, which was in the possession of the sheriff by virtue of a valid attachment levied prior to the assignment: *State v. Superior Court*, 14 Wash. 324.

PREFERENCES: See 1 *Remington's Digest*, p. 287, §§ 9-11. If a chattel mortgage and an assignment for the benefit of creditors are assailed as one transaction and are construed together to prevent an equal distribution among creditors, they must stand or fall together: *Benham v. Ham*, 5 Wash. 128, 132.

A debtor in failing circumstances may dispose of his entire property to pay or secure bona fide debts to a portion of his creditors and leave other creditors unsatisfied: *Turner v. Iowa Nat. Bank*, 2 Wash. 192; *Samuel v. Kittenger*, 6 Wash. 261; *Furth v. Snell*, 6 Wash. 542, 546; *Ephriam v. Kelleher*, 4 Wash. 243; *Benham v. Ham*, 5 Wash. 128, 34 Am. St. Rep. 851; *First Nat. Bank v. Carter*, 6 Wash. 494, 496; and the fact of such distribution does not work an assignment for the benefit of creditors: *Furth v. Snell*, 6 Wash. 542; *Puget Sound Nat Bank v. Levy*, 10 Wash. 499; *Victor v. Glover*, 17 Wash. 37.

While an assignment transfers all of the property of an insolvent debtor to the jurisdiction of the court, it passes such property subject to all valid liens existing against it: *Gilbert Hunt Mfg. Co. v. Wheeler*, 15 Wash. 594; following *Bierer v. Blurock*, 9 Wash. 63.

If an insolvent debtor confesses judgment to certain creditors, who have knowledge of his condition, at the time contemplating an assignment, and follows the confession with an assignment, the judgment liens are voidable and the assignee, or the court's receiver may take possession of all the property for the benefit of all the creditors: *Hyman v. Barmon*, 6 Wash. 516; but where the preferred creditor has no knowledge of an intended assignment by his debtor his preference will be held valid, although the debtor may make an assignment of the remainder of his property within three days thereafter: *Benham v. Ham*, 5 Wash. 128.

Although by the law of this state an assignment for the benefit of creditors would operate to dissolve a prior attachment, yet, in case of the levy of attachment in a foreign state upon the property of a citizen of this state, the levy, if valid where made, would not be affected by the subsequent assignment of the debtor here: *Neufelder v. No. British etc. Ins. Co.*, 10 Wash. 393; citing *Id.*, 6 Wash. 336.

After the institution of insolvency proceedings, all questions relating to fraud of debtor should be tried therein: *Traders' Bank v. Van Wagenen*, 2 Wash. 172.

§ 1087. (5842.) Assent Presumed.

In case of an assignment for the benefit of all the creditors of the assignor, the assent of the creditors shall be presumed. [L. '90, p. 83, § 2; 1 H. C., § 2742.]

§ 1088. (5843.) How Made, Procedure Thereafter.

The debtor shall annex to such assignment an inventory, under oath, of all his estate, real and personal, according to the best of his knowledge, and also a list of his creditors, with their postoffice address[es], and a list of the amount of their respective demands, but such inventory shall not be conclusive as to the amount of the debtor's estate. Every assignment shall be in writing, and duly acknowledged, in the same manner as conveyances of real estate, and recorded in the record of deeds of the county where the person making the same resides, or where the business in respect to which the same is made has been carried on. Upon the application of two or more creditors of said debtor therefor, by petition to the judge of the superior court of the county in which such assignment is or should be recorded, at any time within thirty days from the making or recording of such assignment, it shall be the duty of said superior judge to direct the clerk of said superior court to order a meeting of the creditors of said debtor to choose an assignee of the estate of said debtor in lieu of the assignee named by the debtor in his assignment; and thereupon the clerk of said court shall forthwith give notice to all the creditors of said debtor to meet at his office at a time stated, not to exceed fifteen days from the date of such notice, to select one or more assignees in the place of the assignee named by the debtor in his assignment. Such creditors may appear in person or by proxy, and a majority in number and value of said creditors attending such meeting shall select one or more assignees; and in the event that no one shall receive a majority vote of said creditors, who represent at least one-half in amount of all claims represented at such meeting, then, and in that event, said clerk shall certify that fact to the judge of the superior court aforesaid, and thereupon said superior judge shall select and appoint an assignee. When such assignee shall have been selected by such creditors, or appointed by the superior judge, as herein provided, then the assignee named in the debtor's assignment shall forthwith make to the assignee elected by the creditors, or appointed by the superior judge, an assignment and conveyance of all the estate, real and personal, that has been assigned or conveyed to him by said debtor; and such assignee so elected by the creditors or appointed by the superior judge, upon giving the bond required of an assignee by this chapter, shall possess all the powers and be subject to all the duties imposed by this chapter, as fully, to all intents and purposes, as though named in the debtor's assignment. From the time of the pending of an application to elect an assignee by the creditors, and until the time shall be terminated by an election or appointment as herein provided, no property of the debtor, except perishable property, shall be sold or disposed of by any assignee; but the same shall be safely and securely kept until the election or appointment of an assignee, as herein provided. No creditor shall be entitled to vote at any such meeting called for the purpose of electing an assignee, until he shall have presented to the clerk of the superior court, who shall preside at such meeting, a verified statement of his claim against the debtor. [L. '90, p. 83, § 3; 1 H. C., § 2743.]

See notes to § 1086, *supra*.

Where an assignment for the benefit of creditors has been made and the assignee has failed to comply with the law, a petition to the court by one alleging himself

to be a creditor, asking the appointment of an assignee to administer the insolvent's estate, cannot be dismissed upon the mere affidavit of the insolvent that such petitioner

is not a creditor: In re Heuse, 13 Wash. 614.

Where an assignment for the benefit of creditors has been made by a corporation, the court in which the insolvency proceedings are pending has authority to make an order requiring payment of unpaid stock subscriptions: McKay v. Elwood, 12 Wash. 579.

A person not a party to insolvency proceedings has no right to appear in the action by petition and ask to have a judgment which had been rendered therein set aside, and the filing of a petition under such circumstances will not give the court juris-

diction either of the subject matter or of the person of the defendant: State v. Langhorn, 12 Wash. 588.

In such case the proceedings of the court being without jurisdiction, prohibition will lie to prevent the court enforcing its orders therein: Id.

An unexpired municipal license to sell liquor is assignable and passes to receiver: See Degginger v. Seattle Brewing and Malt- ing Co., 41 Wash. 385.

Irregularities, void provisions, or lack of acknowledgment do not invalidate an as- signment: Smith v. Cullen, 18 Wash. 398.

§ 1089. (5844.) Inventory and Valuation—Bond.

The assignee shall also forthwith file with the clerk of the superior court of the county where such assignment will be recorded a true and full inven- tory and valuation of said estate, under oath, as far as the same has come to his knowledge, and shall then and there enter into bonds to the state of Washington, for the use of the creditors, in double the amount of the inven- tory and valuation, with two or more sufficient sureties, to be approved by said clerk, for the faithful performance of said trust; and the assignee may thereupon proceed to perform any duties necessary to carry into effect the intention of said assignment. [L. '90, p. 85, § 4; 1 H. C., § 2744.]

§ 1090. (5845.) Notice of Assignment.

The assignee shall forthwith give notice of such assignment, by publica- tion in some newspaper in the county, if any, and if none, then in the nearest county thereto, which publication shall be continued at least six weeks; and shall forthwith send a notice by mail to each creditor of whom he shall be informed, directed to their usual place of residence, and notifying the credi- tors to present their claims, under oath, to him within three months there- after. [L. '90, p. 85, § 5; 1 H. C., § 2745.]

Cited in 10 Wash. 315.

Jurisdiction is acquired by the assignment and statutory notice: Cosh-Murray Co. v.

Bothell, 10 Wash. 314; Boston Nat. Bank v. Hammond, 21 Wash. 158.

§ 1091. (5846.) List of Creditors.

At the expiration of three months from the time of first publishing no- tice, the assignee shall report and file with the clerk of the court a true and full list, under oath, of all such creditors of the assignor as shall have claims to be such, with a statement of their claims, and also an affidavit of publica- tion of notice, and a list of the creditors, with their places of residence, to whom notice has been sent by mail, and the date of mailing, duly verified. [L. '90, p. 85, § 6; 1 H. C., § 2746.]

§ 1092. (5847.) Exceptions to Claims.

Any person interested may appear within three months after filing such report, and file with said clerk any exceptions to the claim or demand of any creditor, and the clerk shall forthwith cause notice thereof to be given to the creditor, which shall be served [and returned] as in case of summons; and the court shall proceed to hear the proof and allegation of the parties in the premises, and shall render such judgment therein as shall be just, and may allow a trial by jury thereon. [L. '90, p. 85, § 7; 1 H. C., § 2747.]

Section altered to conform to present organization of courts.

Cited in 5 Wash. 338; 10 Wash. 315.

Under the Insolvency Law of 1890, when an assignment for the benefit of creditors has been made by a debtor, a creditor can-

not, during the pendency of the insolvency proceeding, maintain another form of action against the assigning debtor: *Cosh-Murray Co. v. Bothell*, 10 Wash. 314.

§ 1093. (5848.) Dividends, Accounts, Compensation.

If no exception be made to the claim of any creditor, or if the same has been adjudicated, the court shall order the assignee to make from time to time fair and equal dividends among the creditors of the assets in his hands, in proportion to their claims, and as soon as may be to render a final account of said trust to said court, which may allow such commissions to said assignee in the final settlement as may be considered right and just, not exceeding, however, the fees and compensation allowed by law to administrators and executors. [Cf. L. '90, p. 86; § 8; 1 H. C., § 2748; L. '93, p. 39, § 1.]

See *infra*, § 1549, compensation allowed executors and administrators.

Cited in 5 Wash. 338, 348.

Rights and remedies of creditors: See 1 Remington's Digest, pp. 291, 292, §§ 28-33; *Thompson v. Sines*, 18 Wash. 359; *Gilbert Hunt Mfg. Co. v. Wheeler*, 15 Wash. 594; *Boston Nat. Bank v. Hammond*, 21 Wash. 158; *Oleson v. Bank of Tacoma*, 15 Wash. 148; *Rochford v. Doty*, 37 Wash. 232.

The filing by a creditor of his claim with the assignee does not waive his right under a prior attachment levied in a foreign state; but he becomes thereby a party to the insolvency proceedings and will be bound thereby: *Neufelder v. North B. etc. Ins. Co.*, 10 Wash. 393; but the amount received by means of the attachment ought to be deducted from the claim as filed with the assignee, and the balance treated as the true amount of the indebtedness: *Id.*

If an assignment has been made for the benefit of creditors, a secured creditor is entitled to share pro rata only on the balance of his claim remaining after exhausting and applying the proceeds of his se-

curity to the diminution of his claim: *In re Frasch*, 5 Wash. 345.

Where a creditor accepts a dividend under an assignment for the benefit of creditors, he will not afterward be allowed to impeach the assignment in order to render the assets covered thereby liable to execution for his debt: *Cerf, Schloss & Co. v. Wallace*, 14 Wash. 249.

A creditor of an insolvent does not lose his right to a distributive share in the assets in the hands of an assignee by attaching a portion of the property which passed to the assignee, under a bona fide belief that it was property of a firm of which the insolvent was a member, where such belief had sufficient foundation to induce the lower court to decide in accordance therewith, although its judgment was reversed: *Anderson v. Risdon-Cahn Co.*, 13 Wash. 494.

An assignee of an insolvent estate cannot, for the purpose of distribution, be required to treat as cash assets an uncollected judgment against a creditor of the insolvent, or against any other person: *Id.*

§ 1094. (5849.) Assignee Subject to Control of Court.

The assignee shall at all times be subject to the order of the court or judge and the said court or judge may, by citation and attachment, compel the assignee, from time to time, to file reports of his proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required by this chapter. [L. '90, p. 86, § 9; 1 H. C. § 2749.]

Cited in 5 Wash. 339.

§ 1095. (5850.) Not Void, When—Citation to Debtor.

No assignment shall be declared fraudulent or void for want of any list or inventory as provided in this chapter. The court or judge may, upon application of the assignee, or any creditor, compel the appearance in person of the debtor before such court or judge forthwith, to answer under oath such matters as may then and there be inquired of him; and such debtor may then and there be fully examined under oath as to the amount and situation of his estate, and the names of the creditors, and amounts due to each, with their places of residence, and the court may compel the delivery to the assignee

of any property or estate embraced in the assignment. [L. '90, p. 86, § 10; 1 H. C., § 2750.]

See note to § 1092.

Cited in 5 Wash. 671; 39 Wash. 341.

Estoppel to attack assignment: See Boston Nat. Bank v. Hammond, 21 Wash. 158.
An assignment is not vitiated by a provision which authorizes sales on credit: Smith v. Cullen, 18 Wash. 398.

§ 1096. (5851.) Additional Inventory.

The assignee shall, from time to time, file with the clerk of the court an inventory and valuation of any additional property which may come into his hands, under such assignment, after the filing of the first inventory, and the clerk may thereupon require him to give additional security. [L. '90, p. 86, § 11; 1 H. C., § 2751.]

Cited in 5 Wash. 341.

§ 1097. (5852.) Claims not Due, Limitation.

Any creditor may claim debts to become due, as well as debts due, but on debts not due, a reasonable abatement shall be made when the same are not drawing interest; and all creditors who shall not exhibit their claims within the term of three months from the publication of notice as aforesaid, shall not participate in the dividends until after payment in full of all claims presented within said term and allowed by the court. [L. '90, p. 86, § 12; 1 H. C., § 2752.]

§ 1098. (5853.) Authority of Assignee—Sales.

Any assignee as aforesaid shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the assignment, and to sue for and recover, in the name of such assignee, everything belonging or appertaining to said estate, and generally to do whatever the debtor might have done in the premises; but no sale of real estate belonging to said trust shall be made without notice published, as in case of sale of real estate on execution, unless the court shall order and direct otherwise. [L. '90, p. 87, § 13; 1 H. C., § 2753.]

See notes to § 1093, supra.

Cited in 4 Wash. 786; 5 Wash. 670, 672, 673.

From the time of the assignment by an insolvent corporation the obligation of each stockholder on unpaid subscriptions sufficient to satisfy the indebtedness of the corporation is a debt presently due and may be enforced by the assignee: McKay v. Elwood, 12 Wash. 579, 585.

The purchaser of land at an assignee's sale is entitled to a perfect title, and cannot be compelled to take land which he has

bid for, when he would thereby be put to expense to clear the title: In re Box's Assignment, 11 Wash. 90.

Where the assignee of an insolvent estate, after making sale of land belonging thereto, reports to the court that he returns the property unsold for the reason that the purchaser will not consummate the sale, and asks permission to dispose of the same at private sale, he is estopped, after the lapse of eight months from enforcing payment from the purchaser: Id.

§ 1099. (5854.) Proceedings upon Death or Failure of Assignee to Act.

In case any assignee shall die before closing of his trust, or in case any assignee shall fail or neglect, for the period of thirty days after the making of any assignment, to file an inventory and valuation and give bonds as required by this chapter, the superior court or judge thereof of the county where such assignment may be recorded, on the application of any person interested, shall appoint some person to execute the trust embraced in such

assignment; and such person, on giving the bond with sureties, as required of the assignee, shall possess all the power conferred on such assignee, and shall be subject to all the duties hereby imposed as fully as though named in the assignment; and in case any surety shall be discovered insufficient, or, on complaint before the court or judge, it should be made to appear that any assignee is guilty of wasting or misapplying the trust estate, said court or judge may direct and require additional security, and may remove such assignee, and may appoint others instead; and such person so appointed, on giving bond, shall have full power to execute such duties, and to demand and sue for all estate in the hands of the person removed, and to demand and recover the amount and value of all moneys and property or estate so wasted and misapplied which he may neglect or refuse to make satisfaction for from such person and his sureties. [L. '90, p. 87, § 14; 1 H. C., § 2754.]

Cited in 13 Wash. 614.

§ 1100. (5855.) Discharge of Assignor, When.

Whenever it shall appear to the satisfaction of the court or judge thereof when the assignment is pending upon the final reports of the assignee chosen by the creditors or otherwise that the assignor has been guilty of no fraud in making an assignment or concealment or diversion of the property or any part thereof, in order to keep the same beyond the reach of creditors, and has acted justly and fairly in all respects; that the estate has been made to realize the fullest amount possible and that the expenses of the assignment have been paid. The judge of the court having jurisdiction of the matter shall, upon the allowance of the final account of the assignee, make an order discharging the assignor or assignors as the case may be from any further liability on account of any indebtedness existing prior to the making of such assignment, and thereafter such assignor shall be freed from any liability on account of any unsatisfied portion of the indebtedness existing prior to the making of the assignment. [Cf. L. '90, p. 88, § 15; 1 H. C., § 2755; L. '95, p. 378, § 1.]

Cited in 5 Wash. 340; 24 Wash. 97; 35 Wash. 166.

Discharge: See 1 Remington's Digest, p. 292, § 35; Weber v. Yancey, 7 Wash. 84; Boston Nat. Bank v. Hammond, 21 Wash. 158.

When a judgment debtor failed to apply to court to limit plaintiff's recovery in foreclosure proceedings to the property mortgaged, the discharge in insolvency will not prevent a deficiency judgment for balance due after sale of the mortgaged property: Leisure v. Kneeland, 2 Wash. 537.

After institution of insolvency proceedings all questions relating to the fraud of the debtor should be tried therein, and if the debtor is convicted of fraud he cannot

obtain his discharge, nor the return of his estate, as that has become vested in the assignee for the benefit of his creditors: Traders' Bank v. Van Wagenen, 2 Wash. 172.

An assignment for the benefit of creditors, not objected to, discharges the debtor, and may be set up to defeat supplemental proceedings upon a judgment obtained by a creditor pending the insolvency proceedings: Jensen-King-Byrd Co. v. Williams, 35 Wash. 161.

Accounting, settlement, etc.: See 1 Remington's Digest, p. 293, §§ 36-38; Thompson v. Sines, 18 Wash. 359; Slater v. Stevens County Bank, 12 Wash. 488; Rochford v. Doty, 37 Wash. 232.

§ 1101. (5856.) Sheriff not to be Receiver or Assignee.

It shall be unlawful for the judge of any court of record or the creditors of an insolvent debtor to appoint the sheriff of the county receiver or assignee in any case of insolvency or assignment. [L. '93, p. 462, § 1.]

See § 1173, logger's lien.

Cited in 7 Wash. 77.

§ 1102. (5857.) Right of Exemption.

Hereafter any person making a general assignment for the benefit of creditors, under any statute of this state, shall have the right to claim, and have set aside to him, as exempt from the operation of such assignment, all real and personal property which is, at the time of such assignment, exempt from levy by execution or attachment, under the laws of this state. [L. '97, p. 6, § 1.]

See *supra*, § 528 et seq., exemptions.

Cited in 45 Wash. 618.

§ 1103. (5858.) How Claimed—Objections.

Such assignor shall, if he desires to claim the benefit of the last preceding section, state in such assignment, or in the inventory annexed thereto, what property he claims as exempt, giving a description thereof sufficient for identification. Any creditor of such assignor who believes any of the property so claimed as exempt is not so in fact shall have the right to make objection to such exemption claim at any time prior to the expiration of the time for presentment of claims against such assignor to his assignee. Such objection shall be made by delivering to the assignor and the assignee, and filing with the clerk of the court having jurisdiction of the assignment, a notice in writing, clearly pointing out the part or parts of such exemption claim objected to, and the ground of such objection. When the time above provided for the service and filing of objections has expired, the assignor, upon application to said court, shall have a right to the summary hearing of the said objections, and at such hearing the court shall determine and adjudge to the assignor his lawful exemptions. If any part of the exemptions claimed by the assignor shall be denied, the court shall direct the assignee to pay, out of the funds in his hands, the costs of the hearing, if any, as a part of the expenses of the assignment proceedings. The court may, at its discretion, if it find any claim made for exemption to be fraudulent and made in bad faith, deny such exemption. If no objection to the said exemption claim is served and filed prior to the expiration of the time for presentment of claims to the assignee, the assignor shall be entitled as of course to an order setting aside to him the exemptions claimed by him as aforesaid, and it shall be the duty of the assignee forthwith to deliver the same to him. [L. '97, p. 6, § 2.]

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CHAPTER I.

THE FORECLOSURE OF CHATTEL MORTGAGES.

§ 1104. (5870.) Chattel Mortgage—How Foreclosed.

Any mortgage of personal property, when the debt to secure which the mortgage was given is due, may be foreclosed by notice and sale as herein provided; or it may be foreclosed by action in the superior court having jurisdiction in the county in which the property is situated. [Cf. L. '75, p. 46, § 18; L. '79, p. 105, § 6; Cd. '81, § 1991; 1 H. C., § 1650.]

See *supra*, § 1086, and notes, assignment for benefit of creditors.

See *infra*, §§ 1113, 1114, notes, procedure as in foreclosure of real estate mortgages.

See *infra*, § 1115, sale of mortgagor's interest under process.

See *infra*, § 1116 et seq., foreclosure of real estate mortgage.

See *infra*, § 3659 et seq., and notes, statutes relating to chattel mortgages; validity, etc.

Cited in 16 Wash. 109; 27 Wash. 286; 33 Wash. 640; 48 Wash. 562; 50 Wash. 122.

FORECLOSURE: See 1 Remington's Digest, pp. 488-493, §§ 61-81. Pleading and evidence: See *Id.*, p. 491, §§ 71, 72. A written instrument constituting both a note and mortgage may, at the holder's option, be sued on as a promissory note or foreclosed as a mortgage: *Frank v. Pickle*, 2 W. T. 55.

The mortgagor is not a necessary party in foreclosure, when he has parted with all his interest in the property: *Weir v. Rathbun*, 12 Wash. 84; *Harrington v. Miller*, 4 Wash. 808. And a decree for the sale of mortgaged chattels is sufficient without the rendition of a personal money judgment, when mortgagor has parted with his interest and has not been made a party: *Weir v. Rathbun*, *supra*.

A mortgagee of chattels who stands by at the execution sale of a third person of such chattels and makes no objection to the representations of sheriff to the purchaser, that the property will be applied in satisfaction of the mortgage, is not estopped from subsequently enforcing his lien, when the proceeds were not so applied: *Hamilton v. Carter*, 12 Wash. 510.

In an action to foreclose a chattel mortgage executed in the name of a partnership, to which one partner sets up the defense that the firm was a nontrading partnership, and the note and mortgage had been executed by one partner without the knowledge and consent of his copartner, and contrary to articles of copartnership, plaintiff cannot introduce proof to show that the property mortgaged belonged to the partner who executed the mortgage: *Snively v. Mathe-son*, 12 Wash. 88.

One who, after having sold certain property, accepts a mortgage thereon is estopped in a foreclosure proceeding from setting up a claim of ownership thereof by virtue of a provision in the contract of sale that the title should remain in the seller until payment, when there is no pretense that any of the parties to the foreclosure had notice of such condition: *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349.

The owner of abstract records who so far treats them as valuable property as to secure a loan by the execution of a chattel mortgage thereon is estopped from setting up as a defense to foreclosure proceedings that the records would be of no value in the hands of any but the compiler: *Wash. Bank v. Fidelity etc. Co.*, 15 Wash. 487.

In an action to foreclose a chattel mortgage given without consideration and for the purpose of hindering and defrauding creditors, the court is warranted in finding that the parties are not in *pari delicto*, and

that the mortgagor is entitled to a cancellation of the mortgage in consideration of the facts stated in the case: *Melbye v. Melbye*, 15 Wash. 648.

The refusal of a mortgagee of chattels to accept a tender of the balance due, made before the bringing of action to foreclose, will destroy the lien of the mortgage: *Helphrey v. Strobach*, 13 Wash. 128.

Where leave to foreclose a chattel mortgage has been granted by the court, upon the petition of the mortgagee subsequent to an assignment for the benefit of creditors, made by the mortgagor, it is error for the court to dismiss same on the motion of the assignee on the ground of the pendency of said assignment: *Gilbert Hunt Mfg. Co. v. Wheeler*, 15 Wash. 594; affirmed in *Penn. Mut. Life Ins. Co. v. Fife*, 15 Wash. 605.

Pending foreclosure, the court, upon a proper application showing threatened impairment of plaintiff's security, may restrain the destruction of the property by a temporary injunction: *Schoonover v. Condon*, 12 Wash. 475.

A mortgagee of chattels may intervene in a suit in which the mortgaged property has been attached in order to have the mortgage lien declared prior to that of the attachment, and the property subjected to the payment of the mortgage debt: *Langert v. Brown*, 3 W. T. 102.

The right to foreclose is not lost by the delay of a mortgagee in possession, if the statute of limitations has not run: *Brockway v. Abbott*, 37 Wash. 263.

Where a horse trainer entitled to a lien or services under § 1197, *infra*, accepts a bill of sale of chattel mortgage on the horse he loses his priority over a mortgagee whose lien accrued subsequent to the rendition of service: *Murray v. Guse*, 10 Wash. 25.

POSSESSION.—The holder of a chattel mortgage, who has not reduced the property to possession, cannot maintain an action for possession thereof, when it has been levied on as the property of another: *Sayward v. Nunan*, 6 Wash. 87; *Silsby v. Aldridge*, 1 Wash. 117; *Kerron v. N. P. etc. Co.*, 1 Wash. 241; see *Reed v. Bank of Commerce*, 8 Wash. 539.

Taking possession: See 1 Remington's Digest, p. 491, § 73; *McClellan v. Gaston*, 18 Wash. 472; *Bancroft-Whitney Co. v. Gowan*, 24 Wash. 66.

In replevin, where the personalty has been mortgaged to plaintiffs by third parties, and afterward, but prior to the maturity of the debt, delivered by the mortgagors to a defendant, it is a failure of proof to prove the existence of the mortgage in support of plaintiff's ownership: *Silsby v. Aldridge*, 1 Wash. 117.

And in replevin, where plaintiff claims as owner under a bill of sale from a third party, and the proof shows that he is merely a mortgagee, he cannot recover: *Kerron v. N. P. etc. Co.*, 1 Wash. 241.

IN AN ACTION FOR DAMAGES FOR CONVERSION of the mortgaged chattels plaintiff can only recover the value of the goods converted: *Brotton v. Langert*, 1

Wash. 227; *Sheehan v. Levy*, 1 Wash. 149.

A complaint in an action for damages by a mortgagee of chattels against a subsequent mortgagee for conversion is insufficient, when it contains no allegation of actual possession by plaintiff at the time of the alleged conversion, nor of his right to possession, nor demand for possession: *Binnian v. Baker*, 6 Wash. 50.

§ 1105. (5871.) Notice, Contents of.

The notice must contain a full description of the property mortgaged, together with time and place of sale, also a statement of the amount due, and must be signed by the mortgagee or his attorney. [L. '75, p. 46, § 19; L. '79, p. 106, § 7; Cd. '81, § 1992; 1 H. C., § 1651.]

Cited in 21 Wash. 475; 26 Wash. 179; 50 Wash. 120, 122.

A notice of foreclosure on a growing crop sufficiently describes the property, when it refers to the mortgage and shows that it is upon a certain quantity of wheat grown upon a certain place, described in the mortgage as so many acres of wheat, and in the notice a certain number of sacks: *Harker v. Woolery*, 10 Wash. 484.

A mortgage on growing crops is authorized: *Tipton v. Martzell*, 21 Wash. 273.

A charge to the jury that the statute requires that three copies of the notice of a

foreclosure sale of chattels be posted in the most public places in the county—the statute simply requiring notice to be posted in three public places—is harmless error when there is no contention at the trial over that matter and the uncontradicted testimony shows they were regularly posted: *Rawson v. Ellsworth*, 13 Wash. 668.

A sale of chattels upon foreclosure of mortgage thereon is invalid unless notice has been served upon one in possession of the chattels claiming as owner thereof: *Id.*

§ 1106. (5872.) Service of Notice, How Made.

Such notice shall be placed in the hands of the sheriff or other proper officer, and shall be personally served in the same manner as is provided by law for the service of a summons: Provided, that if the mortgagor cannot be found in the county where the mortgage is being foreclosed, it shall [not] be necessary to advertise the notice or affidavit in a newspaper; but the general publication directed in the next section shall be sufficient service upon all the parties interested, and such notice shall be sufficient authority for the officer to take such property into his immediate possession. [Cf. L. '75, p. 47, §§ 20, 21; L. '79, p. 106, § 8; Cd. '81, § 1993; 1 H. C., § 1652.]

Cited in 21 Wash. 475; 26 Wash. 179; 50 Wash. 122.

WANT OF NOTICE, EFFECT OF.—Where the holder of a chattel mortgage requests the sheriff to take possession of the mortgaged goods which are surrendered to him by the mortgagor, and he posts notices of sale under the mortgage, but no notice is given as provided for by the above section, his possession is not such a possession as will prevent a levy of the same goods being made on a writ of attachment by a deputy sheriff, nor does such possession avoid the necessity of the actual levy by the sheriff of a writ of attachment placed in his own hands: *Meacham Arms Co. v. Strong*, 3 W. T. 61.

Leave of court is not necessary to foreclose on mortgaged property in the hands

of a third person, and never in the possession of the receiver of an insolvent corporation, owner of the property: See *Kidder v. Beavers*, 33 Wash. 635.

Under this section a sheriff is not guilty of conversion in seizing the mortgaged property under a proper notice and proceedings complying with the statute, although against the protests and objections of the mortgagors, where the mortgagors did not contest the amount due or take any steps to secure a transfer of the foreclosure to the superior court, pursuant to § 1110: *Mack v. Doak*, 50 Wash. 119.

A constable cannot act under this section: *Pickle v. Smalley*, 21 Wash. 473; *Jacobson v. Aberdeen Packing Co.*, 25 Wash. 175.

§ 1107. (5873.) Publication—Sale, How Conducted.

After notice has been served upon the mortgagor, it must be published in the same manner and for the same length of time as required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner. [Cf. L. '75, p. 47, § 22; L. '79, p. 106, § 9; Cd. '81, § 1994; 1 H. C., § 1653.]

§ 1108. (5874.) Purchaser's Title.

The purchaser shall take all interest which the mortgagor had in the said mortgaged property upon which the said mortgage operated. [Cf. L. '75, p. 47, § 23; L. '79, p. 106, § 10; Cd. '81, § 1995; 1 H. C., § 1654.]

Title and rights of purchaser: See 1 Remington's Digest, p. 492, § 78; First Nat. Bank of Seattle v. Woolery, 6 Wash. 215; Lawrence v. Times Printing Co., 22 Wash. 482.

A purchaser, at execution sale, of personal property subject to a chattel mortgage of which he had notice acquires no

title prejudicial to the mortgagee: Hamilton v. Carter, 12 Wash. 510.

A purchaser of chattels subject to a mortgage cannot avail himself, as against the mortgagee, of a mistake of one holding the mortgage as collateral security as to the amount due thereon: Weir v. Rathbun, 12 Wash. 84.

§ 1109. (5875.) Officer's Bill of Sale, Effect of.

The officer conducting the sale shall execute to the purchaser a bill of sale of the property, which bill of sale shall be effectual to carry the whole title and interest purchased, and if any balance of the purchase price remain, it shall be disposed of in the same manner as surplus proceeds of sales are on execution. [Cf. L. '75, p. 47, § 24; L. '79, p. 106, § 11; Cd. '81, § 1996; 1 H. C., § 1665.]

A sale of "franchises" under a foreclosure of a mortgage on a newspaper, its plant, franchises, circulation and goodwill, is not a sufficiently definite description of property to pass any title to any rights which existed under a contract between the mortgagor and the Associated Press for

news service: Lawrence v. Times Printing Co., 22 Wash. 482.

Proceeds and surplus of sale: See 1 Remington's Digest, p. 492, § 79; First Nat. Bank of Seattle v. Woolery, 6 Wash. 215; Hamilton v. Carter, 12 Wash. 510; Hinchman v. Pt. Defiance R. Co., 14 Wash. 349; Dubuque v. Stich, 16 Wash. 641.

§ 1110. (5876.) Foreclosure Contested—Injunction.

The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any person interested in so doing, and the proceedings may be transferred to the superior court, for which purpose an injunction may issue if necessary. [Cf. L. '75, p. 47, § 28; L. '79, p. 106, § 12; Cd. '81, § 1997; 1 H. C., § 1656.]

Cited in 4 Wash. 259; 13 Wash. 257; 33 Wash. 640, 643; 50 Wash. 121, 122.

Defenses to foreclosure: See 1 Remington's Digest, p. 490, § 69; Snively v. Matheson, 12 Wash. 88; Hinchman v. Pt. Defiance R. Co., 14 Wash. 349; Washington Bank of Walla Walla v. Fidelity Abstract etc. Co., 15 Wash. 487; Mahoney v. Crockett, 37 Wash. 252; Kidder v. Beavers, 33 Wash. 635; Hotaling Co. v. Clancy, 21 Wash. 1.

Evidence: See 1 Remington's Digest, p. 491, § 72; Collins v. Denny Clay Co., 41 Wash. 136; Slyfield v. Willard, 43 Wash. 179.

An attaching creditor may, under this section, although his attachment has been

dissolved by general assignment, intervene in the foreclosure of a mortgage upon the property assigned in order to have the mortgage declared invalid as against him: Ephraim v. Kelleher, 4 Wash. 243.

In the case of the foreclosure by a wife of a fraudulent chattel mortgage, given her by her husband, an attaching creditor of the husband is entitled to an injunction to restrain the foreclosure in order to protect his lien: Meacham Arms Co. v. Swarts, 2 W. T. 412; this right is not only accorded as a matter of equity jurisdiction, but is also authorized under this section: Id.

If a prior mortgagee has been enjoined from foreclosing his chattel mortgage, and

pending injunction the goods have been sold under a foreclosure of the junior mortgage, the prior mortgagee may, upon dissolution of the injunction, recover upon the injunction bond the full amount of his claim, if the value of the goods was of that amount: *White v. Brooke*, 11 Wash. 99. And the fact that the obligee on the injunction bond may have an action for conversion will not affect his recovery of damages when he pursues his remedy by an action upon the injunction bond: *Id.*

A complaint in an action by a creditor of a chattel mortgagor, under this section to transfer proceedings for the foreclosure of the mortgage to the superior court, in order to contest the mortgage on the ground that it was fraudulent as to creditors, is demurrable when it does not appear from the complaint that plaintiff was a creditor at the time of the execution of the mortgage: *West Coast Gro. Co. v. Stinson*, 13 Wash. 255.

The fact that a creditor, although secured, takes additional security from his debtor, does not constitute a fraud as against other creditors: *Id.*

One partner possesses the right to execute a chattel mortgage in the firm name for the purpose of securing partnership debts; and this is true, though the notes to be secured were signed by the individual members and not in the firm name: *Id.*

A chattel mortgage which is fair on its face cannot be impeached for fraud, unless the facts relied on to constitute fraud are pleaded, a mere general averment of fraud being insufficient: *Id.*

In order to entitle a creditor to the transfer of proceedings for the foreclosure of a chattel mortgage to the superior court, he must show that a defense exists, either in whole or in part, and that he has such an interest in the subject matter as entitles him to resist the foreclosure or assail the mortgage: *Id.*

In an action by a second mortgagee of chattels to charge the first mortgagee, a banker, with sums received from the mortgagor which should have been applied to

discharge the first mortgage, because (as alleged) proceeds of the mortgaged property, evidence on the part of the defendant is admissible to show that the sums received from the mortgagor were deposits derived in part from other sources than the mortgaged property, all made in one account, against which the mortgagor checked as a depositor: *Presby v. Melgard*, 48 Wash. 689.

A banker, holding a first mortgage on a flock of sheep, their increase, and the clip of wool, upon which there is a second mortgage upon the sheep only, is not required to see that the proceeds of the wool, deposited in the bank by the mortgagor, are applied to discharge the first mortgage, where the mortgagor and second mortgagee had been partners, were both present when the mortgagor made the deposit and checked against the same, paying part of the proceeds to each mortgagee and part to a third person, the second mortgagee making no objection at the time, and where at the time of the deposit, the first mortgagee had sold an interest in, and was only part owner of, the bank: *Id.*

Where a chattel mortgage contained no provision requiring the mortgagors to keep the property insured, and there was no collateral agreement to that effect, a tender of the amount due the mortgagee need not include the expense of insurance procured by him: *Hidden v. German Savings etc. Soc.*, 48 Wash. 384.

A tender of the amount due on a chattel mortgage, with costs, made before sale, discharges the lien of the mortgage, pending foreclosure, rendering a sale thereunder void: *Thomas v. Seattle Brewing & Malt- ing Co.*, 48 Wash. 560.

A tender of the amount due on a chattel mortgage before sale, made by one to whom the mortgagor had sold the property, will be held sufficient where the amount was concededly correct and the jury found upon proper instructions that the rights of the party making the tender were disclosed to the officer or mortgagee: *Id.*

§ 1111. (5877.) Action Before Maturity of Debt, When.

Where the debt is not due for which the mortgage is given, and the mortgagee has reasonable cause to believe that the mortgage property will be destroyed, lost, or removed, he shall have the right to an immediate action in the superior court of the county having jurisdiction where the property is situated, for the recovery of his debt, and the court may make any order it may deem fit, in order to secure said property so as to make the same available for the satisfaction of said debt. [L. '79, p. 106, § 13; Cd. '81, § 1998; 1 H. C., § 1657.]

Cited in 47 Wash. 184, 186.

A loan is sufficiently insecure to warrant the commencement of an action before maturity to foreclose a chattel mortgage upon a leasehold and the furnishings of a

lodging-house, where the mortgagors were behind in their rent and about to be ejected by their landlord: *Slyfield v. Willard*, 43 Wash. 179.

§ 1112. (5878.) Mortgagee may Take Possession, When—Sale.

A mortgage[e] of personal property, where a debt for the security of which the mortgage has been given has become due, or if the debt is not yet due, and the mortgagee has reasonable ground to believe that his debt is insecure, and that by allowing the property longer to remain in the hands of the mortgagor he would be in danger of losing his debt or security, may have the property taken from the possession of the mortgagor, and sold in the manner provided in this chapter. [L. '79, p. 105, § 4; Cd. '81, § 1989; 1 H. C., § 1658.]

See supra, § 1104, notes, manner of foreclosure of chattel mortgage.

Cited in 47 Wash. 184, 186.

REMEDY OF MORTGAGEE WHEN SECURITY THREATENED: See 1 Remington's Digest, p. 491, § 74; Schoonover v. Conbon, 12 Wash. 475; Euphrat v. Morrison, 39 Wash. 311.

Where property covered by a chattel mortgage was left in the possession of the mortgagors and one of them delivered it to a third party, no title passed. While the mortgage was not foreclosed, the mortgagors could have recovered the possession; or if the possession of such third party endangered the security of the mortgagee, they could have the property taken into possession, and held for disposal, as prescribed by the above section: Silsby v. Aldridge, 1 Wash. 117, 119; Kerron v. N. P. Co., 1 Wash. 241.

If possession of the mortgaged goods is delivered to the mortgagee with power to sell at private sale, the mortgagee is, in the absence of fraud, entitled to the undisturbed possession for that purpose, subject to a strict accounting, although the mortgage may not be in the statutory form: Sheehan v. Levy, 1 Wash. 149; see Levy v. Sheehan, 3 Wash. 421; and where the sheriff seizes and disposes of the goods, with knowledge of such fact, the mortgagee, in the absence of allegation of special damage may recover of the sheriff the amount of his debt and interest not exceeding the value of the goods at the time of taking: Sheehan v. Levy, 1 Wash. 149.

If a mortgagee of chattels has taken possession thereof for alleged breach of the condition providing for payment, he is entitled to retain possession as against a subsequent assignment by mortgagor for the benefit of creditors, until it is determined by legal proceedings that the assignee has the superior right thereto: Sanders v. Main, 9 Wash. 46; following Marsh v. Wade, 1 Wash. 538; State v. Superior Court, 7 Wash. 77; State v. Superior Court, 8 Wash. 210.

If a chattel mortgage on a stock of goods provides for payment out of sales of the goods and the mortgagee takes possession, his lien will apply to goods after acquired mingled with the stock, although not in terms covered by the mortgage: Armstrong v. Ford, 10 Wash. 64.

The mortgagee will be presumed to have been in possession under a mortgage reciting that he is given possession, where the testimony is conflicting: Id.

Where the possession of goods is taken under a chattel mortgage the fact that it contains no affidavit of good faith will not affect the mortgagee's right: Reed v. Bank of Commerce, 8 Wash. 539. See Sligh v. Shelton etc. R. Co., 20 Wash. 16.

A power of sale in a chattel mortgage, authorizing the mortgagee to sell at retail, does not authorize a sale in bulk of stock remaining after a partial sale at retail: Richter v. Buchanan, 48 Wash. 32.

A mortgagee in possession of chattels, who was empowered by the mortgage to sell the goods at retail, is guilty of a conversion in selling in bulk; and is liable in damages to the mortgagor for the value of the property over and above the mortgage debt: Id.

Where one chattel mortgage is given to secure three notes to different parties, and the holder of one of them has the entire property sold under the power of sale contained in the mortgage without bringing in the other parties, the title passes to the purchaser, and all the mortgagees will share pro rata in the proceeds: First Nat. Bank v. Woolery, 6 Wash. 215; and the other holders may maintain an action to enforce a pro rata distribution: Id.

If some of the mortgaged goods have been sold for cash and some for credit, under a power to sell for the benefit of the mortgagee, he must be charged with the amount whether received or not: Warren v. Creditors, 3 Wash. 48.

§ 1113. (5879.) Foreclosure of Chattel Mortgages—Application of Chapter Two.

The provisions contained in chapter two of this title, so far as the same shall be applicable, shall govern in actions for the foreclosure of chattel mort-

gages or bills of sale creating liens on personal property. [Cf. L. '69, p. 147, § 572; Cd. '81, § 618; 2 H. C., § 636.]

See supra, § 1104, and notes, manner of foreclosure.

Cited in 1 Wash. 546; 4 Wash. 249; 47 Wash. 163.

Upon an accounting in an action to redeem a mortgage of stock held as security, the burden of proof is upon the mort-

gagee to show the amount of dividends received by it on the stock to be credited on the debt: *Collins v. Denny Clay Co.*, 41 Wash. 136.

§ 1114. (5880.) Remedies of Mortgagee—Decree—Sale—Deficiency.

The mortgagee or holder of the lien may proceed upon his mortgage or lien, [or] if there be a separate obligation in writing to pay the same secured by said mortgage or lien, he may bring suit upon such separate promise. When he proceeds on the mortgage, if there be a specific agreement therein contained for the payment of a certain sum, or there is a separate obligation for the said sum, in addition to a decree of sale of mortgaged property, judgment shall be rendered for the amount due upon said mortgage or other instrument, the payment of which is thereby secured. The decree shall direct the sale of the mortgaged property, and if the proceeds of said sale be insufficient under the execution, the sheriff is authorized to levy upon and sell other property of the mortgage debtor, not exempt from execution, for the sum remaining unsatisfied. [Cf. L. '69, p. 147, § 572; Cd. '81, § 619; 2 H. C., § 637.]

See supra, § 1104, notes, manner of foreclosure.

See infra, § 1119 et seq., deficiency judgments.

Cited in 1 Wash. 546; 12 Wash. 87.

CHATTEL MORTGAGES.—This section and that immediately preceding it provide for the foreclosure of chattel mortgages, and assimilate such foreclosure to that of mortgages on real property: *Byrd v. Forbes*, 3 W. T. 318.

ELECTION OF REMEDY—RESIDUE. The payee may, at his option, recover either a money judgment or proceed to foreclose upon a written instrument constituting not only a mortgage, but also a note and mortgage: *Frank v. Pickle*, 2 W. T. 55. When judgment is not satisfied by a sale of mortgaged premises under a decree of foreclosure, it is the duty of the sheriff to proceed at once to make the residue by levy upon and sale of other property: *Hays v. Miller*, 1 W. T. 143.

A first mortgage lien is not in any way affected by a sale of the mortgaged property under a second mortgage: *Binnian v. Baker*, 6 Wash. 50, 51.

The withholding of an order of sale upon a decree of foreclosure of a chattel mort-

gage for five months does not constitute laches: *Hamilton v. Carter*, 12 Wash. 510.

When a mortgagee takes possession and sells without foreclosing, he is not entitled to recover for a deficiency: *Mitchell, Lewis etc. Co. v. O'Neil*, 16 Wash. 108.

In an action to foreclose a mortgage securing a contract, against a party to the contract and one claiming an interest in the property, a joint personal judgment cannot be entered against both defendants: *Hopkins v. Crane*, 50 Wash. 636.

A decree of foreclosure cannot be collaterally attacked on the ground that property was not a proper subject of chattel mortgage, and of foreclosure sale: *Dubuque v. Stich*, 16 Wash. 641.

In an action to foreclose a mortgage given to secure the plaintiff against loss by breach of a contract, it is not necessary that damages from the breach be ascertained before suit brought, jurisdiction to foreclosure necessarily including the determination of the amount for which foreclosure be awarded: *Hopkins v. Crane*, 50 Wash. 636.

§ 1115. (5881.) Sale of Mortgagor's Interest Under Process—Notice.

The interest of the mortgagor, subject, however, to the lien of the mortgagee, may be sold under any process of law issuing out of any superior or justice of the peace court in this state: Provided, however, that if the party who has said mortgage resides in this state, or has an agent herein, and the same is known to the officer executing such process, he shall serve upon him or his agent personally, or by mailing to him or to his agent, if their post-

office is known, a notification of the intended sale at the time such mortgaged property is seized under said process, or within five days thereafter. Said property shall not be sold within less than thirty days after its seizure, and the officer executing such process must post in three public places, near the place where the said property is to be sold, a notice of the time and place of such sale, at the time he seizes said property under said process. [L. '79, p. 105, § 5; Cd. '81, § 1990; 1 H. C., § 1659.]

Cited in 1 Wash. 547; 12 Wash. 515; 13 Wash. 257.

SALE OF MORTGAGOR'S INTEREST UNDER PROCESS OF LAW.—A mortgagor's interest in goods may be taken in execution, and the provisions of the above section are inconsistent with the idea that after levy by the sheriff, the mortgagee can demand and take possession: *Byrd v. Forbes*, 3 W. T. 318, 324. Mortgaged property in the hands of the mortgagor can be taken possession of by process of attachment, and the property can be taken into actual custody by the sheriff: *Marsh v. Wade*, 1 Wash. 538, 547. Any interest that the mortgagor may have in the mortgaged property in the hands of the mortgagee can also be reached by process of garnishment; that is to say, the mortgagee can be garnished for any interest that may ex-

ist after his mortgage is satisfied, but the possession of the honest mortgagee cannot be disturbed: *Marsh v. Wade*, 1 Wash. 538, 547. An unforeclosed mortgage is a mortgage still, regardless of where the possession lies: *Id.*

NOTICE TO MORTGAGEE.—The provisions of the above section concerning the sheriff's notice to the mortgagee are mandatory, but do not affect the validity of the sale: *Byrd v. Forbes*, 1 W. T. 318, 325. A sheriff is not liable for noncompliance with the above section, where it did not appear that, being well informed of the mortgagee's address, he failed to notify him of a levy upon mortgaged chattels, and where it did not appear that the mortgagee lost his security or suffered damage from the sheriff's acts: *Byrd v. Forbes*, 3 W. T. 318.

CHAPTER II.

FORECLOSURE OF MORTGAGES ON REAL ESTATE.

§ 1116. (5885.) Foreclosure—Venue.

When default is made in the performance of any condition contained in a mortgage, the mortgagee or his assigns may proceed in the superior court of the county where the land, or some part thereof, lies, to foreclose the equity of redemption contained in the mortgage. [L. '54, p. 207, § 408; Cd. '81, § 609; 2 H. C., § 625.]

See § 190, and note, where parties are numerous, proceedings.

See *supra*, § 204, venue of actions.

See notes to §§ 474, 475, attorney's fees.

See *supra*, § 594 et seq., redemption.

See *supra*, § 804, mortgagee cannot maintain ejectment.

See notes to § 812, *supra*, as to leased premises.

See *supra*, § 1086, and notes, assignments for benefit of creditors.

See *supra*, § 1104 et seq., foreclosure of chattel mortgages.

See notes to § 1444, *infra*.

See *infra*, § 1528 et seq., sale in probate.

See §§ 1528-1530, *infra*, mortgages on estates of deceased persons.

See *infra*, § 8750 et seq., provisions as to form and execution of mortgages.

Nature of mortgage in general: See 2 Remington's Digest, pp. 1917, 1918, §§ 1-3; *Spokane County v. Prescott*, 19 Wash. 418; *George v. Butler*, 26 Wash. 456; *Dane v. Daniel*, 23 Wash. 379; *Norfor v. Busby*, 19 Wash. 450; *Fischer v. Woodruff*, 25 Wash. 67; *Reed v. Parker*, 33 Wash. 107.

Our statute relating to mortgages is taken from Indiana, and differs from that of California and New York: *Hays v. Miller*, 1 W. T. 143.

A mortgage of lands in this state simply creates a lien upon it to be enforced by foreclosure proceedings. There is no equity of redemption in the mortgagor because the legal title has not passed from him: *Parker v. Daeres*, 2 W. T. 439; *Parker v. Daeres*, 130 U. S. 43; but see § 585; see notes to § 1104, *supra*.

The mortgagee is entitled to have the premises mortgaged subjected to sale for the satisfaction of the debt and there can

be no proceeding for strict foreclosure: *Stevens v. Ferry* (Wash.), 48 Fed. 7.

A homestead settler on public lands may make a valid mortgage thereof after receiving his certificate of entry, notwithstanding the provision of § 2296 of Rev. Stats. U. S.: *Boggan v. Reid*, 1 Wash. 514.

Machinery built into an industrial plant subsequent to a mortgage on the premises is brought under the mortgage as a part of the realty, although the vendor and purchaser of such machinery treat it under the contract of sale as personalty: *Wade v. Donau Brewing Co.*, 10 Wash. 284.

If a mortgage has been given upon the mortgagor's undivided interest in certain lands, upon subsequent partition of such lands, either by decree or by the voluntary interchange of deeds between the cotenants, the lien of the mortgage attaches to the share assigned the mortgagor in lieu of his undivided interest: *Port v. Parfit*, 4 Wash. 369.

The fact that bonds were executed as of a certain date, and a mortgage to secure their payment given to a trustee for the bondholders, will not give a legal existence to the mortgage until the date of the sale and delivery of the bonds: *Wade v. Donau Brewing Co.*, supra.

A person who has assumed and agreed to pay a mortgage cannot, upon making the payment, be subrogated to the rights of the mortgagee: *Isensee v. Austin*, 15 Wash. 352.

A condition in a policy of fire insurance limiting the right of action to a period of twelve months after date of loss is applicable to the mortgagee as well as to the assured: *Am. etc. Assn. v. Farmers' Ins. Co.*, 11 Wash. 619.

Where one employed to procure a mortgage loan, under an agreement for a certain commission, himself makes the loan and takes the note and mortgage therefor, and retains the stipulated commission under the direction of the mortgagor, he is entitled to a lien on the premises for such sum as if it had actually been paid to the mortgagor: *Watson v. Sawyer*, 12 Wash. 35.

A note and mortgage executed and made payable in another state by bona fide residents of such state is a contract of such state, and is not usurious if valid in such state: *Bank v. Doherty*, 42 Wash. 317.

Debts or liabilities which may be secured, conditions imposed, and parties: See 2 Remington's Digest, p. 1919, §§ 7-12; *Board of Church Erec. Fund etc. v. First Presbyterian Church*, 19 Wash. 455; *Home Sav. & L. Assn. v. Burton*, 20 Wash. 688; *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619; *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122; *Goon Gan v. Richardson*, 16 Wash. 373.

Interest on taxes paid by mortgagee: See *Sloane v. Lucas*, 37 Wash. 348; *Shepard v. Vincent*, 38 Wash. 493.

Property mortgaged—Description, extension to or substitution of other property:

See 2 Remington's Digest, pp. 1926, 1928, §§ 43-48; *National Bank of Commerce v. Lock*, 17 Wash. 528; *Book v. West*, 29 Wash. 70; *Land Mortgage Bank v. Nicholson*, 24 Wash. 258; *Osborne v. Scottish-American Co.*, 22 Wash. 83; *Weber v. Laidler*, 26 Wash. 144; *People's Sav. Bank v. Lewis*, 37 Wash. 344; *Commercial Nat. Bank of Seattle v. Johnson*, 16 Wash. 536; *Yakima Water etc. Co. v. Hathaway*, 18 Wash. 377; *Smith v. Northern Pac. R. Co.*, 22 Wash. 500; *In re Seattle*, 26 Wash. 602.

Estates and interests of parties under mortgages: See 2 Remington's Digest, p. 1928, §§ 49-53; *Hyde v. Heller*, 10 Wash. 586; *Norfor v. Busby*, 19 Wash. 450; *Spokane County v. Prescott*, 19 Wash. 418; *George v. Butler*, 26 Wash. 456; *Dane v. Daniel*, 23 Wash. 379; *Fischer v. Woodruff*, 25 Wash. 67; *Hitchcock v. Nixon*, 16 Wash. 281; *Smith v. Northern Pac. R. Co.*, 22 Wash. 500; *Brummett v. Campbell*, 32 Wash. 358; *Snyder v. Parker*, 19 Wash. 276; *Wiss v. Stewart*, 16 Wash. 376; *Ross v. Howard*, 25 Wash. 1; *Fuhrman v. Power*, 43 Wash. 533; *Shepard v. Vincent*, 38 Wash. 493.

Where a mortgagor deeds the mortgaged property to the mortgagee, who surrendered the notes, canceled the mortgage, took possession of the property, giving back an agreement to reconvey to the mortgagor for a certain sum at any time within two years, leaving it optional with the mortgagor to repurchase the same, the deed is absolute and not a mortgage, as the relation of debtor and creditor ceases to exist; and the agreement to convey is an option that expires at the time fixed, and not a conditional sale, although alluded to as such, and time was not made of its essence: *Neeson v. Smith*, 47 Wash. 386.

Rights and liabilities of parties, as to possession, control, rents and profits, taxes, insurance, improvements, etc.: See 2 Remington's Digest, pp. 1934-1936, §§ 75-81; *State ex rel. Montgomery v. Superior Court*, 21 Wash. 564; *Commercial Nat. Bank of Seattle v. Johnson*, 16 Wash. 536; *Peterson v. Philadelphia Mtg. etc. Co.*, 33 Wash. 464; *Fuhrman v. Power*, 43 Wash. 533; *Krutz v. Gardner*, 25 Wash. 396; *Farrell v. Gustin*, 18 Wash. 239; *Pioneer Sav. & L. Co. v. Providence etc. Ins. Co.*, 17 Wash. 175; *Burrows v. McCalley*, 17 Wash. 269; *Sloane v. Lucas*, 37 Wash. 348.

Actions for possession of property or on indebtedness secured: See 2 Remington's Digest, pp. 1936, 1937, §§ 82-86; *Snyder v. Parker*, 19 Wash. 276; *Sloane v. Lucas*, 37 Wash. 348; *Sawyer v. Vermont Loan etc. Co.*, 41 Wash. 524; *Gravelle v. Canadian & Amer. Mtg. & T. Co.*, 42 Wash. 457; *Krutz v. Gardner*, 18 Wash. 332; *Peterson v. Philadelphia Mtg. etc. Co.*, 33 Wash. 464; *Frye v. Meyer*, 22 Wash. 277; *Frew v. Clark*, 34 Wash. 561; *Hinchman v. Anderson*, 32 Wash. 198.

Assignment of mortgage or debt: See 2 Remington's Digest, pp. 1937, 1938, §§ 87-92; Fidelity Ins. etc. Co. v. Nelson, 30 Wash. 340; Security Sav. Soc. v. Cohalan, 31 Wash. 266; Washington Loan etc. Co. v. Ritz, 37 Wash. 642; Smithson Land Co. v. Brautigam, 16 Wash. 174; Reed v. Parker, 33 Wash. 107; Fisher v. Woodruff, 25 Wash. 67; Conklin v. Buckley, 19 Wash. 262.

— Payment or release of debt—Equities in favor of third persons: See 2 Remington's Digest, p. 1939, §§ 93-99; Washington Loan etc. Co. v. Ritz, 37 Wash. 642; Howard v. Shaw, 10 Wash. 151; Fischer v. Woodruff, 25 Wash. 67; Congregational Church etc. Soc. v. Scandinavian Free Church, 24 Wash. 433; Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572.

Transfer of property mortgaged, or of equity of redemption: See 2 Remington's Digest, pp. 1940-1943, §§ 100-115.

Liability of purchaser or grantee for mortgage debt: See 2 Remington's Digest, p. 1940, §§ 101-107.

As to extent of liability of purchaser who has not assumed mortgage: See George v. Butler, 26 Wash. 456; Ordway v. Downey, 18 Wash. 412; Ver Planck v. Lee, 19 Wash. 492; Hull v. Vinning, 17 Wash. 352; Opie v. Pacific Inv. Co., 26 Wash. 505; Hitchcock v. Nixon, 16 Wash. 281; Chase Nat. Bank v. Hastings, 20 Wash. 433.

Merger and extinguishment of debt: See 2 Remington's Digest, pp. 1941, 1942, §§ 108-112; Hitchcock v. Nixon, 16 Wash. 281; Stewart v. Eaton, 20 Wash. 378; Chase Nat. Bank v. Hastings, 20 Wash. 433; Fitch v. Applegate, 24 Wash. 25; Purdin v. Washington etc. Assn., 41 Wash. 395; Corbet v. Waller, 27 Wash. 242.

The exception of a mortgage from the covenant of warranty in a deed conveying the mortgaged property does not estop the grantee from pleading the statute of limitations as against the holder of the mortgage: Boyer v. Price, 45 Wash. 667.

Revival of mortgage lien: See 2 Remington's Digest, p. 1942, § 113; Nommenson v. Angle, 17 Wash. 394; Damon v. Leque, 17 Wash. 573; Raymond v. Bales, 26 Wash. 493; Hanna v. Kasson, 26 Wash. 568; De Voe v. Rundle, 33 Wash. 604; Woodhurst v. Cramer, 29 Wash. 40.

Payment or performance of condition, release and satisfaction: See 2 Remington's Digest, pp. 1943, 1944, §§ 116-126; Krutz v. Gardner, 25 Wash. 396; Hitchcock v. Nixon, 16 Wash. 281; Peterson v. Johnson, 20 Wash. 497; Washington Loan etc. Co. v. Ritz, 37 Wash. 642; Smythe v. New England Loan etc. Co., 12 Wash. 424; Eastham v. Landon, 17 Wash. 48; Fischer v. Woodruff, 25 Wash. 67; Conklin v. Buckley, 19 Wash. 262; Straw-Ellsworth Mfg. Co. v. Cain, 20 Wash. 351; White v. Krutz, 37 Wash. 34; Hanna v. Reeves, 22 Wash. 6; Clambey v. Corliss, 41 Wash. 327; De Voe v. Rundle, 33 Wash. 604; Wilson v.

Hubbard, 39 Wash. 671; Kelso v. Russell, 33 Wash. 474.

FORECLOSURE: See 2 Remington's Digest, pp. 1945-1971, §§ 127-251.

PRACTICE AND PROCEDURE.—A suit for a decree of foreclosure is a proceeding in rem as well as in personam, and therefore must be brought in the court having local jurisdiction over the premises: Stevens v. Ferry (Wash.), 48 Fed. 7; Wood v. Mastick, 2 W. T. 64; McLeod v. Ellis, 2 Wash. 117, 121; see supra, § 204.

Two mortgages securing the same debt, but covering land in different counties, may properly be foreclosed in either county, as they should be regarded as one instrument: Commercial Nat. Bank of Seattle v. Johnson, 16 Wash. 536.

A trustee named in the mortgage to secure payment of certain notes is the proper party to foreclose the same, whether he has the legal title to any of the notes or not: Thompson v. Huron L. Co., 4 Wash. 600.

Foreclosure after assignment in blank: See Fidelity Ins. etc. Co. v. Nelson, 30 Wash. 340.

Where one has been made a party to an action under the general allegation that he claims some interest in the property, but has not appeared except for the purpose of disclaiming interest in the subject matter, he is not a necessary party to an appeal and need not be served with notice: Watson v. Sawyer, 12 Wash. 35.

Process: See 2 Remington's Digest, p. 1953, §§ 172, 173; Tilton v. O'Shea, 31 Wash. 513; Fuhrman v. Power, 43 Wash. 533; Gravelle v. Canadian etc. Mtg. & T. Co., 42 Wash. 457; Payson v. Jacobs, 38 Wash. 203; Hyde v. Heaton, 43 Wash. 433.

Failure to serve defendants with a copy of complaint does not render foreclosure proceedings void, but at most is only erroneous, and cannot on that ground be attacked collaterally: Munch v. McLaren, 9 Wash. 676.

A mortgagor not served with summons in a suit to foreclose a mortgage may set aside the decree rendered therein although guilty of laches for failure to pay the debt or taxes for a period of five years or exercise acts of ownership over it, though residing in its vicinity and able to pay: McEchern v. Brackett, 8 Wash. 652.

The cause and general nature of a foreclosure proceeding is sufficiently stated in the publication of summons if it specifies with particularity the note sued on and that the action is to foreclose a mortgage securing same: De Corvet v. Dolan, 7 Wash. 365.

Pleading and evidence: See 2 Remington's Digest, pp. 1954, 1956, §§ 174-185; Seattle Trust Co. v. Kerry, 19 Wash. 389; Brown v. Elwell, 17 Wash. 442; Rogers v. Turner, 19 Wash. 399; Kizer v. Caulfield, 17 Wash. 417; De Roberts v. Stiles, 24 Wash. 611; Interstate Sav. & L. Assn. v. Knapp, 20 Wash. 225; Wilson v. Hubbard, 39 Wash.

671; *Gleason v. Hawkins*, 32 Wash. 464; *Biddle Pur. Co. v. Pt. Townsend Steel etc. Co.*, 16 Wash. 681; *Goon Gan v. Richardson*, 16 Wash. 373; *Van Dusen v. Kelleher*, 25 Wash. 315; *Butler v. Carvin*, 33 Wash. 621.

In an action to foreclose a mortgage the allegation that a party, who is made a co-defendant with the mortgagor, has, or claims some interest in, or claim upon, the mortgaged premises, is sufficient without averring the character of the interest: *Dexter Horton & Co. v. Long*, 2 Wash. 435.

In an action to foreclose a mortgage on real estate, a complaint is sufficient which states the title of the cause, name of court, name of county in which the action is brought, names of parties, and also a plain and concise statement of the execution of the promissory note for the amount claimed and of a mortgage to secure same, time of maturity, nonpayment, and that plaintiffs are the owners and holders of the note: *Bethel v. Robinson*, 4 Wash. 446.

An allegation that a codefendant has, or claims to have, some interest in, or claim upon, the mortgaged premises, is sufficient without averring the character of his interest: *Dexter Horton & Co. v. Long*, *supra*.

An allegation in the complaint that the will authorized and directed said executor to administer upon said estate without the order or advice of any court, and to execute all its terms and provisions, held sufficient to infer that the power to execute a note and mortgage was within the powers conferred by the will: *Miller v. Borst*, 11 Wash. 260.

An answer in foreclosure alleging non-delivery by the mortgagor and want of consideration for the execution of the mortgage states good defenses: *Ault v. Blackman*, 8 Wash. 624.

Trial or hearing: See 2 *Remington's Digest*, pp. 1957, 1958, §§ 191-193; *Commercial Nat. Bank of Seattle v. Johnson*, 16 Wash. 536; *Jenkins v. Jenkins University*, 17 Wash. 160; *Land Mort. Bank v. Nicholson*, 24 Wash. 258; *Graham v. Smart*, 42 Wash. 205; *Stubblefield v. McAuliff*, 20 Wash. 442; *Johnson v. Irwin*, 16 Wash. 652; *Kizer v. Caufield*, 17 Wash. 417; *Oates v. Shuey*, 25 Wash. 597; *Coolidge v. Schering*, 32 Wash. 557; *Graham v. Smart*, 42 Wash. 205.

Right to foreclose and defenses: See 2 *Remington's Digest*, pp. 1946-1950, §§ 131-154.

Existence of or resort to other remedy: See *Id.*, p. 1947, § 139; *Nason v. Northwestern Mil. & P. Co.*, 17 Wash. 142; *Hanna v. Kason*, 26 Wash. 568; *Hinchman v. Anderson*, 32 Wash. 198.

A mortgagee, to whom other securities are given in addition to the mortgage, is not compelled to exhaust them before relying upon the mortgage. He may waive the securities and rely solely on the mortgage: *Hersner v. Martin*, 8 Wash. 698.

A mortgage of real estate, executed by husband alone, may be foreclosed where the

instrument declares the maker to be unmarried, and the mortgagee had no knowledge or information at the time of its execution as to whether the mortgagor was married or single: *Schwabacher v. Van Reypen*, 6 Wash. 154.

The defective record of a mortgage is immaterial when the mortgagee at once enters into and remains in possession of the property: *Vincent v. Snoqualmie Mill Co.*, 7 Wash. 566.

Where a deed was executed by a husband and wife as security for a note, and the husband subsequently paid the note in full, but agreed that the deed should be held as security for another note then given by him, the deed was void as security for such note without some act equivalent to legal execution thereof by the wife for such purpose: *Mantle v. Dabney*, 44 Wash. 193.

A claim of title adverse to that of the mortgagor, and acquired prior to his execution of the mortgage, cannot be litigated in a suit for the foreclosure of the mortgage: *California Safe etc. Co. v. Electric Light etc. Co.*, 12 Wash. 138. See *Pennsylvania Mtg. Inv. Co. v. Gilbert*, 13 Wash. 684; *Johnson v. Irwin*, 16 Wash. 652.

An agreement in a note and mortgage securing it, that in case of default in the payment of any installment of interest, insurance premium taxes, or the principal, the mortgagor will pay an increased rate of interest, is in the nature of a penalty, and is unenforceable in foreclosure proceedings: *Krutz v. Robbins*, 12 Wash. 7.

A stipulation in mortgage notes providing for an increased rate of interest after maturity is valid: *Sloane v. Lucas*, 37 Wash. 348.

Setoff and counterclaim: See 2 *Remington's Digest*, p. 1950, § 151; *Peterson v. Johnson*, 20 Wash. 497; *First Nat. Bank of Snohomish v. Parker*, 28 Wash. 234.

In the foreclosure of a purchase money mortgage in which grantor covenanted to own the land in fee simple, but had neither a legal nor equitable title thereto, moneys paid in defending and compromising a suit in ejectment showing a good cause of action involving the title to the said land may be set off by the mortgagor as constructive eviction: *Potwin v. Blasher*, 9 Wash. 460.

The surrender by the mortgagor of the mortgaged premises to the mortgagee, under a power of sale therein, is no defense to an action on the note by an assignee of the note and mortgage, when the mortgagee is without authority to act as agent for the assignee: *Dewing v. Crueger*, 7 Wash. 590; *Gordan v. Decker*, 19 Wash. 188.

Successive foreclosures: See 2 *Remington's Digest*, p. 1947, § 140; *Dane v. Daniel*, 28 Wash. 155; *Sloane v. Lucas*, 37 Wash. 348; *Investment Securities Co. v. Adams*, 37 Wash. 211.

The death of the mortgagee does not suspend the right of action on the mortgage: *Frew v. Clark*, 34 Wash. 561; *Gleason v. Hawkins*, 32 Wash. 464; *Fuhrman v. Power*, 43 Wash. 533.

Limitations and laches: See 2 Remington's Digest, p. 1951, §§ 156, 157; Gleason v. Hawkins, 32 Wash. 464; Fuhrman v. Power, 43 Wash. 533; Mann v. Provident Life & T. Co., 42 Wash. 581; Spokane County v. Prescott, 19 Wash. 418; Krutz v. Gardner, 25 Wash. 396; Hanna v. Kasson, 26 Wash. 568; Frew v. Clark, 34 Wash. 561; Investment Securities Co. v. Adams, 37 Wash. 211.

Necessary party defendants: See 2 Remington's Digest, pp. 1952, 1953, §§ 161-170; Dane v. Daniel, 23 Wash. 379; Dane v. Daniel, 28 Wash. 155; Sloane v. Lucas, 37 Wash. 348; Johnson v. Irwin, 16 Wash. 652; Krutz v. Gardner, 25 Wash. 396; Anrud v. Scandinavian-Am. Bank, 27 Wash. 16; Gleason v. Hawkins, 32 Wash. 464; Sawyer v. Vermont Loan etc. Co., 41 Wash. 524; Bisbee v. Carey, 17 Wash. 224; Oates v. Shuey, 25 Wash. 597; Burrows v. McCalley, 17 Wash. 269; Thompson v. Price, 37 Wash. 394; Denny v. Cole, 22 Wash. 372; State v. Superior Court, 21 Wash. 469.

Minor heirs of a deceased mortgagor of community property are necessary parties defendant to an action to foreclose the mortgage: Schlarb v. Castaing, 50 Wash. 331.

Intervention: See Stewart v. Eaton, 20 Wash. 378.

EVIDENCE: See 2 Remington's Digest, p. 1956; Goon Gan v. Richardson, 16 Wash. 373; Van Dusen v. Kelleher, 25 Wash. 315; Allen v. Swerdfiger, 14 Wash. 461; Corbet v. Waller, 27 Wash. 242.

A certified copy of the record of the mortgage is admissible in evidence, and a sufficient proof of its execution, when the certificate of acknowledgment thereon is regular in form and states its due execution by the mortgagor: Howard v. Gemming, 10 Wash. 30; Gardner v. Port Blakely Mill Co., 8 Wash. 1.

The original mortgage filed for record with the auditor's certificate of filing and recording thereon is competent evidence of the record: Peters v. Gay, 9 Wash. 383.

DEED, ETC., CONSTRUED AS A MORTGAGE: See 2 Remington's Digest, pp. 1920-1922, §§ 14-23; Thorne v. Joy, 15 Wash. 83; Plummer v. Ilse, 41 Wash. 5; Conner v. Clapp, 37 Wash. 299; Snyder v. Parker, 19 Wash. 276; Reynolds v. Reynolds, 42 Wash. 107; Baker v. Sinclair, 22 Wash. 462; Reed v. Parker, 33 Wash. 107; Hos-sack v. Graham, 20 Wash. 184; Dabney v. Smith, 38 Wash. 40; Hesser v. Brown, 40 Wash. 688; Goon Gan v. Richardson, 16 Wash. 373; Ross v. Howard, 31 Wash. 393; Borrow v. Borrow, 34 Wash. 684; Collins v. Denny Clay Co., 41 Wash. 136.

A deed absolute on its face will be treated as a mortgage where such is shown to be the intention of the parties: Miller v. Ausenig, 2 W. T. 22; Wood v. Mastick, 2 W. T. 64.

In a particular case held that a deed absolute on its face could not be construed as a mortgage, although a separate writing

was executed at the same time by the grantee for a reconveyance on certain conditions: Dignan v. Moore, 8 Wash. 312; see Butts v. Robson, 5 Wash. 268.

A bond for a deed is simply security different in form from a sale and mortgage back for security. The object of such instrument, however, is the same, and in equity the parties thereto stand relatively in exactly the same position: St. Paul T. L. Co. v. Bolton, 5 Wash. 763, 766.

If the issue is as to whether a bill of sale absolute upon its face is or is not a mortgage, the fact that it was intended only as a security should be established by more than a fair preponderance of the evidence: Voorhies v. Hennessy, 7 Wash. 243.

A contract, a conditional sale of land upon its face, providing for forfeiture of payment in case of default, cannot be shown by parol to be an equitable mortgage: Pease v. Baxter, 12 Wash. 565.

The fact that a conveyance of property by deed and an agreement for its reconveyance by lease for the same consideration were made upon the same day will not raise a conclusive presumption that the transaction amounts to a mortgage, but the character of the transaction as being one of loan or of sale may be shown by evidence upon the trial: Mears v. Starbach, 12 Wash. 61; Dignan v. Moore, 8 Wash. 312.

When a mortgagor to avoid foreclosure and in satisfaction of debt conveys mortgaged premises to mortgagee by instrument in form a warranty deed, providing therein for redemption within one year on conditions, the instrument will be construed as a deed absolute and not a mortgage: Swarm v. Boggs, 12 Wash. 246.

A conveyance intended as a mortgage to secure an existing debt is not void as to creditors, when the value of the land is not greatly in excess of indebtedness to be secured: Samuel v. Kittenger, 6 Wash. 261.

In an action to reform a deed of a one-half interest in land, claimed by plaintiff to be a mortgage to secure \$100, inadequacy of such sum as a purchase price is not shown where it appears that the whole property was subject to a mortgage for \$1,500, which was at least two-thirds of its value; that previously, but subsequent to the mortgage, the grantor had conveyed a one-half interest in the property by warranty deed, which might throw the whole burden of the mortgage on the half interest in question; and where, after the giving of the deed in question, the other half interest was sold for \$300, there having meantime been an increase in values: Sahlin v. Gregson, 46 Wash. 452.

In an action to quiet title to land, held under a deed claimed by defendant to be a mortgage, findings in favor of the plaintiff are supported by evidence to the effect that defendant sought to secure a loan on the property, for the purchase of which he held a contract then in arrears, that the plaintiffs refused to make the loan, but took an

assignment of the contract for purchase and secured title, paying the defendant the difference between the sums paid out and \$12,000, and gave the defendant an option to purchase the property within two years for \$12,000, interest and taxes, and that defendant made no payments or any claim to the property during the following years of depression, or for fourteen years, except to file his option agreement for record with an affidavit claiming that the transaction was a loan, and that the plaintiffs had paid taxes on the land, which was unoccupied, during all said time, in ignorance of defendant's claim: *Hinchman v. Cook*, 45 Wash. 490.

An absolute deed is not shown, by clear and satisfactory evidence, to be a mortgage, where only the grantor testified to that effect and he was contradicted by three witnesses, part of whom were disinterested, and where the grantor took the precaution to reserve a gravel bed embracing but a small proportion of the land, which would probably not have been excepted had the transaction been a loan: *Sahlin v. Gregson*, 46 Wash. 452.

An absolute deed, executed by one of two joint makers of promissory notes, in consideration of a written release from all liability on the notes and the surrender of an individual note against him, is not shown to have been intended as a mortgage by the grantor, who claimed to be only a surety on the notes, where there is no evidence that he signed the notes as surety, and where the evidence shows that the lands were held by the grantee in trust for the other maker of the note, who assumed all liability thereon, and went into possession of the property, paid the taxes thereon, and redeemed the property by payment of the notes: *Osborne v. Osborne*, 46 Wash. 294.

The complaint in an action against parties in possession to reform an absolute deed as a mortgage need not allege tender of the debt due, where the defendants obtained possession by fraud, and under the terms of the mortgage deed, the plaintiffs were given the right to possession: *Gustin v. Crockett*, 44 Wash. 536.

ALLOWANCE OF ATTORNEY'S FEES: See 2 Remington's Digest, pp. 1969, 1970, §§ 242-246; *Commercial Nat. Bank of Seattle v. Johnson*, 16 Wash. 536; *Vermont Loan & Trust Co. v. Greer*, 19 Wash. 611; *Gordon v. Decker*, 19 Wash. 188; *Dennis v. Moses*, 18 Wash. 537; *Scholey v. De Mattos*, 18 Wash. 504.

Counsel fees will not be allowed in foreclosure, where before answer defendant pays into court principal, interest and costs, although the mortgage authorizes ten per cent attorney's fees found due by the decree: *Lammon v. Austin*, 6 Wash. 199; distinguished in *Watson v. Sawyer*, 12 Wash. 35.

A note and a mortgage securing the same constitute but one transaction, and it is error to allow an attorney's fee in excess of the five per cent stipulated in the mortgage, although the note provides for "such

sum as the court may adjudge reasonable as attorney's fees": *Potwin v. Blasher*, 9 Wash. 460.

In an action to foreclose a mortgage which provided in case settlement is made after suit \$250 should be included as attorney's fees and taxed as costs, the fact that the defendant before judgment paid into court the principal and interest, sheriff's and clerk's costs, which sum plaintiff receipted for, does not entitle defendant to dismissal: *Hoyt v. Smith*, 4 Wash. 640.

In a complaint in foreclosure alleging \$250 to be a reasonable attorney's fee, and the answer denying that any greater sum than \$100 is a reasonable attorney's fee, in the absence of testimony, the finding should be that \$100 is a reasonable fee: *Dexter Horton & Co. v. Long*, 2 Wash. 435.

Upon the mortgagee's electing to declare the whole debt due after default in the payment of interest or installments, there should be allowed an attorney's fee based upon a recovery of the entire debt: *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58.

PRESENTATION TO ADMINISTRATOR, ETC.—The failure to present a claim against a decedent's estate secured by a mortgage on his land within one year after notice to creditors will not bar mortgagee's rights under the mortgage, but will prevent a judgment for deficiency after the mortgaged property is exhausted: *Scammon v. Ward*, 1 Wash. 179; *Reed v. Miller*, 1 Wash. 426.

If a mortgagor dies pending foreclosure suit, it is not necessary, in order to recover costs and attorney's fees, to have presented the claim to the administrator within one year after notice to creditors: *Reed v. Miller*, 1 Wash. 426.

A debt secured by mortgage may be allowed as a claim against an estate irrespective of foreclosure of the mortgage: *Gleason v. Hawkins*, 32 Wash. 464; *Frew v. Clark*, 34 Wash. 561.

RECEIVER OVER: See 2 Remington's Digest, p. 1957, §§ 186-190; *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 81; *Norfor v. Busby*, 19 Wash. 450; *Balfour-Guthrie Ins. Co. v. Geiger*, 20 Wash. 579; *Woodward v. Winehill*, 14 Wash. 394; *Sibson v. Hamilton & Rourke Co.*, 21 Wash. 362.

A receiver may be appointed in insolvency proceedings, at the instance of the insolvent, with power to take possession of the mortgaged property, but he cannot be allowed fees out of the fund or property to the prejudice of the mortgagee, unless he joins in the appointment: *Lammon v. Giles*, 3 W. T. 117.

The fact that a mortgagee in possession of premises is committing waste will not authorize the appointment of a receiver in the absence of proof of the mortgagee's insolvency: *Brundage v. Home etc. Ins. Assn.*, 11 Wash. 277.

Where a mortgagee has secured possession of the mortgaged premises without

fraud, and there is any indebtedness due under the terms of the mortgage, the mortgagee cannot be deprived of its possession by the appointment of a receiver: *Id.*

LIEN AND PRIORITIES: See 2 Remington's Digest, pp. 1929-1934, §§ 54-74.

Priority of liens: See *infra*, § 1132.

Where two notes executed at the same time, but payable at different dates, are secured by mortgage upon real estate, the assignment of the notes to different parties does not give the assignee of the note first maturing a priority in proceeds, but they are entitled to share pro rata therein: *First Nat. Bank v. Andrews*, 7 Wash. 261.

Where the holder of two notes sells one of them and at the same time transfers the mortgage to the purchaser, the purchaser is given a priority in the security; the assignment thereafter of the other note to third parties gives them no greater rights than those held by their assignor: *Miller v. Savings Bank*, *supra*.

Assignments of mortgages are not within the operation of the recording acts of this state, and cannot affect priorities: *Howard v. Shaw*, 10 Wash. 151; *Fischer v. Woodruff*, 25 Wash. 67.

One who loans money to an individual partner, taking a mortgage back on partnership lands of which such partner holds the legal title, has a priority over a receiver of the partnership, if the mortgagee was without notice of partnership equities: *Richmond v. Voorhies*, 10 Wash. 316.

A proceeding in foreclosure which seeks to determine priorities between mortgagees, but which is a sham and a fraud upon the court and a prior mortgagee, is against public policy and will not amount to a judicial determination of the rights of the parties: *Connolly v. Cunningham*, 2 W. T. 242.

A mortgagee who has taken a mortgage upon lands with knowledge that they had been omitted by mistake from a prior mortgage is entitled to priority when the understanding was that the first mortgagee should relinquish his equitable claim upon conditions which were fully performed: *Packard v. Delfel*, 9 Wash. 562.

A subsequent mortgagee cannot impair the security of a prior mortgagee by creating liens upon the mortgaged property, and the payment of costs incurred in the foreclosure of the subsequent mortgage is subject to the complete satisfaction of the prior mortgage out of the mortgaged property: *Howard v. Gemming*, 10 Wash. 1.

Although a promissory note and mortgage securing the same have been diverted by the payee from the purpose designed by the maker when executed, no consideration having passed to him, and the same assigned by the payee before maturity, to a bona fide purchaser for value, such purchaser has priority over maker and subsequent mortgagees who take with notice of the record of the prior mortgage: *Peters v. Gay*, 9 Wash. 383.

The bare recital in a mortgage that it is subject to a prior mortgage will not estop the mortgagee from questioning the consideration or validity of such prior mortgage when the mortgagor is assailing it on the same grounds: *Ault v. Blackman*, 8 Wash. 624. See, also, *Bisbee v. Carey*, 17 Wash. 224; *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572.

Where a lien claimant's rights accrue subsequent to a mortgage foreclosure suit on the premises, and he has actual knowledge of such suit, and does not protect his rights by intervention or otherwise, he is bound by the decree of foreclosure: *Pacific Mfg. Co. v. Brown*, 8 Wash. 347.

In a suit to enforce a materialman's lien with others having co-ordinate rights of lien subject to a certain mortgage, and where one party by stipulation with mortgagee took priority, the one holding the stipulation had his claim deducted from the mortgage, and the mortgagee was subrogated to the rights of the one holding the stipulation: *Potwin v. Denny Hotel Co.*, 9 Wash. 316.

Lien, duration, waiver or loss of: See 2 Remington's Digest, p. 1929, §§ 54, 55; *Smith v. Northern Pac. R. Co.*, 22 Wash. 500; *Mason v. McLean*, 6 Wash. 31; *Commercial Nat. Bank of Seattle v. Johnson*, 16 Wash. 536; *Hanna v. Reeves*, 22 Wash. 6.

Priorities between mortgages, or between mortgages and other claims: See 2 Remington's Digest, p. 1930, §§ 57, 58; *Fischer v. Woodruff*, 25 Wash. 67; *Kelso v. Russell & Co.*, 33 Wash. 474; *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499; *Bellingham Bay Imp. Co. v. Fairhaven etc. R. Co.*, 17 Wash. 371; *Seattle v. Hill*, 14 Wash. 487; *Krutz v. Gardner*, 18 Wash. 332; *Graham v. Smart*, 42 Wash. 205.

The release by a mortgagee of a portion of mortgaged premises sufficient to satisfy the mortgage debt, after notice of the liens of judgment creditors of the mortgagor upon the balance of the mortgaged property, discharges the mortgage as to all the property: *Schaad v. Robinson*, 50 Wash. 283.

An allegation in an answer that a mortgagee had full and actual knowledge of subsequent liens upon part of the mortgaged premises at the time he released other portions of the property from the mortgage is a sufficient allegation of notice operating to release pro tanto the balance of the property: *Id.*

Mortgagees as bona fide purchasers: See 2 Remington's Digest, p. 1931, §§ 59-61; *Dane v. Daniel*, 23 Wash. 379; *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132; *Schmidt v. Olympia Light etc. Co.*, 40 Wash. 131; *Attebery v. O'Neil*, 42 Wash. 487; *Fischer v. Woodruff*, 25 Wash. 67.

Priority of mortgage for purchase money: See 2 Remington's Digest, p. 1922, § 62; *Bisbee v. Carey*, 17 Wash. 224; *Skeel v. Christenson*, 17 Wash. 649.

Priority of record—Notice—Failure to record: See 2 Remington's Digest, pp. 1932,

1933. §§ 64-69; *Goetzinger v. Rosenfeld*, 16 Wash. 392; *Bank v. Doherty*, 42 Wash. 317; *Sengfelder v. Hill*, 21 Wash. 371; *Attebery v. O'Neil*, 42 Wash. 487; *Congregational Church Bldg. Soc. v. Scandinavian Free Church*, 24 Wash. 433; *Coolidge v. Schering*, 32 Wash. 557; *Dawson v. McCarty*, 21 Wash. 314.

Transactions subsequent to mortgage affecting priority: See 2 *Remington's Digest*, pp. 1933, 1934, §§ 70-74; *Hanna v. Kasson*, 26 Wash. 568; *Powell v. Nolan*, 27 Wash. 318; *De Voe v. Rundle*, 33 Wash. 604; *Eastham v. Landon*, 17 Wash. 48; *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 19 Wash. 493.

VALID OR FRAUDULENT.—If a corporation, although heavily indebted, gives a mortgage in order to put itself in better shape for continuing the business, such mortgage will not be treated as that of an insolvent corporation for the purpose of hindering, delaying and defrauding the creditors: *Vincent v. Snoqualmie Mill Co.*, 7 Wash. 566.

A mortgage by an insolvent corporation to a trustee to secure certain notes, providing that the mortgagor should remain in possession and conduct the business as before, paying expenses and applying the surplus to the debt secured, and further providing that renewals and extensions of the note are to be secured; and none construed as payments, is voidable as to creditors as being a device to indefinitely perpetuate the corporate life of an insolvent corporation: *Thompson v. Huron L. Co.*, 4 Wash. 600.

A mortgage executed by one corporation to another is not to be deemed fraudulent solely because of the fact that the same individual is president of both corporations: *Roy & Co. v. Scott, Hartley & Co.*, 11 Wash. 399.

If the authorization of the trustees of a corporation for the giving of a mortgage does not prescribe the condition to be inserted, the fact that provisions were inserted to keep the property insured, and authorizing the mortgagees to take possession and to foreclose in case of attachments, would not render the mortgage void: *Vincent v. Snoqualmie Mill Co.*, supra.

Where all the stockholders acquiesce in the execution of a mortgage upon its property they are estopped from setting up its invalidity: *Roy & Co. v. Scott, Hartley & Co.*, supra.

If a mortgage by a corporation, executed by its officers, was not authorized by the trustees, the corporation will be deemed to have ratified it by receiving the benefits thereof: *Dexter Horton & Co. v. Long*, 2 Wash. 435.

Validity: See 2 *Remington's Digest*, p. 1924, §§ 32, 33; *Friday v. Parkhurst*, 13 Wash. 439; *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 19 Wash. 493.

A mortgage by a party of his alleged interest of land in a syndicate who had

falsely represented that he had paid his proportional interest therein, when in fact he had caused his associates, by his false representations, to pay the whole price, is void and cannot be foreclosed where the legal title is in a trustee for the benefit of the syndicate: *Shroufe v. Griffiths*, 4 Wash. 161.

Knowledge by the mortgagee's attorney at the time of taking the mortgage, that it was given to hinder and defraud the mortgagor's creditors, although the mortgagee himself be ignorant of such purpose, renders the mortgage void as to such creditors: *Wells v. McMahon*, 3 W. T. 532.

A mortgage cannot be avoided on the ground of mental incapacity if a party voluntarily executes it fully comprehending its terms and provisions, and where honest dealing requires its execution, although his mind was somewhat impaired at the time: *Hodgdon v. Crosby*, 1 W. T. 578.

An agreement in a mortgage to pay interest semi-annually at the rate of one and one-half per cent per month, which, if not so paid, is to be added to principal and draw like interest, and for ten per cent attorney's fees upon principal and interest, in case of foreclosure, is valid under the laws of this state: *Reed v. Miller*, 1 Wash. 426. See, also, *Sloane v. Lucas*, 37 Wash. 348.

In the particular case held that the charge of fraud in the procurement of a mortgage was not sustained by the evidence: *Hersner v. Martin*, 8 Wash. 698.

In a suit for foreclosure of a mortgage, plaintiff is entitled to a trial of an issue raised as to whether the title to the premises asserted by a defendant other than the mortgagor was acquired prior or subsequent to the execution of the mortgage: *Penn. Mtg. etc. Co. v. Gilbert*, 13 Wash. 684; *Cal. Safe Dep. etc. Co. v. Cheeney Elec. L. Co.*, 12 Wash. 138, distinguished.

Where one employed to procure a mortgage loan, under an agreement for a certain commission, himself makes the loan and takes a note and mortgage therefor, and retains the stipulated commission under the direction of the mortgagor, he is entitled to a lien on the premises for such sum as if it had actually been paid to the mortgagor: *Watson v. Sawyer*, 12 Wash. 35; affirmed in *Hill v. Sawyer*, 12 Wash. 658.

In the foreclosure of a mortgage to a corporation, the admission of other than record proof as to the change of name of the corporation from that stated in the mortgage to the one under which the action was prosecuted is not prejudicial error, when the record also shows a finding, without an exception to it, that "the plaintiff company was and now is the owner and holder of said mortgage": *U. S. etc. Loan Co. v. Cade*, 15 Wash. 38.

In the foreclosure of a mortgage by a loan and building company the certificate of stock issued by it to defendant, with his assignment of the same to the company, is

admissible in evidence, when reference thereto is made in the note and mortgage: *Id.*

Where a note and mortgage given to a loan and building company provide that in case the maker fails to pay any installment of interest or make any monthly payment on certain stock in the company, which had been issued to him and assigned to the company as further security, for the period of three months after the same shall become due, then the whole sum with interest shall upon the election of the company become due and payable, the default does not become fixed for the purposes of the adjustment of the account between the parties, until the company elects to declare the entire amount due and payable, but until such time the contract continues in force entitling the company to accruing interest and payments upon the certificates of stock assigned to it: *Id.* See further, *Interstate Savings & Loan Assn. v. Knapp*, 20 Wash. 225.

A decree of foreclosure against the executor of an estate is binding on devisees, although not parties to the action: *Hill v. Lowman*, 15 Wash. 503; see *Hyde v. Heller*, 10 Wash. 586.

A finding by the court in a foreclosure proceeding that a mortgage had become due prior to the date of its maturity is warranted, when the mortgage provides that the mortgagee has an option to declare the whole sum due for failure to pay any installment of interest, and there is evidence sufficient to show such election: *Ames v. Bigelow*, 15 Wash. 532.

The fact that bonds were executed as of a certain date, and a mortgage to secure their payment given to a trustee for the bondholders, will not give a legal existence to the mortgage until the date of the sale and delivery of the bonds: *Wade v. Donau Brewing Co.*, 10 Wash. 284.

The fact that the complaint, in an action for the reformation of a mortgage, does not in express terms aver that the mortgage was erroneously executed through "mutual mistake" will not render it insufficient, if it sets up facts from which such a conclusion is inevitable: *Murdoch v. Leonard*, 15 Wash. 142.

In an action to reform and foreclose a mortgage upon premises erroneously described, the mortgagors' ownership of the premises intended to be mortgaged is sufficiently proved prima facie by evidence showing that the defendants were in possession of the property, exercising acts of ownership, renting and receiving rent therefor, insuring same in their own right as owners, and that they offered to convey the property to the mortgagee in consideration of a release of the mortgage and the payment of a small sum of money: *Id.*

One whose title is adverse to and paramount to the mortgagor is not a necessary nor proper party to a foreclosure of the mortgage: *Id.*

In an action to reform and foreclose a mortgage upon premises misdescribed therein, the plaintiff is not entitled to a decree when he has, in consideration of a release of the mortgage, received a deed conveying the premises as erroneously described in the mortgage, and has failed to surrender the deed or to tender a reconveyance of the premises, as misdescribed therein: *Id.*

Where an assignment of a mortgage held by a mortgage company has been executed by one of its vice-presidents, under the seal of the corporation, and it is shown that it had been the custom of this officer for a considerable period of time prior thereto to assign like securities, the corporation is estopped to afterward question his authority in that respect: *Atlantic Trust Co. v. Behrend*, 15 Wash. 467.

If an assignment of a mortgage is sufficient to estop the mortgagee from disputing it, the mortgagor cannot raise any question as to the validity of the assignment in an action of foreclosure instituted by the assignee: *Id.*

In an action to foreclose a mortgage on certain real estate, to which one of the defendants interposes the defense that he has a paramount interest by reason of a judgment lien against a leasehold interest in the land, evidence is admissible to show that the actual interest of the judgment debtor in the lands is less than it is made to appear by the county records: *Book v. Willey*, 8 Wash. 267.

One who executes a mortgage representing himself to be a single man is estopped from denying its validity on the ground of his marriage and the failure of his wife to join therein: *Canadian etc. Trust Co. v. Bloomer*, 14 Wash. 491; *Sadler v. Niesz*, 5 Wash. 182.

An innocent mortgagee of land is not subject to the claim of a wife of the mortgagor, who for more than thirty years had lived apart from him in another state, while he represented himself, and was understood in the locality where he resided, to be a single man: *Canadian etc. Trust Co. v. Bloomer*, supra; *Sadler v. Niesz*, supra.

The written notice contemplated by a provision of a trust deed, that upon default in payment of interest the bonds secured shall, at the election of the trustee, become immediately due upon the giving of such written notice, may be dispensed with and the election made by the bondholders, where the corporation deceived them as to the amount due on a mortgage to the trustee and conspired with the trustee to dispose of the property contrary to the provisions of the deed: *Clay v. Selah Valley Irrigation Co.*, 14 Wash. 543.

The appointment of a receiver on the application of bondholders, upon the foreclosure of a trust deed, is warranted when it is shown that the trustee is insolvent, occupies an adverse position to the bondholders, and has been guilty of fraud: *Id.*

A receiver may be appointed pending foreclosure of a real estate mortgage,

where it appears that the mortgagors had abandoned the property and left for foreign lands and that a receiver is necessary to care for and protect the property and rent the same during the pendency of the action: *Collins v. Gross*, 51 Wash. 516.

That portion of mortgaged premises conveyed at the instance of the mortgagor by a grantee of the mortgaged premises in a deed absolute on its face, but in reality intended as security, to a corporation chargeable with notice of the nature of the title, is to be sold in satisfaction of the prior mortgage before the remaining portion, under the rule requiring sales to be made in inverse order of alienation: *Stalb v. Ainslie*, 14 Wash. 567.

Although an assignment for the benefit of creditors has been made by a mortgagor, it is a matter within the discretion of the court to grant leave to the mortgagee to institute a separate suit for foreclosure: *Penn Mut. Life Ins. Co. v. Fife*, 15 Wash. 605; *Gilbert Hunt Mfg. Co. v. Wheeler*, 15 Wash. 594.

The action of the court in assignment proceedings in granting leave to a mortgagee of the assignor to bring a separate suit for foreclosure cannot be collaterally attacked in the foreclosure proceeding: *Penn Mut. Life Ins. Co. v. Fife*, supra.

Where a mortgagee, who has assigned the principal and coupon notes secured by the mortgage, with a guaranty of their payment, subsequently brings suit for foreclosure upon default in payment of some of the coupon notes, under a provision of the mortgage allowing foreclosure in case of default in payment of any part of principal or interest, the assignee of the notes is a party in interest and a necessary party to the action: *Bacon v. O'Keefe*, 13 Wash. 655.

Defenses to foreclosure: See 2 Remington's Digest, pp. 1948-1950, §§ 143-149; *Frye v. Meyer*, 22 Wash. 277; *Brown v. Elwell*, 17 Wash. 442; *Washington L. & T. Co. v. Ritz*, 37 Wash. 642; *Security Sav. Soc. v. Cohalan*, 31 Wash. 266; *Interstate Sav. & L. Assn. v. Cairns*, 16 Wash. 215; *Eastham v. Landon*, 17 Wash. 48; *Hanna v. Reeves*, 22 Wash. 6; *Perkins v. Bailey*, 38 Wash. 46; *Gordon v. Decker*, 19 Wash. 188; *Friday v. Parkhurst*, 13 Wash. 439.

An answer states a good defense to the foreclosure of a mortgage, where it alleges that the same is paid and satisfied and that the satisfaction was being withheld and the foreclosure is being prosecuted as a fraudulent conspiracy to eliminate defendants' liens against part of the property: *Schaad v. Robinson*, 50 Wash. 283.

§ 1117. (5886.) Remedy Confined to Mortgaged Property, When.

When there is no express agreement in the mortgage, nor any separate instrument given for the payment of the sum secured thereby, the remedy of the mortgagee shall be confined to the property mortgaged. [L. '54, p. 207, § 409; Cd. '81, § 610; 2 H. C., § 626.]

See § 1119, judgment for deficiency.

Cited in 14 Wash. 283.

§ 1118. (5887.) Judgment—Order of Sale—Satisfaction of.

In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt, with interest and costs, at any time before sale, shall satisfy the judgment. [L. '54, p. 207, § 410; Cd. '81, § 611; 2 H. C., § 627.]

Cited in 11 Wash. 616, 687.

Under this section the mortgagor has the right to redeem the property at any time prior to the sale by paying the mortgage debt with interest and costs: *Stevens v. Ferry* (Wash.), 48 Fed. 7, 11.

And unless he avail himself of the right given by law, or the grace extended him by order of court, his right to redeem and his interest in the property is extinguished, and the purchaser's right to a valid deed becomes absolute: *Stevens v. Ferry*, supra. See *Parker v. Daeres*, 2 W. T. 439. But see *videns* § 585, redemption.

JUDGMENT OR DECREE.—Scope and extent of relief—Opening or vacating: See 2 Remington's Digest, pp. 1958, 1959, §§ 194-

199; *Hays v. Miller*, 1 W. T. 143; *Shumway v. Orchard*, 12 Wash. 104; *Fuller & Co. v. Hull*, 19 Wash. 400; *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132; *In re Seattle*, 26 Wash. 602; *Anrud v. Scandinavian-Amer. Bank*, 27 Wash. 16; *Smithson Land Co. v. Brautigam*, 16 Wash. 174; *Dane v. Daniel*, 28 Wash. 155; *Twigg v. James*, 37 Wash. 434.

Conclusiveness, operation and effect of judgment or decree: See 2 Remington's Digest, p. 1960, §§ 200-202; *Rohrer v. Snyder*, 29 Wash. 199; *Twigg v. James*, 37 Wash. 434; *Manhattan T. Co. v. Seattle Coal etc. Co.*, 19 Wash. 493; *McGee v. Wincholt*, 23 Wash. 748; *Clark v. Eltinge*, 38 Wash. 376; *Fuller & Co. v. Hall*, 19 Wash. 400.

§ 1119. (5888.) Judgment for Deficiency, When.

When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court shall direct in the decree of foreclosure [or order of sale] that the balance due on the mortgage, and costs, which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor. [L. '54, p. 208, § 211; Cd. '81, § 612; 2 H. C., § 628.]

See supra, § 469, and notes, modification of judgments.

See supra, § 1117, remedy confined to mortgaged property, when.

Cited in 11 Wash. 110, 616; 12 Wash. 106.

This section was not repealed by Laws 1899, page 85, § 2, since that section was void as not included in the title of the act: *Bradley Engineering etc. Co. v. Muzzy*, 54 Wash. —, decided July 17, 1909.

Laws 1897, page 98, § 1 [Bal. Code, § 5888a], limiting the mortgagee to the mortgaged property, was held void in *Dennis v. Moses*, 18 Wash. 537.

Deficiency and personal liability: See 2 *Remington's Digest*, p. 1966, §§ 226-232; *Rogers v. Turner*, 19 Wash. 399; *State ex rel. Twigg v. Superior Court*, 34 Wash. 643; *Fuller & Co. v. Hull*, 19 Wash. 400; *Harding v. Atlantic Trust Co.*, 26 Wash. 536; *Twigg v. James*, 37 Wash. 434; *Clark v. Eltinge*, 29 Wash. 215.

This section was enacted for the express purpose of making a distinction between the power of the court where there was an express agreement to pay in a separate instrument and when there was no such agreement: *Shumway v. Orchard*, 12 Wash. 104, 106.

Under this section and § 1121 the court is authorized, upon decreeing foreclosure, to also direct the entry of a deficiency judgment, upon which execution may be levied against other property of the mortgagor for any balance due, when there is an express agreement to pay the sum of money secured by the mortgage: *Id.* 104; *contra*, *Hays v. Miller*, 1 W. T. 143.

In foreclosure where there is no answer plaintiff is not entitled to a decree for a deficiency when not prayed for in the complaint: *Bank of California v. Dyer*, 14 Wash. 279, 282.

Where no personal judgment is sought or obtained, but a decree of foreclosure merely, plaintiff's remedy against the debtor is exhausted: *Id.* 283.

In case of foreclosure, no lien can be obtained on property not mentioned in the mortgage until, by sale of the mortgaged premises, a deficiency has been ascertained: *Hays v. Miller*, 1 W. T. 143.

Although the form of a deficiency judgment may be objectionable, yet where it clearly appears therefrom that it was the

intent of the court to have the mortgaged property first sold, and, if the proceeds were insufficient, that execution over should be had for the remainder, the decree cannot be attacked collaterally for the want of form: *Munch v. McLaren*, 9 Wash. 676.

A simple decree for sale of mortgaged premises does not constitute a lien on property outside the mortgage, and cannot be amended *nunc pro tunc* so as to prejudice a prior mortgage or encumbrance on other property of the mortgagor: *Hays v. Miller*, supra.

Judgment of foreclosure without personal service upon mortgagor, when the full amount of indebtedness is not realized from sale of mortgaged property, will not prevent the maintaining of a personal action to recover the balance due: *Howard v. McNaught*, 9 Wash. 355.

Evidence of value of land, in such case, in absence of an allegation of fraud in the sale, is immaterial: *Id.*

Personal judgment against the wife is unwarranted in a foreclosure suit upon a mortgage executed by the husband and wife to secure payment on an overdue note executed by the husband, although the mortgage provided that the mortgagors would pay the note when the same should become due: *Exchange Nat. Bank v. Wolverton*, 11 Wash. 109.

In foreclosure suit on mortgage securing note and interest coupons the plaintiff is not entitled to judgment for the interest note not due, although the note in terms provides that in case of default in interest when due, the principal note and interest coupons shall mature and become payable at once at the option of the holder: *Cloud v. Rivord*, 6 Wash. 555.

Where a foreclosure decree is rendered against a debtor subsequent to his discharge in insolvency, but before the order therefor had been entered, and the debtor failed to ask that plaintiff's recovery in foreclosure be limited to the property mortgaged, the discharge will not prevent a recovery for the deficiency remaining, after the sale of the mortgaged premises: *Leisure v. Kneeland*, 2 Wash. 527.

§ 1120. (5889.) Judgments for Deficiency, Form of.

Judgments over for any deficiency remaining unsatisfied after application of the proceeds of sale of mortgaged property, either real or personal,

shall be similar in all respects to other judgments for the recovery of money, and may be made a lien upon the property of a judgment debtor, as other judgments, and the collections thereof enforced in the same manner. [Cf. L. '54, p. 208, § 411; L. '69, p. 148, § 575; Cd. '81, § 622; 2 H. C., § 629.]

Cited in 11 Wash. 616.

§ 1121. (5890.*) Execution to Enforce Decree.

A decree of foreclosure of mortgage or other lien may be enforced by execution as an ordinary judgment or decree for the payment of money. The execution shall contain a description of the property described in the decree. The sheriff shall indorse upon the execution the time when he receives it, and he shall thereupon forthwith proceed to sell such property, or so much thereof as may be necessary to satisfy the judgment, interest and costs upon giving the notice prescribed in section 582. [L. '99, p. 85, § 1; L. '54, p. 208, § 412; L. '69, p. 146, § 567; Cd. '81, § 613; 2 H. C., § 630.]

For former law repealed hereby, see L. '97, pp. 70-76, which repealed 2 Hill's Code, 511-521.

Section 2 of this act is omitted as not included in the title: See note to § 1119. For § 3, of this act, see § 582, supra.

See supra, § 578, sales on execution.

See supra, § 591, confirmation of sales.

Cited in 11 Wash. 688; 12 Wash. 106; 17 Wash. 622, 643; 18 Wash. 560; 46 Wash. 405.

The provision of Ballinger's Code, § 5890, requiring the sheriff forthwith to levy upon other property, etc., precludes the idea of a return to the court and obtaining judgment for deficiency based thereon. The execution here referred to is the execution which the sheriff already has in his hands: *Shumway v. Orchard*, 12 Wash. 104, 106.

Where by sale of the mortgaged property the judgment is unsatisfied, under the order of sale, it is the duty of the sheriff to proceed at once to make such further levy and sale of the debtor's property subject to execution sufficient to satisfy the judgment: *Hays v. Miller*, 1 W. T. 143.

When the whole amount of the debt secured by the mortgage is due, judgment may be rendered therefor, to have the effect of a lien as in money judgments, differing only in the manner of satisfaction; but according to *Hewitt, C. J.*, this lien cannot attach until the deficiency is ascertained by a sale of the mortgaged property: *Id.*

A sale under a mortgage foreclosure is not void because not made subject to redemption, as provided by statute relating to sales of real estate under execution, nor by reason of nonconformity to the provisions of the statute in other particulars on the part of the sheriff in executing and returning process: *Stevens v. Ferry* (Wash.), 48 Fed. 7, 11.

Upon foreclosure of a mortgage upon land a portion of which had been conveyed away subsequent to the mortgage, it is the duty of the court to direct the remaining portion to be first sold, providing it can be done without impairing the security of the mort-

gage: *Solicitors etc. Co. v. Washington etc. Ry. Co.*, 11 Wash. 684.

Real property can be sold under execution in a foreclosure case only in the county in which it is situated and by the sheriff of that county, under Constitution, Article IV, § 6, providing that process of the superior courts shall extend to all parts of the state, Ballinger's Code, § 5890, providing that decrees of foreclosure shall be enforced by execution, and § 513, supra, providing that the writ shall issue to the sheriff of the county in which the property is situated, and for notice and sale in such county; and an execution sale in one county, of lands situated in two counties foreclosed in one action, is void: *Vietzen v. Otis*, 46 Wash. 402.

SALE.—Statutory provisions, appraisal, time, notice, bids, parcels, etc.: See 2 Remington's Digest, pp. 1961, 1962, §§ 204-210; *Swinburne v. Mills*, 17 Wash. 611; *State ex rel. Purves v. Moyer*, 17 Wash. 643; *Dennis v. Moses*, 18 Wash. 537; *National Bank of Commerce v. Lock*, 17 Wash. 528; *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 19 Wash. 493; *Dalgardno v. Barthrop*, 40 Wash. 191; *Moody v. Northwestern etc. Bank*, 20 Wash. 413.

Opening or vacating judgment or decree: See 2 Remington's Digest, p. 1959, § 198; *Brooks v. Lewis*, 22 Wash. 192; *Terry v. Furth*, 40 Wash. 493; *Land Mtg. Bank v. Nicholson*, 24 Wash. 258.

A decree of foreclosure will not be vacated on the ground of fraud because a certain portion of the land ordered sold had been released by the mortgagee: *State v. Superior Court*, 8 Wash. 591.

A purchaser under a foreclosure sale, who takes possession and leases to another, cannot be compelled to account at the suit of the mortgagor for rents and profits arising

from the use and occupation for the period between sale and redemption: *Hardy v. Herriott*, 11 Wash. 460.

Under § 519, 2 H. C., the purchaser under foreclosure sale is entitled to the possession or rental, where there is a tenant, of the property from the day of sale: *Debenture Corporation v. Warren*, 9 Wash. 312.

If the decree in foreclosure provides that the proceeds shall be divided proportionately between certain parties, the issuance of execution at the instance of one of them and sale thereunder will not bar an appeal therefrom to determine questions of priority: *Miller v. Savings Bank*, 5 Wash. 200.

Plaintiff in foreclosure is the proper party to proceed by writ of assistance where the purchaser at foreclosure sale is entitled to possession during period of redemption, and the mortgagor refuses to surrender: *Debenture Corporation v. Warren*, supra.

Sale—Confirmation of, opening or vacating: See 2 Remington's Digest, p. 1963, §§ 213-216; *Snipes v. Kelleher*, 31 Wash. 386; *State ex rel. Steele v. Northwestern & Pac. Hypotheek Bank*, 18 Wash. 118; *Terry v. Furth*, 40 Wash. 493; *Hyde v. Heaton*, 43 Wash. 433; *Brooks v. Lewis*, 22 Wash. 192.

A mortgage foreclosure sale of land situated in a county other than the one in which the sale was had is not cured by a direction in the decree that the sale be so made, or by confirmation of the sale: *Vietzen v. Otis*, 46 Wash. 402.

Confirmation of sale under decree of foreclosure concludes inquiry as to mere irregularities, provided they are not of such a nature as to oust the court of jurisdiction: *Parker v. Dacres*, 1 Wash. 190.

A sheriff, under Ballinger's Code, § 1609, was not entitled to commissions upon the sale of mortgaged premises under decree of foreclosure if the property is bid in by plaintiff for the mortgaged debt, and no moneys pass through the sheriff's hands: *State v. Prince*, 9 Wash. 107; *Soderberg v. King County*, 15 Wash. 194; *Spinning v. Pierce County*, 20 Wash. 126.

Certificate of sale is color of title: See 2 Remington's Digest, p. 1963, § 214; *Philadelphia Mtg. & T. Co. v. Palmer*, 32 Wash. 455; *Olson v. Howard*, 38 Wash. 15.

Effect of defects or irregularities, and reversal of judgment: See 2 Remington's Digest, p. 1964, §§ 219, 220; *Smithson Land Co. v. Brautigam*, 16 Wash. 174; *Investment Securities Co. v. Adams*, 37 Wash. 211; *Sloane v. Lucas*, 37 Wash. 348; *State ex rel. Manhattan Trust Co. v. Superior Court*, 17 Wash. 380; *Hinchman v. Point Defiance B. Co.*, 17 Wash. 399.

Possession by and conveyance to purchaser: See 2 Remington's Digest, pp. 1964, 1965, §§ 221-225; *State ex rel. Steele v. Northwestern & Pac. Hypotheek Bank*, 18 Wash. 118; *Clark v. Eltinge*, 38 Wash. 376; *McManus v. Morgan*, 38 Wash. 528; *State ex rel. Hartman v. Superior Court*, 21 Wash. 469; *National Bank of Commerce v. Lock*, 17 Wash. 528; *Dennis v. Moses*, 18 Wash. 537.

Right of redemption in general—Waiver of right: See 2 Remington's Digest, pp. 1972, 1973, §§ 252-256; *Dane v. Daniel*, 23 Wash. 379; *State ex rel. Twiss v. Carpenter*, 19 Wash. 378; *Preston-Parton Mill Co. v. Dexter Horton & Co.*, 22 Wash. 236; *Krutz v. Gardner*, 25 Wash. 396; *Geddis v. Packwood*, 30 Wash. 270; *Plummer v. Ilse*, 41 Wash. 5; *Dennis v. Moses*, 18 Wash. 537.

Extension, improvements, taxes, tender and payment into court: See 2 Remington's Digest, pp. 1973, 1974, §§ 258-262; *Mann v. Provident Life etc. Co.*, 42 Wash. 581; *Sloane v. Lucas*, 37 Wash. 348; *Farrell v. Gustin*, 18 Wash. 239; *Shepard v. Vincent*, 38 Wash. 493; *State ex rel. Twiss v. Carpenter*, 19 Wash. 378; *Sawyer v. Vermont Loan etc. Co.*, 41 Wash. 524.

Actions and proceedings on redemption, limitations, etc.: See 2 Remington's Digest, pp. 1974, 1975, §§ 263-268; *Baggott v. Turner*, 21 Wash. 339; *Investment Securities Co. v. Adams*, 37 Wash. 211; *Shepard v. Vincent*, 38 Wash. 493; *Northern Pac. R. Co. v. Ely*, 25 Wash. 384; *Krutz v. Gardner*, 25 Wash. 396; *Catlin v. Murray*, 37 Wash. 164; *Smithson Land Co. v. Brautigam*, 16 Wash. 174; *Sloan v. Lucas*, 37 Wash. 348; *Sawyer v. Vermont Loan etc. Co.*, 41 Wash. 524; *Gravelle v. Canadian etc. Co.*, 42 Wash. 457; *De Roberts v. Stiles*, 24 Wash. 611.

§ 1123. (5891.) Levy upon and Sale of Other Property.

In all actions of foreclosure where there is a decree for the sale of the mortgaged premises or property, and a judgment over for any deficiency remaining unsatisfied after applying the proceeds of the sale of mortgaged property, further levy and sales upon other property of the judgment debtor may be made under the same execution. [Cf. L. '69, p. 148, § 573; L. '73, p. 151, § 571; L. '77, p. 129, § 623; Cd. '81, § 620 in part, last part in following section.]

§ 1124. (5892.) Publication of Notice.

When sales of other property not embraced in the mortgage or decree of sale are made under the execution to satisfy any deficiency remaining due

upon judgment, two weeks' publication of notice of such sale shall be sufficient. Such notice shall be published in a newspaper printed in the county where the property is situated, and if there be no newspaper published therein, then in the most convenient newspaper having a circulation in said county. [Cf. L. '69, p. 148, § 574; Cd. '81, § 621; 2 H. C., § 631.]

§ 1125. (5893.) Concurrent Actions not Maintainable.

The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor shall he prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure. [L. '54, p. 208, § 413; Cd. '81, § 614; 2 H. C., § 632.]

Cited in 29 Wash. 203; 32 Wash. 205; 47 Wash. 163-165.

If a written instrument constitutes both a promissory note and a mortgage, the holder, at his option, may recover a money judgment upon it, or foreclose: *Frank v. Pickle*, 2 W. T. 55. See, also, *Frye v. Meyer*, 22 Wash. 277.

Only a single suit can be maintained at one time to foreclose a mortgage upon land in this state, and collect the debt secured thereby, notwithstanding several distinct tracts included in the mortgage are situated in different counties: *Stevens v. Ferry* (Wash.), 48 Fed. 7. See *Hays v. Miller*, 1 W. T. 143.

This statute, preventing a concurrent action for the recovery of the mortgaged debt, pending foreclosure suit, is in derogation

of the common law, and to be strictly construed, so far as it restricts the remedy; its object was to avoid a multiplicity of suits and save expense and to accomplish in one action what formerly could only be attained by two suits: *Hays v. Miller*, 1 W. T. 143. See *Hinchman v. Anderson*, 32 Wash. 198.

An attachment suit by mortgagee is not ground for a collateral attack on foreclosure: *Rohrer v. Snyder*, 29 Wash. 199.

Foreclosure of security is not a prerequisite to an action in this state upon a note made in Montana, secured on property in California, under the statutes of Montana requiring foreclosure of a mortgage before any resort to the note secured thereby: *Mantle v. Dabney*, 50 Wash. 394.

§ 1126. (5894.) Installments not Due—Proceedings.

Whenever a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest or installment of the principal, and there are other installments not due, if the defendant pay into the court the principal and interest due, with costs, at any time before the final judgment, proceedings thereon shall be stayed, subject to be enforced upon a subsequent default in the payment of any installment of the principal or interest thereafter becoming due. In the final judgment, the court shall direct at what time and upon what default any subsequent execution shall issue. [Cf. L. '54, p. 208, § 414; L. '69, p. 147, § 569; Cd. '81, § 615; 2 H. C., § 633.]

Cited in 29 Wash. 238.

Right to foreclose for default or breach of condition—Waiver of right: See 2 Remington's Digest, p. 1946, §§ 131-138; *George v. Butler*, 26 Wash. 456; *White v. Krutz*, 37 Wash. 34; *Bank v. Doherty*, 29 Wash. 233; *Johnson v. Irwin*, 16 Wash. 652; *Board of Election Fund v. First Presbyterian Church*, 19 Wash. 455; *First Nat. Bank of Snohomish v. Parker*, 28 Wash. 234; *White v. Krutz*, 37 Wash. 34; *Bank v. Doherty*, 29 Wash. 233.

An assignee of a mortgage giving to the mortgagor the option to declare the whole sum due upon default in the payment of interest or principal has the right to exer-

cise the option, although the mortgage omits words of inheritance or of succession: *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58.

A release agreement providing that portions of the mortgaged premises shall be released upon the making of partial payments "prior to maturity," requires that such payments be made before the mortgagee has elected to declare the whole debt due for default in the payment of interest or installments of the principal; and evidence of sales, since the commencement of the action, of portions of the premises sufficient to pay the amount of the debt in arrears, is inadmissible: *Id.*

§ 1127. (5895.) Sale in Parcels—Order.

In such cases, after final judgment, the court shall ascertain whether the property can be sold in parcels, and if it can be done without injury to the interests of the parties, the court shall direct so much only of the premises to be sold as will be sufficient to pay the amount then due on the mortgage, with costs, and the judgment shall remain and be enforced upon any subsequent default, unless the amount due shall be paid before execution of the judgment is perfected. [L. '54, p. 208, § 415; Cd. '81, § 616; 2 H. C., § 634.]

Cited in 11 Wash. 689.

§ 1128. (5896.) Sale of Whole—Application of Proceeds.

If the mortgaged premises cannot be sold in parcels, the court shall order the whole to be sold, and the proceeds of the sale shall be applied first to the payment of the principal due, interest, and costs, and then to the residue secured by the mortgage and not due; and if the residue do not bear interest, a deduction shall be made therefrom by discounting the legal interest; and in all cases where the proceeds of the sale shall be more than sufficient to pay the amount due and costs, the surplus shall be paid to the mortgage debtor, his heirs and assigns. [L. '54, p. 208, § 416; Cd. '81, § 617; 2 H. C., § 635.]

Sale—Disposition of proceeds and surplus: See 2 Remington's Digest, pp. 1967, 1968, §§ 233-235; Goetzinger v. Rosenfeld, 16 Wash. 392; Smythe v. New England Loan etc. Co., 12 Wash. 424; Soderberg v. King County, 15 Wash. 194; Moody v. Northwestern etc. Bank, 20 Wash. 413; Kelso v. Russell, 33 Wash. 474.

Review: See 2 Remington's Digest, p. 1968, §§ 236-241; State ex rel. Twigg v. Superior Court, 34 Wash. 643; Bank v. Doherty, 42 Wash. 317; State ex rel. Manhattan Trust Co. v. Superior Court, 17 Wash. 380; Reed v. Parker, 33 Wash. 107; Deeg v. Ettleson, 38 Wash. 241.

CHAPTER III.**LIENS OF MECHANICS AND MATERIALMEN.****§ 1129. (5900.*) Who may have Lien.**

Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dyke, flume, tunnel, well, fence, machinery, railroad, street-railway, wagon road, aqueduct to create hydraulic power or any other structure or who performs labor in any mine or mining claim or stone quarry, has a lien upon the same for the labor performed or material furnished by each, respectively, whether performed or furnished at the instance of the owner of the property subject to the lien or his agent; and every contractor, subcontractor, architect, builder or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter: Provided, that whenever any railroad company shall contract with any person for the construction of its road, or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics, and materialmen, and persons who supply such contractors with provisions, all just dues to such persons or to any person to whom any part of such work is given, incurred in carrying on

such work, which bond shall be filed by such railroad company in the office of the county auditor in each county in which any part of such work is situated. And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor. [L. '93, p. 32, § 1; L. '05, p. 229, § 1.]

For former laws see: L. '54, pp. 392, 393; L. '60, pp. 286, 287; L. '63, pp. 418-420; L. '73, pp. 441-444; L. '77, p. 219; Cd. '81, §§ 1957-1971; L. '88, p. 131; 1 H. C., §§ 1663-1667.

See *infra*, § 1133, duplicate notice to owners.

See *infra*, § 1134, requisites of claim.

See *infra*, § 1140, foreclosure of claim.

See *infra*, § 1145, subjecting community interests.

Cited in 11 Wash. 311; 13 Wash. 263; 16 Wash. 139; 20 Wash. 410; 21 Wash. 622; 27 Wash. 86, 322, 341; 36 Wash. 339, 536, 537; 42 Wash. 293, 294, 296; 43 Wash. 2; 44 Wash. 386; 45 Wash. 659; 52 Wash. 562.

A mechanic's lien is a creature of the statute and its validity must in all cases be determined by the statute creating it: *Johnston v. Harrington*, 5 Wash. 73, 80.

"Materials," as used in the lien law, does not include "provisions" furnished to a railroad contractor: See *Armour & Co. v. Western Const. Co.*, 36 Wash. 529.

A statute giving a lien to materialmen or laborers, notwithstanding payment to the main contractor, is constitutional as to future transactions: *Spokane etc. L. Co. v. McChesney*, 1 Wash. 609.

Under this section no lien can be established unless it is made to appear that the materials were actually used or delivered on the premises for use in the construction of the building: *Fuller & Co. v. Ryan*, 44 Wash. 385.

Property, estates, and rights, subject to lien: See 2 *Remington's Digest*, pp. 1871-1873, §§ 5-15; *Stetson Post Mill Co. v. Brown*, 21 Wash. 620; *Sly v. Palo Alto Gold Min. Co.*, 28 Wash. 485; *Potvin v. Denny Hotel Co.*, 37 Wash. 323; *Sheehan v. Winehill*, 18 Wash. 447; *Second Nat. Bank of Colfax v. Hatch*, 24 Wash. 421; *Merritt v. Corey*, 22 Wash. 462; *Baker v. Sinclair*, 22 Wash. 462; *Laidlow v. Portland etc. R. Co.*, 42 Wash. 292.

Under our statute a mechanic's lien cannot be maintained upon a building separate from any interest in the land upon which it is situate: *Kellogg v. Littell etc. Mfg. Co.*, 1 Wash. 407; but see *infra*, § 1146. It cannot be enforced against a part of a building: *Wright v. Cowie*, 5 Wash. 341; nor upon personal property not attached to a building so as to become a part thereof: *Vendome Turkish Bath Co. v. Schettler*, 2 Wash. 457; following *Kellogg v. Littell etc. Mfg. Co.*, *supra*.

A mechanic's lien cannot be enforced against an irrigating company, under § 1663, 1 H. C., for construction of its ditches, unless it appeared that the company owned or had an interest in the land through

which the ditch is constructed: *Nelson v. Clerf*, 4 Wash. 405; and it was also held that a laborer could have no lien upon a street railway, unless the person causing the railway to be constructed had some estate in the land over which it was laid: *Front St. etc. Ry. Co. v. Johnson*, 2 Wash. 112; following *Kellogg v. Littell etc. Mfg. Co.*, *supra*; see, also, *Vincent v. Snoqualmie Mill Co.*, 7 Wash. 566.

Laborers' liens may be enforced for the full amount against the output of a shingle mill, notwithstanding it was run successively by two different concerns, without segregating the claims against each, when it appears that the labor contract was a continuing one and the business a joint undertaking: *Howey v. Bingham*, 14 Wash. 450.

Where permanent repairs upon leased premises are permitted and made with the knowledge of the owner of the fee, his interest is subject to a mechanic's lien therefor unless he expressly limited his liability by notifying the lien claimant, and such limitation is not made by merely sending the claimant to the lessee in an endeavor to get the lessee to pay for part of the repairs: *Housekeeper v. Livingstone*, 48 Wash. 209.

Services rendered and materials furnished See 2 *Remington's Digest*, pp. 1873, 1874, §§ 16-20; *Spaulding v. Burke*, 33 Wash. 679; *Childs Lumber & Mfg. Co. v. Page*, 28 Wash. 128.

If materials have been furnished contractors generally for use in several buildings, without intention to supply them for any particular building, the materialman cannot claim a lien therefor: *Eisenbeis v. Wakeman*, 3 Wash. 534; *Whittier v. Puget Sound etc. Co.*, 4 Wash. 666.

One who performs labor upon and about a mill is entitled to the benefit of the lien law: *Vincent v. Snoqualmie Mill Co.*, 7 Wash. 566; and a mechanic's lien may be claimed for the erection of a dwelling-house, although the premises are at the time intended to be claimed as a homestead: *Parsons v. Pearson*, 9 Wash. 48.

Agreement or consent of owner: See 2 *Remington's Digest*, pp. 1874-1876, §§ 21-30; *Bell v. Swalwell Land etc. Co.*, 20 Wash. 602; *Kremer v. Walton*, 16 Wash.

139; *Sheehan v. Winehill*, 18 Wash. 447; *Cattell v. Fergusson*, 3 Wash. 541; *Stetson & Post Mill Co. v. Brown*, 21 Wash. 619; *Northwest Bridge Co. v. Tacoma Shipbuilding Co.*, 36 Wash. 333; *Griffith v. Maxwell*, 20 Wash. 403; *Powell v. Nolan*, 27 Wash. 319; *Seattle Lum. Co. v. Sweeney*, 43 Wash. 1.

Under § 5918, *infra*, giving the husband the management and control of community real property, and providing that it shall be subject to mechanics' liens, etc., the husband is empowered to contract for the erection of buildings on the community lands and subject it to mechanics' liens: *Littell etc. Mfg. Co. v. Miller*, 3 Wash. 480.

The wife is estopped to dispute the validity of a mechanic's lien when she had full knowledge of the erection of a building on her separate property, and was in and around it during erection and assisted in the selection of the colors of paints for it: *Spears v. Lawrence*, 10 Wash. 368.

Where labor is performed in erecting a building upon lands at the instance of a person holding a contract of sale thereon, a mechanic's lien can attach only upon the interest of the contracting party and not against the owner of the legal title: *Iliff v. Forssell*, 7 Wash. 225; *Mentzer v. Peters*, 6 Wash. 540; *St. Paul etc. L. Co. v. Bolton*, 5 Wash. 763.

Liens of mechanics and materialmen for repairs to a building at the instance of a lessee thereof attach only to the leasehold interest and do not bind the owner in the absence of authority to lessee to act as owner's agent: *Miles Co. v. Gordon*, 8 Wash. 442.

If a building has been erected by a lessee under agreement that the lessor would repay the costs thereof by allowing the retention of the rent by the lessee, the interest of the owner as well as the lessee's is subject to liens for work and materials furnished for the building: *Kremer v. Walton*, 11 Wash. 120; see *Miles Co. v. Gordon*, *supra*.

The purchase by the owner of improvements made by a lessee after the forfeiture of the lease and the taking possession by the owner is not such a merger by the leasehold interest into the fee simple title as to make the lien of a materialman against the leasehold a valid one against the fee: *Masow v. Fife*, 10 Wash. 528; and one falsely representing himself as lessee contracting and procuring materials cannot bind the owner in mechanic's lien: *Id.*; and the fact that the owner of the fee stated to the parties furnishing materials that he

would see that the alleged lessee paid therefor, will not subject the property to a lien: *Id.*

The interest of the obligor in a bond for deed is not subject to liens arising from construction of a building on the land at the instance of the obligee: *St. Paul etc. L. Co. v. Bolton*, 5 Wash. 763; and one who signs as surety a contractor's bond securing the owner of a building from the enforcement of any liens cannot himself file and enforce a lien thereon: *Morse v. Mansfield*, 10 Wash. 373; nor can a surety in an indemnifying bond, given by a contractor to protect the owner of a building against liens, enforce a lien thereon, although the owner may at the time be indebted to the contractor: *Spears v. Lawrence*, *supra*. See, also, *Kent Lum. Co. v. Ward*, 37 Wash. 60.

One who guarantees a surety company upon a building contractor's bond against loss by reason of failure to perform the contract cannot claim a mechanic's lien on the building, under a subcontract subsequently entered into with the contractor: *Todd v. Fransvog*, 44 Wash. 520.

Persons entitled in general: See 2 *Remington's Digest*, p. 1876. §§ 31-36; *Huetter v. Redhead*, 31 Wash. 320; *Cochran v. Yoho*, 34 Wash. 238; *Washington Bridge Co. v. The Land & R. Imp. Co.*, 12 Wash. 272; *Sweatt v. Hunt*, 42 Wash. 96; *Windham v. Independent Tel. Co.*, 35 Wash. 166; *Seattle Lumber Co. v. Sweeney*, 43 Wash. 1; *Powell v. Nolan*, 27 Wash. 318.

CONSTITUTIONALITY AND CONSTRUCTION OF MECHANICS' LIEN LAW.—Under the various sections of this chapter materialmen and laborers have a lien for labor done or materials furnished, notwithstanding the fact that the main contractor has been paid by the owner. And such a statute is constitutional as to all transactions occurring after it is passed, for the reason that it does not impair the obligations of existing contracts, but merely declares the effect of future contracts. The owner can escape liability in one way only, and that is posting a notice on the premises according to the requirements of § 1671. 1 *Hill's Code*: *Spokane Mfg. etc. Co. v. McChesney*, 1 Wash. 609. Decisions of another state construing a statute contrary to its plain import will not be followed in construing a similar statute subsequently enacted here, especially where such statute has been adopted in other states, and has been there construed according to its terms, before its adoption here: *Id.*

§ 1130. (5901.*) Land, Subject to.

The lot, tract or parcel of land upon which the improvement is made or the property is situated, subject to the lien created by section 1129, *supra*, or so much thereof as may be necessary to satisfy the lien and the judgment thereon, to be determined by the court on rendering judgment in a fore-

closure of the lien, is also subject to the lien to the extent of the interest of the person or company, who in his or its own behalf, or who, through any of the persons designated in section 1129 to be agent of the owner or owners caused the performance of the labor, or the construction, alteration or repair of the property. [L. '93, p. 33, § 2; L. '05, p. 230, § 2.]

Cited in 21 Wash. 622; 22 Wash. 465; 36 Wash. 336; 45 Wash. 659.

§ 1131. (5902.) Improvements at Request of Owner.

Any person who, at the request of the owner of any real property, his agent, contractor or subcontractor, clears, grades, fills in or otherwise improves the same, or any street or road in front of, or adjoining the same, has a lien upon such real property for the labor performed, or the materials furnished for such purposes. [L. '93, p. 33, § 3.]

See *infra*, § 1149, laborer's liens.

Cited in 23 Wash. 570; 26 Wash. 15; 29 Wash. 527; 51 Wash. 296.

See *Stringham v. Davis*, 23 Wash. 568; *Young v. Borzone*, 26 Wash. 4.

In an action to foreclose a lien for labor in clearing land, a counterclaim for damages by reason of failure to complete the

work in time for the crop of 1906 is demurrable, when the contract did not require the work to be done within that time: *Owen v. Casey*, 48 Wash. 673.

A lien for labor in clearing land attaches against a leasehold estate: *Id.*

§ 1132. (5903.) Priority Over Subsequent Encumbrances.

The liens created by this chapter are preferred to any lien, mortgage or other encumbrance which may attach subsequently to the time of the commencement of the performance of the labor, or the furnishing of the materials for which the right of lien is given by this chapter, and are also preferred to any lien, mortgage or other encumbrance which may have attached previously to that time, and which was not filed or recorded so as to create constructive notice of the same prior to that time, and of which the lien claimant had no notice. [L. '93, p. 33, § 4.]

Cited in 17 Wash. 146; 20 Wash. 606; 22 Wash. 466; 27 Wash. 338; 51 Wash. 34.

A mechanic's lien will not date, for the purpose of priority over a mortgage and other liens, from the time claimant began preparation of materials in another state: *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122.

A materialman can claim a lien under the statute only from the time he commenced to furnish materials for the building, and if such time is subsequent to the

creation of a mortgage lien, of which he had notice, his lien is subject thereto: *Id.*

Priorities: See 2 *Remington's Digest*, pp. 1887, 1888, §§ 69-72; *Home Savings & L. Assn. v. Burton*, 20 Wash. 688; *Nason v. Northwestern Mill & P. Co.*, 17 Wash. 142; *Stetson & Post Mill Co. v. Brown*, 21 Wash. 619; *Potvin v. Denny Hotel Co.*, 9 Wash. 316; *Fitch v. Applegate*, 24 Wash. 25; *Bell v. Swalwell Land etc. Co.*, 20 Wash. 602; *Baker v. Sinclair*, 22 Wash. 462; *Powell v. Nolan*, 27 Wash. 318.

§ 1133. Prerequisites—Duplicate Statements to be Furnished.

Every person furnishing material or supplies to be used in the construction, alteration or repair of any mining claim, building, wharf, steamer, vessel, boat, bridge, ditch, dyke, flume, tunnel, well, fence, machinery, railroad, street-railway, wagon road, aqueduct to create hydraulic power, or any other structure or mining claim or stone quarry, shall, at the time such material or supplies are delivered to any person or contractor, deliver or mail to the owner, or reputed owner, of the property, on, upon or about which said materials or supplies are to be used, a duplicate statement of all such materials or supplies delivered to any contractor or person to whom any such materials or supplies have been sold or delivered, and no materialmen's lien shall

be filed or enforced unless the provisions of this act have been complied with.
[L. '09, p. 71, § 1.]

Laws 1909, Ex. Ses., p. 71, § 5, repealed this section, after enacting a new law on this subject. The governor, however, vetoed the act, except the emergency and repealing clauses, which he undertook to approve. It is believed that the repealing section, which is not included in the title, is dependent upon the vetoed provisions. This section is therefore retained.

§ 1134. (5904.) Requisites of Claim, Form, Time of Filing.

No lien created by this chapter shall exist, and no action to enforce the same shall be maintained, unless within ninety days from the date of the cessation of the performance of such labor or of the furnishing of such materials, a claim for such lien shall be filed for record as hereinafter provided, in the office of the county auditor of the county in which the property, or some part thereof to be affected thereby, is situated. Such claim shall state, as nearly as may be, the time of the commencement and cessation of performing the labor, or furnishing the material, the name of the person who performed the labor, or furnished the material, the name of the person by whom the laborer was employed (if known) or to whom the material was furnished, a description of the property to be charged with the lien sufficient for identification, the name of the owner, or reputed owner if known, and if not known, that fact shall be mentioned, the amount for which the lien is claimed, and shall be signed by the claimant, or by some person in his behalf, and be verified by the oath of the claimant, or some person in his behalf, to the effect that the affiant believes the claim to be just; in case the claim shall have been assigned the name of the assignee shall be stated; and such claim of lien may be amended in case of action brought to foreclose the same, by order of the court, as pleadings may be, in so far as the interests of third parties shall not be affected by such amendment. A claim for lien substantially in the following form shall be sufficient:—

—, claimant, vs. —

Notice is hereby given that on the — day (date of commencement of performing labor or furnishing material) — at the request of — commenced to perform labor (or to furnish material to be used) upon — (here describe property subject to the lien) of which property the owner, or reputed owner, is — (or if the owner or reputed owner is not known, insert the word “unknown”), the performance of which labor (or the furnishing of which material) ceased on the — day of —; that said labor performed (or material furnished) was of the value of — dollars, for which labor (or material) the undersigned claims a lien upon the property herein described for the sum of — dollars. (In case the claim has been assigned, add the words “and — is assignee of said claim,” or claims, if several are united.)

—, Claimant.

State of Washington, County of —, ss.

—, being sworn, says: I am the claimant (or attorney of the claimant) above named; I have heard the foregoing claim read and know the contents thereof, and believe the same to be just.

Subscribed and sworn to before me this — day of —

Any number of claimants may join in the same claim for the purpose of filing the same and enforcing their liens, but in such case the amount claimed by each original lienor, respectively, shall be stated: Provided, it shall not be necessary to insert in the notice of claim of lien provided for by this chapter any itemized statement or bill of particulars of such claim. [L. '93, p. 34, § 5.]

See *supra*, § 1129, notes, who may have lien.

See *infra*, § 1140, notes, foreclosure of lien.

Cited in 13 Wash. 263; 22 Wash. 144, 188; 26 Wash. 22; 27 Wash. 341; 33 Wash. 694; 40 Wash. 201; 42 Wash. 295, 298; 48 Wash. 271; 52 Wash. 512.

NOTICE OR CLAIM OF LIEN.—A number of claimants may join, under this section, in the same claim of lien for labor and materials furnished for the same structure: *Hopkins v. Jamieson-Dixon Mill Co.*, 11 Wash. 308, 316.

As to name of claimant, see *Littell v. Saulsberry*, 40 Wash. 550.

WHEN TO BE FILED: See 2 Remington's Digest, p. 1879, § 43; *Seattle Lum. Co. v. Sweeney*, 33 Wash. 691; *Ellsworth v. Layton*, 37 Wash. 340. If labor and material have been put upon a structure by the contractor subsequent to the furnishing of a certificate of final completion, the time within which a claim of lien should be filed will begin to run from the date of performing such labor and furnishing such material, and not from the date of final certificate: *Wash. Bridge Co. v. Improvement Co.*, 12 Wash. 272.

Where a materialman refuses to furnish materials for a building under his contract with the contractor, but makes a new contract with another party for furnishing materials for the completion of the building, his claim of lien for material under the old contract must be filed within ninety days after ceasing to furnish materials thereunder: *Pacific Mfg. Co. v. Brown*, 8 Wash. 347.

If a notice of lien is filed before last of materials are furnished, claimant may file a second notice after delivery thereof: *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122.

Defective lien notice will be considered as amended on appeal, the same as a defective pleading: See *Olson v. Snake River Valley R. Co.*, 22 Wash. 139; *Greene v. Finnell*, 22 Wash. 186.

In an action to foreclose a mechanic's lien, leave to amend a complaint which set forth an indefinite notice of lien does not authorize the filing of an amended notice of lien, under this section, and a notice filed without leave is properly treated as an original notice, and is insufficient if not filed in time: *Brown v. Trimble*, 48 Wash. 270.

STATEMENT OF OWNER'S NAME—AGENCY: See 2 Remington's Digest, p. 1880, § 47; *Id.*, 1883, §§ 53, 54; *Seattle Lum. Co. v. Sweeney*, 43 Wash. 1; *Kremer v. Walton*, 16 Wash. 139; *Northwest*

Bridge Co. v. Tacoma Shipbuilding Co., 36 Wash. 333. A claim of lien which alleges the name of the owner and reputed owner of the premises at the time of the filing of the notice is a sufficient compliance with § 1667, 1 Hill's Code: *Collins v. Snoke*, 9 Wash. 566; see *Warren v. Quade*, 3 Wash. 750.

A claim of lien stating the real owner has but an equitable interest in the premises, and mistakenly attributing the legal ownership to another, does not thereby invalidate the lien: *McHugh v. Slack*, 11 Wash. 370.

A notice of the lien alleging "the name of the owner and reputed owner of such premises is and at all times herein was Jamieson-Dixon Mill Co., and that one John Smith is the owner of the ground on which said plant is located," and setting forth a leasehold interest of said mill company, is sufficient: *Hopkins v. Jamieson-Dixon Mill Co.*, 11 Wash. 308.

An allegation in the notice is sufficient when it states "that the name of the person at whose request claimants performed labor and furnished materials was John McMaster, and he was at the time thereof the foreman or superintendent of said Jamieson-Dixon Mill Co., or person having charge of said work": *Id.*

Under this section a claim of lien stating that "at the special instance and request of the Jamieson-Dixon Mill Co., acting therein by Andrew Jamieson, its president, it furnished and delivered to said Jamieson-Dixon Mill Co." certain merchandise, sufficiently names the person by whom it was employed and to whom it furnished materials: *Id.*

The contractual relation between owner and agent is sufficiently alleged in a lien notice by the recital that a certain person, as agent of the owner named, contracted for the materials for which lien is claimed: *Fairhaven Land Co. v. Jordan*, 5 Wash. 729; distinguishing *Warren v. Quade*, 3 Wash. 750.

Under § 1667, 1 Hill's Code, requiring the notice of claim of lien to contain "a statement of his (claimant's) demand," etc., a notice is defective which shows that the materials, etc., were furnished to a firm named in the notice, and not to or for the owner directly, without showing a relation between the firm and owner which would bind the owner under the lien law: *Warren v. Quade*, 3 Wash. 750.

Where property was leased to a partnership, which assigned the lease to a corporation of the same name formed for the purpose, a subcontractor claiming a mechanic's lien against the leasehold is not excused from making the corporation a party by reason of the fact that there was no apparent change in the management or possession where the corporation had taken possession more than a year before the work was done, was in possession at the time, made the original contract, and there was no concealment or fraud: *Rees v. Wilson*, 50 Wash. 339.

A claim of lien and notice in a particular case held sufficient as establishing relations of principal and agent between owner and contractor: *Collins v. Snoke*, 9 Wash. 566; *Warren v. Quade*, supra.

A claim of lien which states that the claimant was employed by two persons, as contractors on the building, when in fact one was but a subcontractor, will not invalidate the lien, especially when both had informed the claimant that they were contractors on the building: *McHugh v. Slack*, supra.

A lien notice will be construed as a whole, and when it states that certain persons were the contractors for the erection of a building for the owner of certain premises, and that materials had been furnished to said contractors for such purpose, it is sufficient: *Saulter v. McDonald*, 12 Wash. 27.

STATEMENT AS TO TERMS AND CONDITIONS OF CONTRACT: See 2 Remington's Digest, p. 1883, §§ 55, 56; *Greene v. Finnell*, 22 Wash. 186; *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691.

Under the lien act of 1893 the notice of claim does not require the incorporation of the terms of the contract; and the fact that other employees of the mechanic worked upon the materials furnished will not defeat his claim of lien: *Hopkins v. Jamieson-Dixon Mill Co.*, supra; hence the adjudications on this point as found below under the old law are not applicable to the present statute.

Under § 1961, Code 1881, providing for contents of notice of lien, a notice is defective which states that the work was performed and materials furnished under a subcontract, but omits a statement of the terms and conditions of the contract: *Gates v. Brown*, 1 Wash. 470.

A lien notice which makes reference to a bill of items setting forth in detail all the materials furnished under the contract, together with the reasonable value thereof, contains a sufficient statement of the terms of the contract: *Washington R. P. Co. v. Johnson*, 10 Wash. 445. See *Mras v. Duff*, 11 Wash. 36.

A contractual relation is sufficiently alleged by stating, after naming owner, and that she caused a building to be erected, that certain persons named are the contractors for its construction: *Sautter v.*

McDonald, 12 Wash. 27; *Collins v. Snoke*, 9 Wash. 566.

The fact that the contract was made with the owner instead of the contractor will not excuse a lien claimant from fully stating the terms and conditions of the contract in the lien notice: *Savings L. & B. Co. v. Jones*, 9 Wash. 435.

A claim of lien sufficiently sets forth the terms and conditions of the contract under which materials were furnished when it states that certain described materials were delivered to the owner of the premises upon which the lien was claimed, upon his promise to pay a certain price therefor as soon as the materials should be delivered, and the failure of the claimant to deliver within a specified time is matter of defense, not affecting the contract set up by the claimant, until established by defendant: *Washington Mill Co. v. Craig*, 7 Wash. 556.

The terms and conditions of the contract set forth in a claim of lien should include a sufficient description of the materials furnished or work done to enable the owner to intelligently determine as to the bona fides of such contract and the reasonableness thereof (affirming *Eisenbeis v. Wakeman*, 3 Wash. 534): *Warren v. Quade*, 3 Wash. 750; affirmed in *Tacoma L. & M. Co. v. Wilson*, 3 Wash. 786.

A lien claim is defective in which the only statement of the terms and conditions of the contract is that the claimant agreed to furnish the contractors certain windows, doors, etc., for inside finish, and that said material was to be furnished at the time and in the manner requested by said contractor: *Tacoma L. & Mfg. Co. v. Wolff*, 5 Wash. 264; distinguished in *Bolster v. Stocks*, 13 Wash. 460, 464.

A lien notice held invalid on the ground that it contained no sufficient statement of the terms and conditions of the contract: *Savings L. & B. Co. v. Jones*, 9 Wash. 435; and a notice claiming both for labor and material without describing quality or segregating the two is defective: *Id.*

A lien notice of subcontractor held sufficient in the particular case in the absence of a showing that it was made fraudulently or improvidently: *Spears v. Lawrence*, 10 Wash. 368; and unnecessary to set out separate amounts for material and labor under the terms of a contract when: *Id.*

The fact that the law implies an agreement to pay upon delivery does not render a statement of such legal rule essential in a lien notice as a term or condition required to be recited: *Fairhaven Land Co. v. Jordan*, 5 Wash. 729.

Statement of amount due, credits and material—Inclusion of nonlienable materials: See 2 Remington's Digest, pp. 1885, 1886, §§ 58-64; *Powell v. Nolan*, 27 Wash. 318; *Robinson v. Brooks*, 31 Wash. 60. A lien notice is sufficient as indicating the character of the material furnished reciting: "Bought of the Fairhaven Land Co.,

manufacturer and dealer in rough and dressed lumber, sash, doors, shingles and blinds," "1890, Aug. 14, to mdse., \$93.90": *Fairhaven Land Co. v. Jordan*, supra.

If the lien claim shows either in the notice or exhibit the quantity of materials and when furnished, and between what dates used in construction, it is a sufficient statement of when claimant ceased to furnish materials for the building: *Johnston v. Harrington*, 5 Wash. 73.

The inclusion in a claim of lien a charge for a door which was not furnished by the claimant will not vitiate his lien where no fraud was intended thereby: *Peterman v. Milwaukee Brewing Co.*, 11 Wash. 199.

A notice of lien which fails to state the kinds of materials furnished, or the character or number of buildings in which the materials were used, is insufficient: *Tacoma L. & Mfg. Co. v. Kennedy*, 4 Wash. 305; *Warren v. Quade*, 3 Wash. 750.

If an exhibit or itemized statement, made a part of a lien notice, contains a statement of the amount due after deducting all just credits and offsets, it is a sufficient compliance with the statute: *Johnston v. Harrington*, 5 Wash. 73.

An expression in a notice of lien containing a statement of the demand in the words "after deducting all just credits and effects there is due," is a sufficient compliance with the statute: *Merchant v. Humeston*, 2 W. T. 433.

A claim of lien for a balance of account upon materials furnished is insufficient: *Fairhaven Land Co. v. Jordan*, supra.

DESCRIPTION OF PROPERTY: See 2 Remington's Digest, p. 1879, § 46; *Griffith v. Maxwell*, 20 Wash. 403. A claim of lien is sufficient if it fairly shows that the materials were furnished to be used in the building or structure designated: *Johnston v. Harrington*, supra.

Under § 1667, 1 Hill's Code, requiring a claim of lien to contain a description of the property, a notice claiming a lien on certain lots for labor is insufficient if it fails to allege that the building on which the work was done was situated on said lot: *Warren v. Quade*, supra.

It is not necessary for the notice to name a particular building where a number of buildings are constructed upon contiguous lots under one contract, the materials being used in all, indiscriminately, and there being no intervening rights of third parties: *Wheeler v. Ralph*, 4 Wash. 617.

It sufficiently appears from a lien notice that the materials were furnished to be used in a certain building when the preamble alleges that the subcontractor furnished materials actually used therein and a subsequent portion of the notice alleges that the contract was for materials for the building: *Fairhaven Land Co. v. Jordan*, supra.

Where a mistake is made in claiming materials used in a building jointly con-

structed by different parties, the mistake may be rectified by remitting the excessive claim: *Whittier v. Stetson etc. Mill Co.*, 6 Wash. 190.

A lien claim describing the property as "one three-story frame building, situated on a two-acre tract, in section 6, township 20, range N. 3 E., in school district 13, and bounded as follows: Beginning at the northeast corner of the southeast $\frac{1}{4}$ of Willamette meridian; running then W. 20 rods; then S. 16 rods, then E. 20 rods, then N. 16 rods to place of beginning," is insufficient: *Young v. Howell*, 5 Wash. 239; *Warren v. Quade*, 3 Wash. 750; see, also *Mt. Tacoma Mfg. Co. v. Cultum*, 5 Wash. 294.

A lien notice describing the property as "all of lot five in block 9 . . . except the west 20 feet of said lot; and that said building is known as the Brodek-Schlessinger building, and is on the N. W. corner of Third and Washington Sts., in said City," is insufficient: *Whittier v. Stetson etc. Mill Co.*, supra.

A notice describing the land as "being 70 feet on Pike St., and on the southerly line thereof, by 75 feet front on Fourth St., and on the westerly line thereof, excepting a space of 22 feet more or less wide on Pike St. by about 75 feet deep," is so indefinite and uncertain as to the tract excepted that a decree of foreclosure cannot be based thereon: *Kellogg v. Littell etc. Mfg. Co.*, 1 Wash. 407.

Where the claim of lien is upon the whole of a lot sixty feet wide, and the proof showed that it was only on a part of it thirty-six feet wide and nearer the center than either side of the lot, it is not sufficiently definite and certain to sustain a judgment, even though the judgment adds the name of the building: *Cowie v. Ahrenstadt*, 1 Wash. 416. A description in a lien notice and foreclosure must be in substance so complete and certain that an officer charged with a sale of the property would not be in doubt as to what he is called upon to sell: *Id.*

A notice of lien which describes the building as one of seven distinct buildings, situated on two certain lots, and sets forth that the demand is for one-seventh of the aggregate of labor done and materials furnished in the erection of the seven buildings, is void for uncertainty: *Merchant v. Humeston*, 2 W. T. 434.

A notice of lien claimed "upon that certain building or structure now upon those certain lots and parcel of land (description), that S. is the name of the owner of said premises and caused said building or structure to be built and erected," is sufficient: *Collins v. Snoke*, 9 Wash. 566.

A lien notice which states that a lien is claimed "upon that certain wooden frame building situated upon the S. E. corner of North Tenth and J. Sts., upon lot 12 in block 4016, city of Tacoma," will not sus-

tain an action to foreclose a lien for materials used in construction of a dwelling-house on lots 1 and 2 in block 3919: *Mt. Tacoma Mfg. Co. v. Cultum*, 5 Wash. 294.

A claim of lien describing certain property in the city of Everett, although somewhat indefinite, held sufficient for purposes of identification: *McHugh v. Slack*, 11 Wash. 370.

Under this section, a lien notice and complaint to foreclose the same can be amended to correct an erroneous description of the property, after answer by the defendant disclosing the error in the notice: *Malfa v. Crisp*, 52 Wash. 509.

VERIFICATION: See 2 Remington's Digest, p. 1886, §§ 61-65. If the body of a lien notice shows that a certain amount is due after deducting all just credits and offsets, a verification that "said statement is true, as he verily believes," is sufficient: *Fairhaven Land Co. v. Jordan*, supra. See, also, *Cornelius v. Washington Steam Laundry*, 52 Wash. 272.

Verification of claim of lien reciting that claimant "knows the contents thereof, that said claim is just and correct," is sufficient: *Johnston v. Harrington*, supra.

A verification of a claim of lien to the effect that the affiant believes the same to be true is equivalent to alleging that he believes it to be just: *Sautter v. McDonald*, 12 Wash. 27; and the employment of the term "lien," instead of "claim of lien" will not render the verification insufficient: *Id.*

Under § 1667, 1 Hill's Code, an attorney verifying a lien notice for a foreign corporation need not be specially authorized by appointment and appointment filed with secretary of state: *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122.

The omission of the notarial seal to the jurat in lien notice renders the lien notice invalid, and it cannot be cured by proof that the notice had in fact been sworn to: *Stetson etc. Mill Co. v. McDonald*, 5 Wash. 496; such notice is not within the exception provided by § 8299, infra: *Gates v. Brown*, 1 Wash. 470; *Sullivan v. Treen*, 13 Wash. 261, 263. See *Griffith v. Maxwell*, 20 Wash. 403, as to facts implying that notary's seal was on original notice of lien.

Mechanic's lien notices claiming separate liens upon each of three houses situated upon a single lot is not insufficient because they describe each of the houses as being upon the lot, and do not specify any particular portion thereof upon which each

house is situated, when no particular portion of the lot has been set apart by the owner as necessary to be used in connection with each house: *Sullivan v. Treen*, 13 Wash. 261.

Under this chapter, a claim of mechanic's lien upon several houses upon a single lot is sufficient, when the notice indicates an intention to claim a lien upon the entire lot and the buildings thereon for all labor done and materials furnished for all the houses: *Id.*

The provision of this section authorizing an amendment of lien notices when the interests of third parties will not be affected thereby has reference only to such third parties as acquire some interest subsequent to the filing of the lien notice: *Id.*

Proof of the filing within the time required by law for record in the office of the county auditor of a notice of lien is sufficient, without proof that it was actually recorded within such period: *Bolster v. Stocks*, 13 Wash. 460.

A claim of lien setting forth, in its statement of the terms of the contract, that the claimant was to "furnish the hardware and other like material" for a certain building, is sufficiently definite in that particular: *Id.*

Failure to include the name of the wife as one of the reputed owners of premises upon which a lien is claimed is not a ground of objection thereto, when it does not appear upon the face of the notice that the claimant had knowledge at that time of her interest therein: *Id.*

A statement in a claim of lien of the terms of the contract as to materials furnished is too indefinite, when it alleges merely that claimants "furnished certain goods, wares and merchandise, being iron, iron work, galvanized iron, nails, paints, glass and other building material": *Id.*; following *Tacoma L. & M. Co. v. Wolff*, 5 Wash. 264.

A claim of lien for furnishing the "lumber, sash, doors, etc., used in the construction of (building described) at the agreed and contract price of \$2,449.85," is sufficiently definite as to the terms of the contract: *Id.*

A claim of lien is not vitiated by the inclusion therein by mistake of lienable items, which had not been furnished, there being no attempt to perpetrate a fraud and the true amount of the claim not being increased thereby: *Id.*

§ 1135. (5905.) Recording Claim.

The county auditor must record the claims mentioned in this chapter in a book to be kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed. [L. '93, p. 35, § 6.]

Evidence of recording claim: See 2 Remington's Digest, p. 1893, § 93; *Greene v.*

Finnell, 22 Wash. 186; *Powell v. Nolan*, 27 Wash. 318.

Indorsement on lien claim, "Filed for record at 9 A. M., Aug. 16th, '77. Recorded, page 205, book 6, records Island Co., Robert C. Hill, county auditor": Held, not

evidence of anything: *Jewett v. Darlington*, 1 W. T. 602; and proof that notice was handed the auditor with request to record is also insufficient proof of recording: *Id.*

§ 1136. (5906.) Assignment of Lien.

Any lien or right of lien created by law and the rights of action to recover therefor, shall be assignable so as to vest in the assignee all rights and remedies of the assignor, subject to all defenses thereto that might be made if such assignment had not been made. [L. '93, p. 35, § 7.]

The assignment by the contractor of his claim against the owner will not deprive him of the right to assert a lien upon the premises, when the assignment was given merely as security for indebtedness: *Potvin v. Denny Hotel Co.*, 9 Wash. 316.

The lien given by statute (§ 1947, Code 1881) is personal to the laborer; and where the laborer combines with his own claim one assigned him by another laborer, he loses all right to take benefit of fore-

closure: *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165.

Although the inchoate right of lien cannot be assigned, yet where the lien is perfected by the filing of notice thereof, the assignment of the claim will give the assignee the benefit of the security: *Casey v. Ault*, 4 Wash. 167.

The foregoing adjudications were made prior to the enactment of this section.

§ 1137. (5907.) Segregation of Claims.

In every case in which one claim is filed against two or more separate pieces of property owned by the same person, or owned by two or more persons who jointly contracted for the labor or material for which the lien is claimed, the person filing such claim must designate in the claim the amount due him on each piece of property, otherwise the lien of such claim is postponed to other liens. The lien of such claim does not extend beyond the amount designated as against other creditors having liens upon either of such pieces of property. [L. '93, p. 35, § 8.]

Cited in 27 Wash. 343; 33 Wash. 696.

See 2 Remington's Digest, p. 1878, § 41; *Powell v. Nolan*, 27 Wash. 318; *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691; *Sly v. Mining Co.*, 28 Wash. 485.

In an action to foreclose a mechanic's lien, there is not sufficient evidence of the amount to be charged to the property, where there was but one general account for different houses, charging various items to the contractor, with general credits, from which it could not be clearly ascertained what was chargeable against the property,

or what amount remained unpaid: *Knudson-Jacob Co. v. Brandt*, 44 Wash. 68.

In an action to foreclose a mechanic's lien, it is error to enter a joint judgment for the value of the material against the several owners of two houses to whom the material was delivered in common and so charged against them, where it was agreed that, the houses being identical, the delivery should be in common, but that each should pay one-half of the value thereof, to be taken out of their several salaries, each being employed by the plaintiff: *Argo Mfg. Co. v. Parker*, 52 Wash. 100.

§ 1138. (5908.) Limitations of Actions.

No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the proper court within that time to enforce such lien; or, if credit be given, then eight calendar months after the expiration of such credit; and in case such action be not prosecuted to judgment within two years after the commencement thereof, the court, in its discretion, may dismiss the same for want of prosecution, and the dismissal of such action, or a judgment rendered therein, that no lien exists, shall constitute a cancellation of the lien. [L. '93, p. 35, § 9.]

Cited in 27 Wash. 86, 346; 42 Wash. 453, 454.

Limitation of actions: See 2 Remington's Digest, p. 1890, § 83; *Peterson v. Dillon*,

27 Wash. 78; *Powell v. Nolan*, 27 Wash. 318; *Service v. McMahon*, 42 Wash. 452; 52 Wash. 511.

When proceedings have been commenced within the time limited, the fact that judgment was not rendered until after such

limitation will not defeat the lien: *Pacific Mfg. Co. v. Brown*, 8 Wash. 347.

A mechanic's lien lapses unless action is commenced against the owner of the property within eight months after the filing of the lien claim: *Rees v. Wilson*, 50 Wash. 339.

§ 1139. (5909.) Extent of Contractor's Liability—Rights of Owner.

The contractor shall be entitled to recover upon the claim filed by him only such amount as may be due him according to the terms of his contract, after deducting all claims of other parties for labor performed and materials furnished; and in all cases where a claim shall be filed under this chapter for labor performed or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which the claim is filed; and in case of judgment against the owner or his property, upon the lien, the owner shall be entitled to deduct from any amount due or to become due by him to the contractor, the amount of the judgment and costs, and if the amount of such judgment and costs shall exceed the amount due by him to the contractor or if the owner shall have settled with the contractors in full, he shall be entitled to recover back from the contractor the amount, including costs for which the lien is established in excess of any sum that may remain due from him to the contractor. [L. '93, p. 36, § 10.]

Cited in 52 Wash. 562.

Under this section, and §§ 1129 and 1147, a person employed to do the plastering upon a building for the contractor, to be paid therefor the amount paid out to his men and a further sum for his own work and superintendence, is entitled to a lien for the amounts paid by him for the labor of his men, and for his own labor, according to the terms of the contract, although he did none of the actual work of the

plastering: *Smyth v. Lance & Peters*, 52 Wash. 560.

The judgment on a lien for labor and material furnished in the construction of a building may include a commission of fifteen per cent on the cost, as profit, where the contract provides therefor, and defendants offer no evidence to support their denial of the contract: *Cornelius v. Washington Steam Laundry*, 52 Wash. 272.

§ 1140. (5910.) Foreclosure—Parties.

The liens provided by this chapter, for which claims have been filed, may be foreclosed and enforced by a civil action in the court having jurisdiction; in any action brought to foreclose a lien, all persons who, prior to the commencement of such action, have legally filed claims of liens against the same property, or any part thereof shall be joined as parties, either plaintiff or defendant; and no person shall begin an action to foreclose a lien upon any property while a prior action begun to foreclose another lien on the same property is pending, but if not made a party plaintiff or defendant to such prior action, he may apply to the court to be joined as a party thereto, and his lien may be foreclosed in such action; and no action to foreclose a lien shall be dismissed at the instance of a plaintiff therein to the prejudice of another party to the suit who claims a lien. [L. '93, p. 36, § 11.]

See supra, § 1129, who may have lien.

See supra, § 1136, assignment of lien.

Cited in 17 Wash. 147; 24 Wash. 30; 27 Wash. 333; 37 Wash. 599.

ENFORCEMENT OF LIENS: See 2 Remington's Digest, pp. 1890-1898, §§ 79-107.

Under the statutes of this state a mechanic's lien cannot be enforced against property after it has passed into the hands of an assignee for the benefit of creditors, but all those having claims against the es-

tate must present them in the insolvency proceedings: *Quinby v. Slipper*, 7 Wash. 475.

A mechanic's lien cannot be maintained by one who performs labor upon the credit of the contractors employing him, with no intent, at the time of service, of claiming a lien: *Heald v. Hodder*, 5 Wash. 677; nor when the claim of lien does not show that the work was done at the direct instance of owner, or for contractors bearing the statutory relation of agent for the owner: *Id.*

The fact that certain persons signed a building contract as sureties does not render them liable for materials furnished the contractor: *Stetson etc. Mill Co. v. McDonald*, 5 Wash. 496.

As to amount of recovery by owner against surety for failure of principal to comply with contract, see *Crowley v. U. S. Fidelity & Guar. Co.*, 29 Wash. 268.

If materials have been specially designed for a certain building and furnished the contractor therefor, a lien may be claimed for the whole amount furnished, although only a portion has been used in the structure because of the contractor suspending work: *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122.

If there is a partial cessation of work on a building, but abandonment of contract is not complete until after the furnishing of certain materials, lien may be claimed therefor: *Id.*

Where a party has a contract to furnish all the brick used in a building and delivers a quantity at the ruling market price, the fact that he subsequently throws off fifty cents a thousand when the price falls is a mere modification of the original contract, and delivery to contractor's bondsmen after he had left the country is a delivery under the contract: *Fairhaven Land Co. v. Jordan*, 5 Wash. 729.

If materials are furnished to contractors as copartners, the subsequent withdrawal of one does not release him from liability when no agreement is entered into between contractors and owners of the building, or between contractors and materialmen: *Stetson etc. Mill Co. v. McDonald*, *supra*.

In case of consolidated actions each should be tried on its merits: *Harrington v. Miller*, 4 Wash. 808.

The knowledge of the owner that materials were furnished for his building is not ground for sustaining a defective lien thereon: *Fairhaven Land Co. v. Jordan*, *supra*.

Under § 1965, Code 1881, providing for the owners giving notice that they will not be responsible for improvements, it was held that it must affirmatively appear that they had notice of such improvement: *Culter v. Striegel*, 4 Wash. 346; but this section is omitted as repealed by this chapter.

Setoff and counterclaim: See 2 Remington's Digest, p. 1890, § 82; *Cochran v. Yoho*, 34 Wash. 238; *Burnett v. Ewing*, 39 Wash. 45.

A suit to foreclose a mechanic's lien is a proceeding in equity and triable therein: *Installment etc. Co. v. Wentworth*, 1 Wash. 467; *Wheeler v. Ralph*, 4 Wash. 617; *Kilroy v. Mitchell*, 2 Wash. 407; *Fox v. Nachtsheim*, 3 Wash. 684; *Powell v. Nolan*, 27 Wash. 318.

Consolidation of action brought by owner to prevent lien attaching: See *Peterson v. Dillon* 27 Wash. 78.

A complaint to enforce a mechanic's lien is insufficient which alleges that, at the time the materials were furnished, a certain party was the owner or reputed owner of the property and seeks to subject his interest therein, but the notice alleges that the materials were furnished at the instance and request of another party, the interest of the latter being described: *Cutter v. Striegel*, *supra*.

Foreclosure of a mechanic's lien being a proceeding in equity, defendant cannot, by setting up a claim for damages for breach of contract, demand a jury trial, although he may possess the right to interpose such defense: *Installment etc. Co. v. Wentworth*, *supra*; but it is within the discretion of the court to grant or refuse a jury trial of any questions of fact therein involved: *Wheeler v. Ralph*, *supra*.

A suit to foreclose a mechanic's lien cannot be transformed into an action at law by defendant setting up a legal defense by way of counterclaim: *Kilroy v. Mitchell*, *supra*; following *Installment etc. Co. v. Wentworth*, *supra*.

A notice must be filed before the lien attaches so that there can be a foreclosure thereof, and a denial on knowledge or information is sufficient to put the record of the notice in issue: *Cowie v. Ahrenstedt*, 1 Wash. 416.

An action to enforce a mechanic's lien is an equitable proceeding, and the judgment therein is appealable, although the amount in controversy does not exceed two hundred dollars: *Fox v. Nachtsheim*, 3 Wash. 684; *Wash. Iron Works Co. v. Jensen*, 3 Wash. 584.

Although a deed absolute on its face is intended as a mortgage between the parties, yet the mortgagee so holding legal title is, for purposes of foreclosure, properly designated as "owner, or reputed owner": *Harrington v. Miller*, *supra*.

PARTIES: See 2 Remington's Digest, p. 1891, §§ 84, 85; *Powell v. Nolan*, 27 Wash. 318; *Peterson v. Dillon*, 27 Wash. 78; *Northwest Bridge Co. v. Tacoma Shipbuilding Co.*, 36 Wash. 333.

In claiming a lien for the erection of a building upon the separate property of one spouse, it is not necessary to name the other spouse in the notice: *Parsons v.*

Pearson, 9 Wash. 48; Washington R. P. Co. v. Johnson, 10 Wash. 445.

Where the record title is in the husband, and the lien claimant has no knowledge of any wife, it is unnecessary to make her a party to a lien notice, although the claim is against the community property: Washington R. P. Co. v. Johnson, *supra*, 445, 447.

A notice describing the husband as the reputed owner is not invalid, where it appears upon the trial, the wife being joined, that the property was community, but that such fact was not known to claimant when the notice was filed: Douthitt v. MacCulsky, 11 Wash. 601; see Sagmeister v. Foss, 4 Wash. 320.

A claim of lien against a husband, showing on its face knowledge that the lands sought to be charged are community property, is defective: Sagmeister v. Foss, 4 Wash. 320.

If it does not appear in the lien notice that the claim is against community property, or that the wife has an interest in the premises, the failure to make the wife a party to the notice is not a fatal defect, although she must be made a party to the foreclosure proceedings: Collins v. Snoke, 9 Wash. 566; distinguishing Sagmeister v. Foss, 4 Wash. 320; see *supra*, notes to § 1134.

In all suits to enforce liens upon community lands the wife is a necessary party defendant, and in such cases, § 1959, Code 1881 (§ 1130, *supra*), authorizing the interest of a party owning less than a fee simple to be sold on execution, does not apply: Littell etc. Mfg. Co. v. Miller, 3 Wash. 480; Sagmeister v. Foss, 4 Wash. 320; see § 1130, *supra*, proviso.

In an action to foreclose a mechanic's lien, it is proper to join as defendants the contractor who purchased the material and his wife, as a community, and the plaintiff is entitled to a personal judgment against them as for a community debt for the material purchased, as well as a lien against the property of the other defendants, without a jury trial; and the same would not be an improper joinder of causes of action: Rasmusson v. Liming, 50 Wash. 184.

Intervention, addition or substitution of parties: See 2 Remington's Digest, p. 1891, § 96; Fairhaven Land Co. v. Jordan, 5 Wash. 729; Nason v. Northwestern Mill. & P. Co., 17 Wash. 142; Powell v. Nolan, 27 Wash. 318; Lavanway v. Cannon, 37 Wash. 593.

In an action to foreclose a mechanic's lien on partnership realty the wives of the partners are not necessary parties, such property being in equity a trust fund of the partnership, unaffected by any contingent rights the wives may have therein after the settlement of the partnership: Harrington v. Johnson, 10 Wash. 542; Littell etc. Mfg. Co. v. Miller, *supra*, distinguished.

The assignee of a lien, after commencement of suit to foreclose the same, may be substituted as a party plaintiff: Fairhaven Land Co. v. Jordan, *supra*; see *supra*, § 1136, assignment of lien.

In order to enforce a mechanic's lien against a certain parcel of land and the buildings thereon, the owner of a leasehold interest in a portion thereof is a necessary party to the notice and action: Wright v. Cowie, 5 Wash. 341.

The fact that a mortgagee loaning money for the erection of a building on certain lands reserves the right in the mortgage to pay liens that may be created against the property from the amount of the loan, does not make the mortgagee a party to such liens or estop him from disputing the claims of lienors: Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122.

A complaint for foreclosure of a mechanic's lien which makes the assignee of the estate of the person to whom the materials were furnished a party, and, without describing him as assignee, merely alleges that he has some interest in the premises, will be taken as alleging a personal interest and not as assignee: Quinby v. Slipper, 7 Wash. 475.

In foreclosing a mechanic's lien, it is within the discretion of the court to allow the intervention of other parties for the purpose of enforcing liens against the same property growing out of contracts of a different nature: Washington R. P. Co. v. Johnson, 10 Wash. 445; but this right is expressly given under this section.

The assignor of a leasehold interest in real estate is not a necessary party to an action to foreclose a lien thereon: Harrington v. Miller, *supra*.

Where a lien claimant's right to lien accrues subsequent to a mortgage foreclosure suit on the premises, and such claimant has knowledge of such suit, and does not seek, by intervention or otherwise, to protect his rights, he is bound by the judgment in the foreclosure suit: Pacific Mfg. Co. v. Brown, 8 Wash. 347; and in a subsequent suit the burden of proof of knowledge of claimant is upon the party claiming under the foreclosure sale, and knowledge by claimant's attorney is not knowledge by claimant: *Id.*

Decree of foreclosure should not be refused, even though interested parties are not before the court: Harrington v. Miller, *supra*.

Pleading: See 2 Remington's Digest, pp. 1892, 1893, §§ 87-90; Griffith v. Maxwell, 20 Wash. 403; Childs Lum. & Mfg. Co. v. Page, 28 Wash. 128; Powell v. Nolan, 27 Wash. 318, 67 Pac. 712; Seattle Lum. Co. v. Sweeney, 33 Wash. 691; Burnett v. Ewing, 39 Wash. 45.

A general demurrer to a complaint for the foreclosure of a mechanic's lien should be overruled where the complaint states a

cause of action for a general recovery: *Lee v. Kimball*, 45 Wash. 656.

A complaint for the foreclosure of a mechanic's lien for the construction of a well states a cause of action where it shows that work ceased January 30th, that the lien notice was filed February 10th, and, aided by the lien notice attached, that the notice was filed within ninety days from the time the work ceased: *Id.*

Objections to a decree foreclosing a mechanic's lien for boring a well, entered against the whole of the premises without determining how much thereof was necessary to satisfy the lien, as required by § 1130, cannot be urged by a defendant who stood upon a general demurrer to the complaint and joined no issue and offered no evidence on the subject: *Id.*

EVIDENCE: See 2 Remington's Digest, pp. 1893, 1894, §§ 90-94; *Stetson-Post Mill Co. v. McDonald*, 5 Wash. 496; *Greene v. Finnell*, 22 Wash. 186; *Childs Lum. & Mfg. Co. v. Page*, 28 Wash. 128; *Heald v. Hodder*, 5 Wash. 677; *Powell v. Nolan*, 27 Wash. 318; *Griffith v. Maxwell*, 20 Wash. 403; *Huetter v. Redhead*, 31 Wash. 320; *Cochran v. Yoho*, 34 Wash. 238.

An action against a married woman to foreclose a mechanic's lien on a building erected on her land will be nonsuited, where the contract is with the husband and the proof fails to establish the husband's agency: *Chattell v. Fergusson*, 3 Wash. 541.

If defendant holds under a written lease the premises upon which a lien is claimed, his interest therein cannot be shown by parol: *Cowie v. Ahrenstedt*, 1 Wash. 416.

In an action to enforce a lien against a refrigerating machine building and boiler house, for materials furnished, there is no variance on the ground that the proof showed two buildings instead of one, when it appears that they were so connected as to make substantially one building: *Peterman v. Milwaukee B. Co.*, 11 Wash. 199.

If a lien notice is offered in evidence for the purpose of establishing the lien, all questions going to its sufficiency, if not raised at the time of offer, will be deemed waived: *Wheeler v. Ralph*, 4 Wash. 617.

The introduction of an original lien notice in evidence, with the auditor's certificate that it was "as the same appears of record," etc., is sufficient proof of the facts and date of record, notwithstanding *Jewett*

v. Darlington, 1 W. T. 601, and *Cowie v. Ahrenstedt*, 1 Wash. 416; *Fairhaven Land Co. v. Jordan*, 5 Wash. 729.

A mere indorsement upon a mechanic's lien notice is not even prima facie evidence of the filing and date of recording: *Jewett v. Darlington*, 1 W. T. 601.

It is an immaterial variance that a notice of claim of lien styles the defendant the "Installment Building and Loan Association," whose name is "Installment Building and Loan Company," when the corporation itself was making the improvements and could not be misled: *Installment etc. Co. v. Wentworth*, supra.

An appeal from a decree of foreclosure of a mechanic's lien, resulting in a reversal of the decree on account of the invalidity of the lien, will not affect the personal judgment obtained against the contractor when he has not joined in the appeal: *Littell v. Miller*, supra.

Although owner of lumber may have made default, the holder of a chattel mortgage thereon, impleaded as defendant, who has answered, is entitled to trial: *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165.

In an action to foreclose a mechanic's lien, there is not sufficient evidence of delivery of the material at the property in question, where the only testimony was that some of the material was given the appellant's deliveryman with directions for delivery, and most of it to a subcontractor, the contractor being engaged in a number of houses, and neither the deliveryman or subcontractor were called to testify: *Knudson-Jacob v. Brandt*, 44 Wash. 68.

The evidence is sufficient to sustain findings that repairs upon leased premises were not made at the request of the tenants, so as to subject their interests to a mechanic's lien, where it appears that the lessor agreed to fully repair the building as rapidly as possible and the lessees simply demanded that the repairs be made without further delay or they would get someone else to make them: *Housekeeper v. Livingstone*, 48 Wash. 209.

A judgment foreclosing a mechanic's lien must be reversed, where there was no testimony tending to show that the materials were delivered or furnished for use in the building or that they were so used: *Crane Co. v. Farnandis*, 46 Wash. 436.

§ 1141. (5911.) Rank of Liens—Attorney's Fees.

In every case in which different liens are claimed against the same property, the court, in the judgment, must declare the rank of such lien or class of liens, which shall be in the following order:—

1. All persons performing labor;
2. All persons furnishing material;
3. The subcontractors;
4. The original contractor.

And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; and personal judgment may be rendered in an action brought to foreclose a lien, against any party personally liable for any debt for which the lien is claimed, and if the lien be established, the judgment shall provide for the enforcement thereof upon the property liable as in case of foreclosure of mortgages; and the amount realized by such enforcement of the lien shall be credited upon the proper personal judgment, and the deficiency, if any remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against the party liable therefor. The court may allow, as part of the costs of the action, the moneys paid for filing or recording the claim, and a reasonable attorney's fee in the superior and supreme courts. [L. '93, p. 37, § 12.]

Cited in 23 Wash. 570; 27 Wash. 341; 31 Wash. 429; 33 Wash. 684; 40 Wash. 553.

DECREE OF FORECLOSURE: See 2 Remington's Digest, p. 1895, § 98; Huetter v. Redhead, 31 Wash. 320; Friend v. Ralston, 35 Wash. 422.

A decree foreclosing a mechanic's lien upon real estate creates a judgment lien upon the premises as against subsequent purchasers, and no filing of *lis pendens* is necessary: Frank v. Jenkins, 11 Wash. 611.

In a suit by a subcontractor to foreclose his lien against the owner and the principal contractor, no personal judgment can be rendered against the principal contractor when the lien is not established: Eisenbeis v. Wakeman, 3 Wash. 534; Hildebrandt v. Savage, 4 Wash. 524; but see this section.

The only personal judgment authorized by the statute (§ 1673, 1 Hill's Code) is for the deficiency in the proceeds of the sale of the property on which the lien is established: Hildebrandt v. Savage, *supra*; and to take advantage of the error in rendering a personal judgment on the failure of the lien, defendant must object in the court below, or demand a jury trial: Stetson Mill Co. v. McDonald, 5 Wash. 496, 498.

A decree rendered in a consolidated action finding that the ownership was in the husband, when in fact it was in the community, is binding on the wife when she had been made a party to some of the actions, knew of the pendency of the others, had appeared in trial of consolidated cause and had knowledge of the decree rendered therein and failed to appeal: Douthitt v. MacCulsky, 11 Wash. 601; Littell etc. Mfg. Co. v. Miller, 3 Wash. 480.

If several actions between owner and contractor and lien claimant had been consolidated, by order of court, a subsequent order directing an issue to be made up between owner and contractor has the effect of segregating to that extent the actions theretofore consolidated: Wheeler v. Ralph, 4 Wash. 617.

In mechanic's lien suit when the decree ordered sale subject to a certain mortgage

and subsequently in the mortgage foreclosure suit one of the lien claimants introduced in evidence a stipulation between itself and mortgagee showing priority of such claimant's lien, it was held that the amount of such claim would be deducted from the mortgage and placed on the same plane as to priority as the other lien claims, and the mortgagee subrogated to the rights of the claimant holding the stipulation: Potvin v. Denny Hotel Co., 9 Wash. 316.

Judgment awarding liens on shingles not mentioned in lien claim is erroneous: Dexter Horton & Co. v. Sparkman, 2 Wash. 165.

Conveyance of premises pending foreclosure will not deprive grantor of right to appeal from foreclosure of decree when he still has an interest in the result of the action: Tacoma L. & M. Co. v. Wolff, 5 Wash. 264.

Sale of mortgaged or encumbered property: See Stetson etc. Mill Co. v. Pacific Amusement Co., 37 Wash. 335.

Deficiency and personal liability: See 2 Remington's Digest, p. 1896, §§ 101-104; Peterson v. Dillon, 27 Wash. 78; Powell v. Nolan, 27 Wash. 318; Spaulding v. Burke, 33 Wash. 679; Robinson v. Brooks, 31 Wash. 60; Service v. McMahon, 42 Wash. 452; Marks v. Pence, 31 Wash. 426.

Interest is allowable on a mechanic's lien from the date of filing of the lien notice: Cornelius v. Washington Steam Laundry, 52 Wash. 272.

That a decree foreclosing a mechanic's lien fails to describe the lien notice is not ground for reversal, where the court had jurisdiction and the rights of third parties are not involved and the whole record discloses that the decree was proper: Cornelius v. Washington Steam Laundry, 52 Wash. 272.

ATTORNEY'S FEE: See 2 Remington's Digest, pp. 1897, 1898, §§ 106, 107; Wheeler, Osgood & Co. v. Ralph, 4 Wash. 617; Bolster v. Stocks, 13 Wash. 460; Lavanway v. Cannon, 37 Wash. 593; Sweatt v. Hunt, 42 Wash. 96; Littell v. Saulsberry, 40 Wash. 550; Griffith v. Maxwell, 20 Wash. 404;

Greene v. Finnell, 22 Wash. 186; Lee v. Kimball, 45 Wash. 656.

An attorney's fee is allowed in the foreclosure of a mechanic's lien: Seattle etc. R. Co. v. Ah Kow, 2 W. T. 36.

An attorney's fee of \$2,000 for enforcing a lien of \$21,000 is excessive, and should be reduced to one thousand or less: Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122.

§ 1142. (5912.) Personal Action.

Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for labor performed or material furnished to maintain a personal action to recover such debt against the person liable therefor. [L. '93, p. 37, § 13.]

§ 1143. (5913.) Lien not Discharged by Taking Note, When.

The taking of a promissory note or other evidence of indebtedness for any labor performed or material furnished for which lien is created by law, shall not discharge the lien therefor, unless expressly received as payment and so specified therein. [L. '93, p. 37, § 14.]

§ 1144. (5914.) Material Exempt from Attachment, etc., When.

Whenever material shall have been furnished for use in the construction, alteration or repair of property subject to a lien created by this chapter, such material shall not be subject to attachment, execution, or other legal process, to enforce any debt due by the purchaser of such material, except a debt due for the purchase money thereof, so long as in good faith the said material is about to be applied in the construction, alteration or repair of such property. [L. '93, p. 37, § 15.]

The fact that a materialman, who has furnished building material to a contractor, has filed notice of lien against the owner of the building in which it is to be used, will not, when the lien claim has not been paid, vest the title to such material in the owner of the building so as to render it liable to execution on judgments against him: Potvin v. Wickersham, 15 Wash. 646.

Under 1 H. C., § 1675, exempting from

execution material designed in good faith to be used in the construction of a building, such material will be exempt, although the completion of the building has been delayed for a number of years pending litigation, and whether the material is to be used by the one engaged in the construction of the building at the time of its purchase or by one succeeding to his rights: Id.

§ 1145. (5915.) Community Interest, How Subjected.

The claim of lien, when filed as required by this chapter, shall be notice to the husband or wife of the person who appears of record to be the owner of the property sought to be charged with the lien, and shall subject all the community interest of both husband and wife to said lien. [L. '93, p. 38, § 16.]

See *infra*, § 5918, and notes, community lands, subject to.

§ 1146. (5916.) When Land not Subject to Lien—Power of Court.

When, for any reason the title or interest in the land, upon which the property subject to the lien is situated cannot be subjected to the lien, the court may order the sale and removal from the land of the property subject to the lien to satisfy the lien. [L. '93, p. 38, § 17.]

Cited in 20 Wash. 605.

§ 1147. (5917.) Liberal Construction.

The provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed with a view to effect their objects. [L. '93, p. 38, § 18.]

See *supra*, § 144, construction in general.

Cited in 27 Wash. 338; 33 Wash. 695; 52 Wash. 278, 512, 562.

The mechanic's lien statute should be liberally construed, but to hold that a lien could attach without a full compliance with the statute would be to take property with-

out "due process of law": Kellogg v. Littell etc. Mfg. Co., 1 Wash. 407, 410.

Under this section all proceedings on the foreclosure of a mechanic's lien are to be liberally construed: Cornelius v. Washington Steam Laundry, 52 Wash. 272.

§ 1148. (5918.) Existing Rights Preserved.

All rights acquired under any existing law of this state are hereby preserved, and all actions now pending shall be proceeded with under the law as it exists at the time this act shall take effect. [L. '93, p. 38, § 19.]

Cited in 11 Wash. 311.

Validity of statutes and effect of change or repeal: See 2 Remington's Digest, p. 1870, §§ 2, 3; Armour & Co. v. Western Const. Co., 36 Wash. 529.

This section authorizes the procedure under the former law merely for those actions begun prior to the taking effect of the act embraced in this chapter; rights accrued before the taking effect of the same, but for whose enforcement actions are instituted subsequent thereto, are governed by

the procedure provided in this chapter: Hopkins v. Jamieson-Dixon Mill Co., 11 Wash. 308.

The mechanic's lien law of 1877 was intended as a substitute for and not a continuation of the act of 1873. All rights accrued under the earlier act were repealed, except to the extent they were kept alive by the latter act; while all remedies to enforce such preserved rights are under the provisions of the new statute: Seattle etc. v. Ah Kow, 2 W. T. 36; see Garneau v. Port Blakeley Mill Co., 8 Wash. 467.

CHAPTER IV.

LIENS OF EMPLOYEES.

§ 1149. (5919.) Laborer's Lien on Property, Franchises, etc.

Every person performing labor for any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, sawmill, lumber or timber company, shall have a prior lien on the franchise, earnings, and on all the real and personal property of said person, company or corporation, which is used in the operation of its business, to the extent of the moneys due him from such person, company or corporation, operating said franchise or business, for labor performed within six months next preceding the filing of his claim therefor, as hereinafter provided; and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien. [L. '97, p. 55, § 1.]

See supra, § 1131, lien for work on lands.

See infra, § 1188, lien on farm products.

Cited in 22 Wash. 512; 24 Wash. 32, 598; 41 Wash. 113; 45 Wash. 649, 651.

Liens of employees: See 2 Remington's Digest, p. 1808, §§ 18-20; Blumauer v. Clock, 24 Wash. 596; Fitch v. Applegate, 24 Wash. 25.

A laborer engaged in cutting logs in the woods at a distance from a mill, paid by

the thousand feet, is not an employee of the mill or engaged in performing labor in its operation, within the meaning of this section; his remedy being a logger's lien under § 1162, infra: Graham v. Gardner, 45 Wash. 648.

§ 1150. (5920.) Notice of Lien.

No person shall be entitled to the lien given by the preceding section, unless he shall, within ninety days after he has ceased to perform labor for such person, company or corporation, filed for record with the county auditor of the county in which said labor was performed, or in which is located the principal office of such person, company or corporation in this state, a notice of claim, containing a statement of his demand, after deducting all just cred-

its and offsets, the name of the person, company or corporation, and the name of the person or persons employing claimant, if known, with the statement of the terms and conditions of his contract, if any, and the time he commenced the employment, and the date of his last service, and shall serve a copy thereof on said person, company or corporation within thirty days after the same is so filed for record. [L. '97, p. 56, § 2.]

See notes to last section.

Cited in 45 Wash. 650.

§ 1151. (5921.) Service of Notice.

Service of notice, as herein required, may be made in the same manner as summons in civil actions. [L. '97, p. 56, § 3.]

§ 1152. (5922.) Foreclosure of Lien.

Any such lien may be enforced within the same time and in the same manner as mechanics' liens are foreclosed. [L. '97, p. 56, § 4.]

§ 1153. (5923.) How Claims are to be Paid by Receiver or Assignee.

Whenever a receiver or assignee is appointed for any person, company or corporation, the court shall require such receiver or assignee to pay all claims for which a lien could be filed under this chapter, before the payment of any other debts or claims, other than operating expenses. [L. '97, p. 56, § 5.]

CHAPTER V.

LIENS ON CHATTELS.

§ 1154. Lien on Chattels for Labor and Material.

Every person, firm or corporation who has expended labor, skill or material on any chattel, at the request of its owner, or authorized agent of the owner, shall have a lien upon such chattels for the contract price for such expenditure, or in the absence of such contract price, for the reasonable worth of such expenditure, for a period of one year from and after such expenditure, notwithstanding the fact that such chattel be surrendered to the owner thereof: Provided, however, that no such lien shall continue after the delivery of such chattel to its owner as against the rights of third persons who may have acquired an interest in, or the title to, such chattel in good faith, for value, and without actual knowledge of the lien. [L. '05, p. 137, § 1; L. '09, p. 626, § 1.]

See *infra*, § 1188, lien on farm products.

§ 1155. Notice of Lien on Chattel.

In order to make such lien effectual the lien claimant shall within ninety days from the date of delivery of such chattel to the owner file in the office of the auditor of the county in which such chattel is kept a lien notice, which notice shall state the name of the claimant, the name of the owner, a description of the chattel upon which the claimant has expended labor, skill or material, the amount for which a lien is claimed, and the date upon which such expenditure was completed, which notice shall be signed by the claimant, or some one in his behalf, and may be in substantially the following form:

CHATTEL LIEN NOTICE.

— Claimant,
 against
 — Owner. }

Notice is hereby given that — has and claims a lien upon (here insert description of chattel), owned by — for the sum of — dollars, for and on account of labor, skill and material expended upon said — which was completed upon the — day of —, 190—.

—,
 Claimant.

[L. '05, p. 137, § 2.]

§ 1156. Ownership.

Every person who is in possession of a chattel, under an agreement for the purchase thereof, whether the title thereto be in him, or his vendor, shall, for the purposes of this act, be deemed the owner thereof, and the lien of a person expending material, labor or skill thereon shall be superior to and preferred to the rights of the person holding the title thereto, or any lien thereon antedating the time of expenditure of the labor, skill or material thereon by a lien claimant, to the extent that such expenditure has enhanced the value of such chattel. [L. '05, p. 138, § 3.]

§ 1157. Enforcement of Lien.

The lien herein provided for may be enforced against the owner of and all persons having an interest in any such chattel by notice and sale in the same manner that a chattel mortgage is foreclosed, or by decree of any court in this state, exercising original equity jurisdiction in the county wherein such chattel may be, or in action commenced within nine months after the filing of such lien notice and if no such action be commenced within such time such lien shall cease. [L. '05, p. 138, § 4.]

§ 1158. Filing of Notice.

Upon presentation of such lien notice to the auditor of any county, and the payment to him of fifteen cents, he shall file the same, and indorse thereon the time of the reception, the number thereof, and shall enter the same in a suitable book or file (but need not record the same). Such book or file shall have herewith an alphabetic index, in which the county auditor shall index such notice by noting the name of the owner, name of lien claimant, description of property, date of lien (which shall be the date upon which such expenditure of labor, skill or material was completed), date of filing and when released, the date of release. [L. '05, p. 138, § 5.]

CHAPTER VI.

SECURITY FOR LABOR, ETC., ON PUBLIC WORKS.

§ 1159. (5925.*) **Contractor's Bond—Filing.**

Whenever any board, council, commission, trustees or body acting for the state or any county or municipality or any public body shall contract with any person or corporation to do any work for the state, county or municipality, or other public body, city, town or district, such board, council, commission, trustees or body shall require the person or persons with whom such contract is made to make, execute and deliver to such board, council, commission, trustees or body a good and sufficient bond, with two or more sureties, or with a surety company as surety, conditioned that such person or persons shall faithfully perform all the provisions of such contract and pay all laborers, mechanics and subcontractors and materialmen, and all persons who shall supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, all just debts, dues and demands incurred in the performance of such work, which bond shall be filed with the county auditor of the county where such work is performed or improvement made, except in cases of cities and towns, in which cases such bond shall be filed with the clerk or comptroller thereof, and any person or persons performing such services or furnishing material to any subcontractor shall have the same right under the provision of such bond as if such work, services or material was furnished to the original contractor. [L. '09, p. 716, § 1. Cf. L. '88, p. 15, § 1; 1 H. C., § 2415; L. '97, p. 57, § 1.]

Cited in 5 Wash. 145, 146, 586; 6 Wash. 121; 7 Wash. 272, 280, 281, 283, 485; 8 Wash. 328, 457; 9 Wash. 6, 429; 11 Wash. 162, 476; 12 Wash. 120; 13 Wash. 392, 560, 575; 19 Wash. 592, 627; 21 Wash. 508; 22 Wash. 107; 28 Wash. 93; 29 Wash. 527; 39 Wash. 556; 46 Wash. 435.

Liability of surety on contractor's bond: See 2 Remington's Digest, pp. 2021, 2022, §§ 134-138; Baum v. Whatcom County, 19 Wash. 626; Spokane & Idaho Lumber Co. v. Loy, 21 Wash. 501; Spokane & Idaho Lumber Co. v. Boyd, 28 Wash. 90; Pacific Bridge Co. v. U. S. Fidelity etc. Co., 33 Wash. 47; Huggins v. Sutherland, 39 Wash. 552; Spokane v. Costello, 33 Wash. 98; Id., 42 Wash. 182.

The object of this statute is to give the same relief by action on the bond as could be had by the enforcement of a lien against the building: Ihrig v. Scott, 5 Wash. 584, 588.

The provisions of this chapter requiring bonds of contractors to secure laborers and materialmen does not violate Article 9, § 2, of the Constitution: Pacific Mfg. Co. v. School Dist., 6 Wash. 121.

This chapter provides a remedy for those furnishing material or labor by virtue of a subcontract, as well as those who furnish the same in any other capacity: Ihrig v. Scott, *supra*.

This section does not apply to street grading contracts: Clough v. Spokane, 7 Wash. 279.

The provisions of this chapter should not be extended beyond the scope of the mechanic's lien statute: Clough v. Spokane, *supra*.

School districts are, within the contemplation of the legislative and constitutional enactments of this state, municipal corporations providing for liens for work done or improvements made for any "county, incorporated town or city, or other municipal corporations": Maxon v. School Dist., 5 Wash. 142.

The construction of a local ditch is not such a county improvement as to require the county commissioners to take a bond from the contractor for the protection of laborers: Wallace v. Skagit Co., 8 Wash. 457.

Under this chapter, it is not necessary that the plaintiff, in an action to enforce his claim, should have established in a prior action the contractor's indebtedness to him, or should make the contractor a party to his action against the municipal corporation: Maxon v. School Dist., *supra*.

Where a contractor's bond by mistake names the board of school directors instead of the state of Washington as obligee, such defect is not fatal, if from the terms of the bond it appears that its object was to se-

cure laborers and materialmen as provided for by this section: *Ihrig v. Scott*, supra; and such a bond is not inoperative by reason of its being made payable to the school district instead of the state: *Wadsworth v. School Dist.*, 7 Wash. 485.

In an action by a materialman against a school district, founded on its failure to take a bond from the contractor, where there is evidence showing that the lumber was furnished to a firm of which the contractor was a member, and a charge on plaintiff's books showing a sale to the firm, an instruction "that if plaintiffs satisfy your mind that there was a mistake (in making the charge), and the evidence is not in conflict, you will find that there was a mistake, and that the goods were sold to the contractor," is misleading, as it makes the whole question as to whom the lumber was sold turn upon the way it was charged upon the books of plaintiff, and whether it was so charged by mistake: *Sexton v. School Dist.*, 9 Wash. 5.

In an action against a school district for failure to take a sufficient bond from a contractor for the protection of materialmen, the fact that the sureties thereon did not justify is a mere irregularity, and presumed not injurious in absence of allegations and proof that they could not justify as required by law: *Wadsworth v. School Dist.*, supra.

A bond taken by a school district under this section, conditioned that the sureties shall be liable only in case the contractor fails to "perform said work and comply with said contract, plans and specifications to which reference is hereby made, and the same made a part of the bond," is insufficient: *Puget Sound Brick etc. Co. v. School Dist.*, 12 Wash. 118.

It is not necessary that a school district should be made a party to a suit against a contractor for materials furnished in the construction of a schoolhouse in order to subject the district to liability for failure to take bond from contractor: *Pacific Mfg. Co. v. School Dist.*, 6 Wash. 121.

It is not within the corporate powers of a city of the third class to take a bond conditioned that the obligors shall construct a street railway upon its streets, and in case of a default shall pay a certain sum as liquidated damages: *Aberdeen v. Honey*, 8 Wash. 251; and where such bond is given in a penal sum it is a penal bond, and no recovery can be had thereon without proof showing that actual damages had accrued by reason of the failure to construct the railway: *Id.*

Although under this section a public corporation is not required to take a bond from a contractor in improving streets, the fact that such a bond has been voluntarily given will not estop the sureties thereon from denying their liability to materialmen, although, as between the city and the obligors thereon, the bond may be valid:

Sears v. Williams, 9 Wash. 428; see *Clough v. Spokane*, 7 Wash. 279.

An action on a contractor's bond given under this section is not barred by the procuring of a judgment against the contractors personally prior to suit upon his bond: *Fischer v. Quigley*, 8 Wash. 327.

It is not necessary to file such bond with the auditor prior to furnishing materials to the contractor, in order to relieve the district from liability: *Wadsworth v. School Dist.*, supra.

The provisions of § 781, supra, that no bond shall fail for want of form, etc., applies to a contractor's bond for public works given under this section: *Ihrig v. Scott*, supra.

Persons who furnish material for public bridges, whether to the original contractor or to a subcontractor, are within the protection of this section, providing that whenever the board of county commissioners shall contract with any person to do work of a character which, if performed for an individual, a lien would exist, it shall take a bond conditioned for the payment of all the laborers and materialmen: *Gilmore v. Westerman*, 13 Wash. 390.

A materialman's right of action on a bond given under this section is assignable: *Id.*

The acceptance, without payment, of an order drawn upon the contractor for a public work by a subcontractor in favor of a materialman does not extinguish the latter's right of action upon the contractor's bond given under this section: *Id.*; *Moody v. Westerman*, 13 Wash. 709.

A judgment obtained against the principal upon a statutory bond given under the provisions of this act for the protection of those furnishing labor and materials to a contractor upon public improvements, is prima facie sufficient to warrant a recovery against the sureties, without requiring proof of the contract between the principal and the party so furnishing labor or materials: *Ihrig v. Scott*, supra.

The sureties upon a bond given by a contractor for the erection of a school building, under the statute requiring such bond, for the protection of those furnishing labor and materials to a contractor employed in making public improvements, are estopped to deny the authority of the school district to make the contract, when the bond executed by such sureties recites as a fact that the principal in the bond had duly entered into a contract with the school district for the erection of said school building: *Price v. Scott*, 13 Wash. 574; see *Ihrig v. Scott*, supra.

Sureties upon the bond given by a contractor under the terms of this section for the protection of those furnishing labor or material to the contractor in the construction of public improvements, cannot escape liability from the fact that the

bond was not signed by the contractor, when it has been delivered by him to, and accepted by, the other contracting party with the knowledge and consent of the sureties: *Eureka Sandstone Co. v. Long*, 11 Wash. 161; *Twigley v. Bellingham Bay Boom Co.*, 5 Wash. 644.

The presumption arises from the delivery of a bond by the principal, as the agent of the sureties, that they must have known its conditions, and ratification by them of the bond while ignorant that it was unsigned by the principal will not affect their liability: *Id.*

A complaint against principal and sureties upon a contractor's bond, given in compliance with this section, but which had not been signed by the principal, is not demurrable on the ground of misjoinder of parties defendant, for the reason that the obligations of the parties and the rights of plaintiff are identical, although founded in the case of the principal upon the contract, and in the case of the sureties upon the bond: *Id.*; following *Ihrig v. Scott*, 5 Wash. 584.

§ 1160. (5926.*) **Liability for Failure to Take Bond.**

If any board of county commissioners of any county, or mayor and common council of any incorporated city or town, or tribunal transacting the business of any municipal corporation shall fail to take such bond as herein required, such county, incorporated city or town, or other municipal corporation, shall be liable to the persons mentioned in section 1159, to the full extent and for the full amount of all such debts so contracted by such contractor. [L. '88, p. 15, § 2; 1 H. C., § 2416; L. '09, p. 717, § 2.]

See notes to last section.

Cited in 7 Wash. 280, 282; 9 Wash. 429; 22 Wash. 110; 28 Wash. 93.

§ 1161. (5927.*) **Conditions of Bond—Action on.**

The bond mentioned in section 1159 shall be in an amount equal to the full contract price agreed to be paid for such work or improvement, and shall be to the state of Washington, except in cases of cities and towns, in which cases such municipalities may by general ordinance fix and determine the amount of such bond and to whom such bond shall run: Provided, the same shall not be for a less amount than twenty-five per cent. (25%) of the contract price of any such improvement, and may designate that the same shall be payable to such city, and not to the state of Washington, and all such persons mentioned in said section 1159 shall have a right of action in his, her, or their own name or names on such bond, for the full amount of all debts against such contractor, or for work done by such laborers or mechanics, and for materials furnished or provisions and goods supplied and furnished in the prosecution of such work, or the making of such improvements: Provided, that such persons shall not have any right of action on such bond for any sum whatever, unless within thirty (30) days from and after the completion of the contract with and acceptance of the work by the board, council, commission, trustees, or body acting for the state, county or municipality, or other public body, city, town or district, the laborer, mechanic or subcontractor, or materialman, or person claiming to have supplied materials, provisions or goods for the prosecution of such work, or the making of such improvement, shall present to and file with such board, council, commission, trustees or body acting for the state, county or municipality, or other public body, city, town or district, a notice in writing in substance as follows:

To (here insert the name of the state, county or municipality or other public body, city, town or district):

Notice is hereby given that the undersigned (here insert the name of the laborer, mechanic or subcontractor, or materialman, or person claiming to have furnished labor, materials or provisions for or upon such contract or work) has a claim in the sum of — dollars (here insert the amount) against the bond taken from — (here insert the name of the principal and surety or sureties upon such bond) for the work of — (here insert a brief mention or description of the work concerning which said bond was taken).

(Here to be signed) —

Such notice shall be signed by the person or corporation making the claim or giving the notice; and said notice, after being presented and filed, shall be a public record open to inspection by any person: Provided further, that any city may avail itself of the provisions of this act, notwithstanding any charter provisions in conflict herewith: And provided further, that any city or town may impose any other or further conditions and obligations in such bond as may be deemed necessary for its proper protection in the fulfillment of the terms of the contract secured thereby. [L. '09, p. 717, § 3. Cf. L. '88, p. 16, § 3; 1 H. C., § 2417; L. '99, p. 172, § 1.]

Necessity of filing notice: See *Huggins v. Sutherland*, 39 Wash. 552.

Failure to file bond does not relieve contractor from failure to file claim: *Crane Co. v. Aetna Indemnity Co.*, 43 Wash. 516.

The overstatement of the amount due, in a notice to a city of a claim for material furnished to a contractor upon public work, is not fatal to recovery upon the contractor's statutory bond to secure laborers and

materialmen, where actual fraud is not shown: *Strandell v. Moran*, 49 Wash. 533.

Such a notice, required by the statute to be signed by the claimant, is sufficient when signed by one "A. S. Agent," through whom the claimant did business without disclosing the principal, where no one was misled thereby; since the same fulfills the purpose of the statute to give notice of claims: *Id.*

CHAPTER VII.

LIENS UPON LOGS AND OTHER TIMBER.

§ 1162. (5930.*) Who may Have Liens.

Every person performing labor upon, or who shall assist in obtaining or securing saw-logs, spars, piles, cordwood, shingle bolts, or other timber, and the owner or owners of any tugboat, or towboat, which shall tow or assist in towing, from one place to another within this state, any saw-logs, spars, piles, cordwood, shingle bolts, or other timber, and the owner or owners of any team or any logging engine, which shall haul or assist in hauling from one place to another within this state, any saw-logs, spars, piles, cord wood, shingle bolts, or other timber, and the owner or owners of any logging or other railroad over which saw-logs, spars, piles, cordwood, shingle bolts, or other timber shall be transported and delivered, shall have a lien upon the same for the work or labor done upon, or in obtaining or securing, or for services rendered in towing, transporting, hauling, or driving, the particular saw-logs, spars, cordwood, shingle bolts, or other timber in said claim of lien described, whether such work, labor or services was done, rendered or performed at the instance of the owner of the same or his agent. The cook in a logging camp shall be regarded as a person who assists in obtaining or securing the timber herein mentioned. [L. '07, p. 14, § 1. Cf. L. '60, p. 340,

§ 1; L. '77, p. 217, § 3; L. '79, p. 100, § 2; Cd. '81, § 1941; 1 H. C., § 1679; L. '93, p. 428, § 1; L. '95, p. 175, § 1.]

See *infra*, § 1190a, this chapter applicable to liens on farm products.

Cited in 5 Wash. 430, 431; 6 Wash. 343, 480, 481; 8 Wash. 469, 471; 10 Wash. 86; 11 Wash. 206, 691; 12 Wash. 340; 13 Wash. 161, 375; 14 Wash. 227; 20 Wash. 124, 593; 30 Wash. 460, 461; 45 Wash. 650, 652; 49 Wash. 396, 444.

Liens on logs and actions for enforcement: See 2 Remington's Digest, pp. 1757, 1765, §§ 21-49.

CONSTRUCTION.—Logger's lien statutes are remedial in their nature and ought to be liberally construed in the interest of labor: *Proulx v. Stetson & Post M. Co.*, 6 Wash. 478, 481.

The statute is broad enough to fairly include all kinds of labor necessarily performed in and about a logging camp: *Id.*, 482.

RIGHT TO LIEN.—A statutory right of lien given loggers for labor in getting out logs becomes such a part of the contract for such labor as to be unaffected by the repeal of the statute pending the enforcement of the lien: *Garneau v. Port Blakeley M. Co.*, 8 Wash. 467; *McQueston v. Morrill*, 12 Wash. 335.

One who constructs a necessary road by which certain logs are taken from the forest to the mill, or to water and after to the mill or to market, as much assists in obtaining and securing such logs as if he were engaged in cutting and sawing them, and is entitled to a lien for such labor: *Proulx v. Stetson etc. Mill Co.*, *supra*; and labor in blasting rocks along a river-bed in order to make a passage for logs in getting them from the woods to the place of booming is lienable under this section: *Duggan v. Washougal L. & L. Co.*, 10 Wash. 84; but not for labor in opening a public road to get in supplies: *Id.*

No lien is given by statute for the manufacture of shingles, and where the notice is for the manufacture of lumber and shingles, without showing how much is due for the labor on the lumber and how much on the shingles, the whole lien fails: *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165, decided prior to amendment of 1895.

Lien claimants who had worked for defendant for from one to six months, in getting out logs in several log booms, have a lien upon all the logs cut and secured during the time, and they need not prove that the services for which the lien was filed were all performed in cutting and securing the particular logs against which the lien was filed: *Grimm v. Pacific Creosot Co.*, 50 Wash. 415.

Where the logs were at all times owned by one who manufactured them into lumber, the owner cannot defeat a lien on the logs by claiming that he was only liable

as an eloigner, where the statute gave a lien on the finished product to anyone rendering services on the logs: *O'Connor v. Burnham*, 49 Wash. 443.

A person getting out logs and piling under a contract with the owner is an agent of the owner, within the meaning of Ballinger's Code § 5930 (amended by this section): *O'Brien v. Perfection Pile Preserving Co.*, 49 Wash. 395.

The lien given by Ballinger's Code, § 5930 (amended by this section), extends to hauling logs and piles before being worked into a finished product, and is not restricted to railroads and steamboats by the clause giving such carriers liens for hauling or towing: *Id.*

One claiming a lien on logs under a contract to cut certain timber at \$4 per thousand, payable monthly as delivered, is justified in ceasing to work upon the owner's refusal to make payments agreed upon: *O'Connor v. Burnham*, 49 Wash. 443.

Under §§ 1679, 1680, 1 Hill's Code, a lien upon logs cannot be so extended as to reach the lumber manufactured therefrom: *Winsor v. Johnson*, 5 Wash. 429; but the present law is to the contrary; see this and the next section.

A logger's lien cannot be defeated on the ground that plaintiff had worked for three corporations, when he had no knowledge of their existence other than the one employing him, when the three companies had the same officers, same manager and same place of business: *Duggan v. Washougal L. & L. Co.*, *supra*.

If laborers engaged in getting out sawlogs have expressly released all right of lien upon the logs cut within thirty days of the time of filing liens, the right to lien upon logs cut prior thereto is thereby lost: *Campbell v. Vincent*, 8 Wash. 650; *Beal v. Nichols*, 12 Wash. 157.

The lien of vendor of timber attaches to each log, for the contract price for one thousand feet, as if a separate contract of sale had been made respecting it: *Baxter v. Smith*, 2 W. T. 97.

The owner of logs cannot defeat loggers' liens thereon by intermingling the logs with others of the same brand: *Creighton v. Cole*, 10 Wash. 472.

PURCHASERS OF PROPERTY subject to logger's lien do so at their peril: *Proulx v. Stetson & Post Mill Co.*, *supra*.

It is not the duty of the vendee to pay liens on lumber (labor liens) at the time of purchase, although he may do so, and make the price so paid a setoff against the purchase price, at the hazard, however, of the liens being valid: *Baker v. McAllister*, 2 W. T. 48.

§ 1163. (5931.) Lien on Lumber—Lumber, Defined.

Every person performing work or labor or assisting in manufacturing saw-logs and other timber into lumber and shingles, has a lien upon such lumber while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer, whether such work or labor was done at the instance of the owner of such logs or his agent or any contractor or subcontractor of such owner. The term lumber, as used in this chapter, shall be held and be construed to mean all logs or other timber sawed or split for use, including beams, joists, planks, boards, shingles, laths, staves, hoops, and every article of whatsoever nature or description manufactured from saw-logs or other timber. [Cf. L. '77, p. 217, § 4; Cd. '81, § 1942; 1 H. C., § 1680; L. '93, p. 19, § 1; L. '93, p. 428, § 2.]

Cited in 11 Wash. 205, 691; 13 Wash. 161, 351, 375; 16 Wash. 696; 18 Wash. 269; 30 Wash. 460, 461; 49 Wash. 444.

Persons entitled to lien: See 2 Remington's Digest, p. 1758, § 25; Cross v. Dore, 20 Wash. 121; Blumauer v. Clock, 24 Wash. 596; Robins v. Paulson, 30 Wash. 459; Munroe v. Sedro Lum. & Shingle Co., 16 Wash. 694; Judge v. Bay Mill Co., 18 Wash. 269.

A judgment awarding liens on shingles not mentioned in the claim of lien is erroneous: Dexter Horton & Co. v. Sparkman, 2 Wash. 165.

Shingle-bolt cutters are entitled to a lien under this section on the shingles as long as they are under the control of the manufacturer: Campbell v. Sterling Mfg. Co., 11 Wash. 204; Hadlock v. Shumway, 11 Wash. 690.

This section, giving liens to persons who assist in obtaining saw-logs and other timber to be manufactured into lumber and shingles, does not apply to one who employs men to do the work thereon, and who does not directly perform the labor himself: Campbell v. Sterling Mfg. Co., 11 Wash. 204.

The removal of shingles by a purchaser from the mill in which they were manufactured, before the filing of a logger's lien thereon, precludes the acquisition of a lien under this section, providing that every person performing work in manufacturing

saw-logs and other timber into lumber and shingles has a lien upon such lumber while it remains at the mill or in possession or under the control of the manufacturer: Swartwood v. Red Star Shingle Co., 13 Wash. 349.

A lien for work performed upon manufactured fence posts can be asserted only under this section, providing that "every person performing work or labor or assisting in manufacturing saw-logs and other timber into lumber and shingles has a lien upon such lumber while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer," and under such provision one who has hauled the posts from the place of manufacture to the place of delivery to the purchaser is not entitled to file a lien for such hauling: Ryan v. Guilfail, 13 Wash. 373.

Waiver of lien: See 2 Remington's Digest, p. 1762, § 37; Anderson v. Tingley, 24 Wash. 537; Maris v. Clevenger, 29 Wash. 395.

Contractors getting out logs, at so much per thousand feet, for immediate manufacture into lumber by the owner, are entitled to a lien upon the finished product, under this section, and are not confined to a lien upon the logs given by the preceding section: O'Connor v. Burnham, 49 Wash. 443.

§ 1164. (5932.) Lien for Stumpage.

Any person who shall permit another to go upon his timber land and cut thereon saw-logs, spars, piles or other timber, has a lien upon the same for the price agreed to be paid for such privilege, or for the price such privilege would be reasonably worth in case there was no express agreement fixing the price. [Cf. L. '77, p. 217, § 5; Cd. '81, § 1943; 1 H. C., § 1681; L. '93, p. 429, § 3.]

Where the contract for stumpage provided that payment should be made for each thousand feet of logs cut, a claim of lien cannot be maintained for stumpage

on the whole number of logs against a party who is in possession of a part only of the entire cutting: Doyle v. McLeod, 4 Wash. 732.

§ 1165. (5933.) Preferred Liens.

The liens provided for in this chapter are preferred liens and are prior to any other liens, and no sale or transfer of any saw-logs, spars, piles or other timber or manufactured lumber or shingles shall divest the lien thereon as herein provided, and as between liens provided for in this chapter those for work and labor shall be preferred: Provided, that as between liens for work and labor claimed by several laborers on the same logs or lot of logs the claim or claims for work or labor done or performed on the identical logs proceeded against to the extent that said logs can be identified, shall be preferred as against the general claim of lien for work and labor recognized and provided for in this chapter. [Cf. L. '77, p. 217, § 6; Cd. '81, § 1944; 1 H. C., § 1682; L. '93, p. 429, § 4.]

Cited in 14 Wash. 227; 20 Wash. 593.

§ 1166. (5934.) Limitation of Filing Lien for Labor.

The person rendering the service of [or] doing the work or labor named in sections 1162 and 1163 of this chapter is only entitled to the liens as provided herein for services, work or labor for the period of eight calendar months, or any part thereof next preceding the filing of the claim, as provided in section 1169 of this chapter. [Cf. L. '77, p. 217, § 7; Cd. '81, § 1945; 1 H. C., § 1683; L. '93, p. 429, § 5.]

"Section 1169" substituted for "section 8" of the act of 1893, while "section 7" [§ 1168, *infra*] was evidently intended.

§ 1167. (5935.) Limitation of Filing Lien for Stumpage.

The person granting the privilege mentioned in section 1164 of this chapter is only entitled to the lien as provided therein for saw-logs, spars, piles and other timber cut during the eight months next preceding the filing of the claim, as herein provided in the next succeeding section of this chapter. [Cf. L. '77, p. 217, § 8; Cd. '81, § 1946; 1 H. C., § 1684; L. '93, p. 429, § 6.]

§ 1168. (5936.) Filing of Claim for Labor, etc.

Every person within thirty days after the close of the rendition of the services, or after the close of the work or labor mentioned in the preceding sections (1162, 1163) claiming the benefit hereof, must file for record with the county auditor of the county in which such saw-logs, spars, piles and other timber were cut, or in which such lumber or shingles were manufactured, a claim containing a statement of his demand and the amount thereof, after deducting as nearly as possible all just credits and offsets, with the name of the person by whom he was employed, with a statement of the terms and conditions of his contract, if any, and in case there is no express contract, the claim shall state what such service, work or labor is reasonably worth; and it shall also contain a description of the property to be charged with the lien sufficient for identification with reasonable certainty, which claim must be verified by the oath of himself or some other person to the effect that the affiant believes the same to be true, which claim shall be substantially in the following form:—

— Claimant, vs. —.

Notice is hereby given that — of — county, state of Washington, claims a lien upon a — of —, being about — in quantity, which were

cut or manufactured in — county, state of Washington, are marked thus —, and are now lying in —, for labor performed upon and assistance rendered in — said —; that the name of the owner or reputed owner is —; that — employed said — to perform such labor and render such assistance upon the following terms and conditions, to wit:—

The said — agreed to pay the said — for such labor and assistance —; that said contract has been faithfully performed and fully complied with on the part of said —, who performed labor upon and assisted in — said — for the period of —; that said labor and assistance were so performed and rendered upon said —, between the — day of — and the — day of —; and the rendition of said service was closed on the — day of —, and thirty days have not elapsed since that time; that the amount of claimant's demand for said service is —; that no part thereof has been paid except —, and there is now due and remaining unpaid thereon, after deducting all just credits and offsets, the sum of —, in which amount he claims a lien upon said —. The said —, also claims a lien on all said — now owned by said — of said county to secure payment for the work and labor performed in obtaining or securing the said logs, spars, piles or other timber, lumber or shingles herein described.

State of Washington, County of —, ss.

— being first duly sworn, on oath says that he is — named in the foregoing claim, has heard the same read, knows the contents thereof, and believes the same to be true.

Subscribed and sworn to before me this — day of —.

[Cf. L. '77, p. 217, § 9; L. '79, p. 100, § 4; Cd. '81, § 1947; 1 H. C., § 1685; L. '93, p. 429, § 7.]

Cited in 2 Wash. 167, 172; 14 Wash. 228; 20 Wash. 594; 29 Wash. 403; 40 Wash. 200.

Time for filing: See 2 Remington's Digest, p. 1762, § 35; Beal v. Nicols, 12 Wash. 157.

THIRTY DAYS' LIMITATION for the filing of liens for labor in securing saw-logs does not begin to run from the time such logs are rafted into booms, but from the time the service rendered in securing the logs is at an end: Overbeck v. Calligan, 6 Wash. 342.

ASSIGNMENT, EFFECT OF: See 2 Remington's Digest, p. 1758, § 23.

Although the inchoate right of lien cannot be assigned, yet when the lien is perfected by the filing of a notice thereof, the assignment of the claim will give the assignee the benefit of the security: Casey v. Ault, 4 Wash. 167; Dexter Horton & Co. v. Sparkman, 2 Wash. 165.

NOTICE, VERIFICATION: See 2 Remington's Digest, p. 1700, § 29; Duggan v. Washougal Land etc. Co., 10 Wash. 84.

When a claim of lien is verified by another than the claimant, a verification to

the effect that he believes it to be true is sufficient: Dexter Horton & Co. v. Sparkman, supra.

NOTICE, SUFFICIENCY OF: See 2 Remington's Digest, pp. 1700, 1701, §§ 30-34; Marlette v. Crawford, 17 Wash. 603; Maris v. Clavenger, 29 Wash. 365.

An innocent mistake in a lien notice as to the exact amount due a laborer for his hire will not defeat the lien: Proulx v. Stetson & Post Mill Co., 6 Wash. 478.

A notice of lien that states that the claim is for labor performed upon and assistance rendered in preparing and securing certain saw-logs is sufficiently definite: Overbeck v. Calligan, 6 Wash. 342; see Proulx v. Stetson & Post Mill Co., supra.

A logger's lien notice complies with the language of the statute if it appears, taken as a whole, what was the entire demand before the deductions of offsets and what amount remained due after such deductions: Baxter v. Smith, 2 W. T. 97.

In logger's lien claims, where both lienable and nonlienable items appear in the notice, the former will not fail unless apparent intention to defraud appears and no

confusion of claims is made in the notice, and the evidence segregates the two classes of claims: *Duggan v. Washougal L. & L. Co.*, 10 Wash. 84.

A notice of lien "for labor in manufacturing lumber" which describes the lumber as "being about one hundred thousand feet, which was manufactured in Kitsap Co., Wash., and which is marked thus —, and is now lying at the sawmill owned by said Builders' Material Co., in Kitsap Co., the same being the place where said lumber was manufactured, and situated about two miles south of Port Blakeley, on Puget Sound," complies with the statute: *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165.

A claim of lien which describes the property as "a quantity of lumber, being about 70,000 feet, now lying at defendant's sawmill, in said county," is insufficient: *Dexter Horton & Co. v. Wyley*, 2 Wash. 171.

A claim of lien upon a certain lot of saw-logs, described as "being 1,625,000 feet in quantity . . . being marked thus, K. 30, and a part of which are loose in the water, and a part made up of rafts, one raft of which is now in the possession of the Hart Mill Co., of Seattle, Wash., and the remainder are now lying in the water at the bay at Shelton, Wash.," is insufficient: *Doyle v. McLeod*, 4 Wash. 732; but the notice was held sufficient describing "a lot of saw-logs, being about 1,100,000 feet in quantity . . . marked thus, K. 33, about 153,000 feet of which are in the possession of the Hart Mill Co., of Seattle, Wash., and the remainder of which are now lying in the water in the bay at Shelton, Wash.": *Id.*

A notice of a logging lien need not declare that the labor was performed on all

the logs upon which the lien is claimed, as Laws of 1893, page 428, gives a lien upon all the logs of the person for whom the labor was performed which belonged to him at the time of the filing of the claim: *McPherson v. Smith*, 14 Wash. 226.

The question of the sufficiency of a lien notice cannot be raised in the appellate court, although an objection was made to its introduction, when there is no exception to a finding by the court that the notice was sufficient, or a refusal of the court to make a finding on the subject: *Id.*; compare *Wash. B., L. & M. Co. v. Adler*, 12 Wash. 24.

Affirmative proof that the notice of a logging lien was properly indexed in the records of the auditor's office is not essential to recovery thereon: *McPherson v. Smith*, *supra*.

The provisions of this section reducing the time within which actions to enforce laborers' liens upon logs may be commenced, from twelve to eight months, is a matter affecting the remedy merely, which was within the power of the legislature to abridge; and lien notices filed prior to the passage of the law of 1893 must be enforced within a reasonable time after its taking effect: *McQuesten v. Morrill*, 12 Wash. 135; citing *Garneau v. Port Blakeley M. Co.*, 8 Wash. 467.

The fact that notice of a logger's lien was duly recorded is sufficiently proved by the introduction in evidence of the original notice with the auditor's certificate of record thereon and by testimony admitted without objection, that plaintiff had filed the notice for record in the proper auditor's office: *Mason v. McGee*, 15 Wash. 272.

§ 1169. (5937.) Filing of Claim for Stumpage.

Every person mentioned in section 1164 claiming the benefit thereof must file for record with the county auditor of the county in which such saw-logs, spars, piles or other timber were cut, a claim in substance the same as provided in the next preceding section of this chapter and verified as therein provided. [Cf. L. '77, p. 218, § 10; Cd. '81, § 1948; 1 H. C., § 1686; L. '93, p. 431, § 8.]

§ 1170. (5938.) Recording Claim.

The county auditor must record any claim filed under this act in a book kept by him for that purpose, which record must be indexed, as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments. [Cf. L. '77, p. 218, § 11; Cd. '81, § 1949; 1 H. C., § 1687; L. '93, p. 431, § 9.]

§ 1171. (5939.) Limitation of Actions.

No lien provided for in this chapter binds any saw-logs, spars, piles or other timber, or lumber and shingles, for a longer period than eight

calendar months after the claim as herein provided has been filed, unless a civil action be commenced in a proper court, within that time, to enforce the same: Provided, however, that in case such civil action so commenced should for any cause other than the merits, be nonsuited or dismissed, then the lien shall continue for the term of one calendar month, if the said eight months have expired, to permit the commencement of another action thereon, which shall be as effective in prolonging the lien as if it had been entered during the term of eight months hereinbefore stated. [Cf. L. '77, p. 218, § 12; L. '79, p. 100, § 5; Cd. '81, § 1950; 1 H. C., § 1688; L. '93, p. 431, § 10.]

Cited in 4 Wash. 169.

Time to sue: See 2 Remington's Digest, p. 1763, § 42.

A lienor who filed his lien prior to the taking effect of the law of 1893 is governed by the limitation of time for commencing suit by the new law: *McQuesten v. Morrill*, 12 Wash. 335.

An action to foreclose a lien on saw-logs may be commenced after a portion of them have been made into lumber, and foreclosure may be decreed as to the existing portion: *Gray's Harbor Boom Co. v. Lytle Log. etc. Co.*, 36 Wash. 151.

§ 1172. (5940.) Jurisdiction—Procedure.

The liens provided for in this chapter shall be enforced by a civil action in the superior court of the county wherein the lien was filed, and shall be governed by the laws regulating the proceedings in civil actions touching the mode and manner of trial, and the proceedings and laws to secure property so as to hold it for the satisfaction of any lien that be against it; except as hereinafter otherwise provided. [Cf. L. '77, p. 218, § 13; Cd. '81, § 1951; 1 H. C., § 1689; L. '93, p. 431, § 11.]

See *infra*, § 1175.

Cited in 6 Wash. 346; 20 Wash. 594.

FORECLOSURE: See 2 Remington's Digest, pp. 1762, 1764, §§ 39-47; *Mason v. McGee*, 15 Wash. 272; *Cross v. Dore*, 20 Wash. 121; *Duggin v. Smith*, 27 Wash. 702.

A lien given by statute is personal to the laborer; and when the laborer combines with his own claim one assigned him by another laborer, he loses all right to take the benefit of foreclosure: *Dexter Horton & Co. v. Sparkman*, 2 Wash. 166; see *Casey v. Ault*, 4 Wash. 167.

The action to foreclose a laborer's lien upon saw-logs cannot be maintained against a personal representative of decedent's estate unless the claim shall have been first presented to the executor or administrator, as required by law. Such provision does not, however, prevent such liens being primary claims upon the property covered by them: *Casey v. Ault*, *supra*.

The action to foreclose a loggers' lien is properly brought in the county where the logs were cut, the notice filed, and where the owner resides: *Overbeck v. Calligan*, 6 Wash. 342.

Where it sufficiently appears from the allegations of a complaint that the action is for foreclosure of a loggers' lien, although some of the allegations give it the character of an action of damages for the eloignment of logs, the court is warranted in denying a change of venue, if by amendment the

complaint could be made adequate in the foreclosure proceedings without changing the nature of the action: *Mill Co. v. Superior Court*, 9 Wash. 673.

Under §§ 1679-1690, 1 Hill's Code, one who has performed labor in securing logs may enforce a lien against a part of the property upon which he expended labor, for all of the labor performed upon the whole lot of saw-logs, provided the logs all belonged to the same owner, and the labor was performed under one entire contract: *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478; see *infra*, § 1175.

In a certain loggers' lien action stipulation was entered into by the terms of which the logs were to be sold and proceeds divided pro rata; held that the defendant could not attack the sufficiency of the notices of lien claims held by plaintiff, and that it was the duty of the court to take jurisdiction of the trust fund for distribution, according to the stipulation, although some of the lien claimants raised objections thereto: *Winsor v. Johnson*, 5 Wash. 429.

In an action to foreclose a number of liens upon several lots of logs for labor performed by various persons, whose claims had been assigned to plaintiff, the complaint is not subject to demurrer for misjoinder of causes of action, although each lien may not have covered all the logs, when the complaint alleges that the defendant has

some interest in the logs upon which the various liens are claimed: *McQuesten v. Morrill*, 12 Wash. 335.

Although the owner of lumber and shingles may have made default, the holder of a chattel mortgage thereon, impleaded as defendant, who has answered, denying all plaintiff's allegations, is entitled to a trial: *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165.

Where plaintiffs allege in their complaint that they had filed a lien upon certain lumber and shingles, but the copies of liens forming part of the complaint show that lien was not claimed on the shingles, the answer of defendant specifically denying all the allegations of the complaint and setting up as a new defense that the shingles were cut and sawed from shingle bolts made by other parties than the plaintiffs, to which plaintiffs filed no reply, does not entitle defendants to judgment on the pleadings: *Id.*

In an action to enforce a logger's lien proof that the logs were cut in the county where the notice was filed is necessary: *Garneau v. Port Blakeley Mill Co.*, 8 Wash. 467; *Overbeck v. Calligan*, 6 Wash. 342.

In an action to foreclose a logger's lien, time checks given by the employer to a third party impleaded as defendant on account of some interest in the logs are competent evidence: *Garneau v. Port Blakeley Mill Co.*, supra.

Where a notice of lien described logs as marked "T" on each end, while the proof described them as marked "circle T," without showing the location of the mark, the notice and proof will be held sufficient in the absence of any showing that anyone was misled thereby: *Casey v. Ault*, 4 Wash. 167.

COSTS AND ATTORNEY'S FEES: See 2 *Remington's Digest*, p. 1765, § 48; *Ivall v. Willis*, 17 Wash. 645; *Fraser v. Rutherford*, 26 Wash. 658.

Liabilities of claimants for having notices prepared should be considered as moneys paid and taxed as costs: *Creighton v. Cle*, 10 Wash. 472.

Twenty-five dollars attorney's fees is not excessive in a loggers' lien suit for each sev-

eral claimant: *Garneau v. Port Blakeley Mill Co.*, 8 Wash. 468.

The amount of attorney's fee in logger's lien case is within the discretion of the court, and the decision will not be disturbed, because no evidence was produced of the reasonable value thereof: *Proulx v. Stetson & Post Mill Co.*, supra; distinguishing *Cowie v. Ahrenstedt*, 1 Wash. 416, 420.

A complaint in an action to foreclose a lien on shingles alleges sufficient ground for the issuance of a temporary injunction when it avers that the debt is due; that defendants are insolvent and financially irresponsible; and that the only security for plaintiff's claim was the lien upon the shingles, which defendants were threatening to and were about to remove from the state and dispose of: *Cady v. Case*, 11 Wash. 126.

The issuance of a temporary injunction pendente lite to preserve and make efficient a lien upon shingles, which plaintiff was seeking to enforce, is warranted, although the allegations of the complaint have been denied, when neither the amount sued for nor the right to a lien is disputed by the defendants: *Cady v. Case*, 11 Wash. 124.

The owner of logs cannot defeat loggers' liens thereon by intermingling the logs with others of the same brand: *Creighton v. Cole*, 10 Wash. 472.

In taxing costs upon foreclosure of loggers' liens, liabilities incurred by the claimants for having lien notices prepared should be considered as moneys paid: *Id.*

It is error to tax as costs fees paid a private citizen for preparing copies of the complaint and summons, and for the service thereof upon the defendants: *Id.*

Semble, a rule of the superior court allowing such costs to be taxed is invalid: *Id.*

The complaint in an action to foreclose a logger's lien is not demurrable on the ground that it does not allege, except as a conclusion of law, that anything was due the plaintiff, when it states that "under the terms and conditions of the said contract defendants became indebted to the plaintiff in the sum of three hundred three and 87-100 dollars": *Mason v. McGee*, 15 Wash. 172.

§ 1173. (5941.*) Sheriff as Receiver.

The sheriff of the county wherein the lien is filed shall be the receiver when one is appointed, and the superior court, upon a showing made, shall appoint such receiver without notice, who shall be allowed such fees as may seem just to the court, which fees shall be accounted for by such sheriff as other fees collected by him in his official capacity: Provided, that at any time when any property is in the custody of such sheriff under the provisions of this act, and any person claiming any interest therein may deposit with the clerk of the court in which such action is pending, a sum of money in an amount equal to the claim sued upon, together with one hundred (\$100) dollars, to cover costs and interest, (unless the court shall make an order fixing a different amount to cover such costs and interest, then such an amount as the court shall fix to secure such costs

and interest, which such action is being prosecuted) and shall have the right to demand and receive forthwith from such sheriff the possession and custody of such property: Provided, that in no action brought under the provisions of this act shall costs be allowed to lienholders unless a demand has been made for payment of his lien claim before commencement of suit, unless the court shall find the claimants at time of bringing action had reasonable ground to believe that the owner or the person having control of the property upon which such lien is claimed was attempting to defraud such claimant, or prevent the collection of such lien. [L. '93, p. 432, § 12; L. '99, p. 143, § 1.]

Cited in 8 Wash. 475; 20 Wash. 594; 26 Wash. 660; 51 Wash. 600.

Necessity of demand for payment before suit: See *Fraser v. Rutherford*, 26 Wash. 658.

Under this section demand before the filing of the lien will entitle the claimant to costs: *Sumpter v. Burnham*, 51 Wash. 599.

§ 1174. (5942.) Answer of Defendant—Hearing.

If the defendant or defendants appear in a suit to enforce any lien provided by this chapter he or they shall make their answer on the merits of the complaint, and any motion or demurrer against the said complaint must be filed with the answer; and no motion shall be allowed to make complaint more definite and certain, if it appear to the court that the defendant or defendants have or should have knowledge of the facts, or that it can be made more certain and definite by facts which will appear necessarily in the testimony; but the case, unless the court sustains the demurrer to the complaint, shall be heard on the merits as speedily, as possible, and amendments of the pleadings, if necessary, shall be liberally allowed. [L. '93, p. 432, § 13.]

See notes and references to § 1172, *supra*.

Cited in 13 Wash. 159; 29 Wash. 404.

Pleading—Amendment of complaint: See 2 Remington's Digest, p. 1763, § 44; *Cross v. Dore*, 20 Wash. 121; *Maris v. Clevenger*, 29 Wash. 395.

In loggers' lien complaint where the claim of each plaintiff is separately pleaded, if any of the causes of action are well pleaded a general demurrer to the complaint for want of sufficient facts should be overruled:

Chevret v. Mechanics' M. & L. Co., 4 Wash. 721.

An answer setting up a tender "at the time of the filing of the lien" and plaintiff's failure to make a demand before such filing, dispenses with plaintiff's proof of the filing of the lien, which defendant had denied on information and belief: *Sumpter v. Burnham*, 51 Wash. 599.

§ 1175. (5943.) Enforcement of Lien Against Whole or Part.

Any person who shall bring a civil action to enforce the lien herein provided for, or any person having a lien as herein provided for, who shall be made a party to any civil action, has the right to demand that such lien be enforced against the whole or any part of the saw-logs, spars, piles or other timber or manufactured lumber or shingles upon which he has performed labor or which he has assisted in securing or obtaining, or which he has cut on his timber land during the eight months next preceding the filing of his lien, for all his labor upon or for all his assistance in obtaining or securing said logs, spars, piles or other timber, or in manufacturing said lumber or shingles during the whole or any part of the eight months mentioned in section 1168, or for timber cut during the whole or any part of the eight months above mentioned. And where proceedings are commenced against any lot of saw-logs, spars, piles or

other timber or lumber or shingles as herein provided, and some of the lienors claim liens against the specific logs, spars, piles or other timber or lumber or shingles proceeded against, and others against the same generally, to secure their claims for work and labor, the priority of the liens shall be determined as hereinbefore provided. [Cf. L. '77, p. 218, § 14; Cd. '81, § 1952; 1 H. C., § 1690; L. '93, p. 432, § 14.]

See note to § 1172, *supra*.

"Section 1168" substituted for "section 7" of the act of 1893, while "section 5" [§ 1166, *supra*] was evidently intended.

Cited in 6 Wash. 480, 481; 20 Wash. 594; 27 Wash. 110.

§ 1176. (5944.) **Errors not to Invalidate Lien, When.**

No mistake or error in the statement of the demand, or of the amount of credits and offsets allowed, or of the balance asserted to be due to claimant, nor in the description of the property against which the claim is filed, shall invalidate the lien, unless the court finds that such mistake or error in the statement of the demand, credits and offsets or of the balance due was made with intent to defraud, or the court shall find that an innocent third party without notice, direct or constructive, has, since the claim was filed, become the bona fide owner of the property lienied upon, and that the notice of claim was so deficient that it did not put the party upon further inquiry, in any manner. [L. '93, p. 433, § 15.]

See notes and references to § 1174, *supra*.

Cited in 17 Wash. 605; 27 Wash. 107; 29 Wash. 404; 36 Wash. 154; 40 Wash. 201.

As to immaterial variance in description, see *Marlette v. Crawford*, 17 Wash. 603.

As to harmless error in lien notice, see *Maris v. Clevenger*, 29 Wash. 395; *Livingstone v. Lovegren*, 27 Wash. 102.

§ 1177. (5945.) **Innocent Third Party, Who is.**

It shall be conclusively presumed by the court that a party purchasing the property lienied upon within thirty days given herein to claimants wherein to file their liens, is not an innocent third party, nor that he has become a bona fide owner of the property lienied upon, unless it shall appear that he has paid full value for the said property, and has seen that the purchase money of the said property has been applied to the payment of such bona fide claims as are entitled to liens upon the said property under the provisions of this chapter, according to the priorities herein established. [L. '93, p. 433, § 16.]

Cited in 27 Wash. 107; 40 Wash. 201.

Innocent purchaser: See *Livingstone v. Lovegren*, 27 Wash. 102.

The latter part of this section is not open to objection that it seeks, without due process of law, to dispose of the purchase money,

and vest in the buyer the authority to apply it to such claims as he may see fit to consider bona fide and entitled to liens on the property sold, in violation of the Constitution, Article I, §§ 3-16: *McCoy v. Spithell*, 13 Wash. 158.

§ 1178. (5946.*) **Joinder—Costs.**

Any number of persons claiming liens under this chapter may join in the affidavit in section 1168 provided, and may join in the same action, and when separate actions are commenced the court may consolidate them. The court shall also allow as part of the costs the moneys paid for filing, making and recording the claim, and a reasonable attorney's fee for each person claiming a lien. [L. '01, p. 20, § 1. Cf. L. '77, p. 219, § 15; Cd. '81, § 1953; 1 H. C., § 1691; L. '93, p. 433, § 17.]

Cited in 4 Wash. 722; 10 Wash. 174; 16 Wash. 416; 17 Wash. 647.

The joinder of several claimants' liens in one notice of lien, where the character of the claims is the same, the property is proceeded against and each claim is separately stated, is authorized by § 1691, 1 Hill's Code, which provides for the joinder in one action of foreclosure by persons claiming liens against the same property: *Cheveret v. Mechanics' M. & L. Co.*, 4 Wash. 721.

Where a number of loggers have filed liens on a certain boom of logs they may all join in the action: *Peterson v. Sayward*, 9 Wash. 503; and damages may be recovered in the lien foreclosure or by separate action: *Id.*

As to attorney's fees in cases of joinder of action: see *Wall v. Willis*, 17 Wash. 645.

§ 1179. (5947.) Judgment, Enforcement of.

In each civil action judgment must be rendered in favor of each person having a lien for the amount due to him, and the court or judge thereof shall order any property subject to the lien herein provided for to be sold by the sheriff of the proper county in the same manner that personal property is sold on execution, and the court or judge shall apportion the proceeds of such sale to the payment of each judgment, according to the priorities established in this act pro rata in its class according to the amount of such judgment. [Cf. L. '77, p. 219, § 16; Cd. '81, § 1954; 1 H. C., § 1692; L. '93, p. 434, § 18.]

Judgment: See 2 Remington's Digest, p. 1764, § 47.

In a joint action by a number of loggers, a judgment in their favor will be reversed as to one who fails to show that anything was due him either at the time of trial or when notice was filed: *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 485.

Where a number of claimants join in foreclosing loggers' liens and the pleadings, proofs and findings establish that each assisted in producing certain logs, of which the marks and quantity in feet were given,

the decree should set out the logs upon which the several recoveries can be had: *Garneau v. Port Blakeley Mill Co.*, 8 Wash. 467.

Where the logs have been manufactured into lumber, and their identity destroyed, foreclosure cannot be ordered, but a money judgment may be entered against the party liable, and any money in court impressed with the lien applied thereon: *Grays' Harbor Boom Co. v. Lytle Log etc. Co.*, 36 Wash. 151.

§ 1180. (5948.) Sale as Personalty.

The court or judge may order any property subject to a lien as in this chapter provided to be sold by the sheriff as personal property is sold on execution either before or at the time judgment is rendered, as provided in section next preceding, and the proceeds of such sale must be paid into court, to be applied as in said section directed. [Cf. L. '77, p. 219, § 17; Cd. '81, § 1955; 1 H. C., § 1693; L. '93, p. 434, § 19.]

§ 1181. (5949.) Damages for Eloigning or Removing Marks, etc.—Recoverable When.

Any person who shall eloin, injure or destroy, or who shall render difficult, uncertain or impossible of identification any saw-logs, spars, piles, shingles or other timber upon which there is a lien as herein provided, without the express consent of the person entitled to such lien shall be liable to the lienholder for the damages to the amount secured by his lien, and it being shown to the court in the civil action to enforce said lien, it shall be the duty of the court to enter a personal judgment for the amount in such action against the said person, provided he be a party to such action, or the damages may be recovered by a civil action against such person. [Cf. L. '77, p. 219, § 18; Cd. '81, § 1956; 1 H. C., § 1694; L. '93, p. 434, § 20.]

Cited in 5 Wash. 383; 8 Wash. 475, 578; 9 Wash. 505, 506; 12 Wash. 537; 27 Wash. 109; 50 Wash. 416.

This section, in so far as it authorizes a personal judgment against the eloigner of property subject to a lien without the right to a trial by jury, is void: *McCoy v. Spithill*, 13 Wash. 158.

A personal judgment against a third party for damages is unwarranted when the act of eloignment was committed prior to the taking effect of this law: *Garneau v. Port Blakeley Mill Co.*, 8 Wash. 467; also a judgment for damages when there is no proof of the value of the logs: *Id.*

Under § 1694, 1 Hill's Code, the action of the holder of a lien upon saw-logs for damages by reason of their being sawed into lumber, destroying identification, is not of equitable cognizance, but at law, and where the judgment is for less than \$200 an appeal will not lie: *Tom the Cook v. Sayward*, 5 Wash. 383.

In an action for damages for the destruction of certain logs, defendant cannot set up as a counterclaim that the logs had been sold to defendant, and that in a former case plaintiff had secured a foreclosure of his lien and a sale of a portion of the logs which had not been destroyed: *Peterson v. Sayward*, 9 Wash. 503.

An action for damages may be maintained against persons injuring or destroying logs, and the complaint states a cause of action when it alleges that plaintiff performed work on a certain boom of logs, for which they filed their lien notices within the statutory time; that the logs were sold to defendants, who, knowing the logs were subject to liens, sawed them into lumber without the consent of plaintiffs, etc.: *Id.*; a prior adjudication to establish the liens is not necessary to maintain the action: *Id.*

In an action to foreclose loggers' liens the person who destroyed the identity of the logs to which the right of lien attached cannot be made a party defendant for the purpose of being made to respond in damages, but the remedy of the laborers is to bring separate actions against their employers for the sum due, and under § 1694, 1 Hill's Code, they have another right of action against the person sawing up and destroying the identity of the logs for the actual damages suffered by them: *Singer v. Wallace*, 8 Wash. 576.

In an action for damages for destroying the identification and removal of lumber for which a lien is claimed there is no appellate jurisdiction if the amount is less than \$200: *Chapin v. Kenoyer*, 12 Wash. 530.

In an action to foreclose loggers' liens and for damages against an eloigner of the property, the joinder of the law and equity actions will not deprive the one charged with eloignment of the right to trial by jury: *McCoy v. Spithill*, 13 Wash. 158.

In an action foreclosing liens on certain logs, and for damages against a defendant for the eloignment of logs, it is error in entering personal judgment against the eloigner to tax as costs attorney's and receiver's fees allowed in the matter of the foreclosure: *Grimm v. Pacific Creosoting Co.*, 50 Wash. 415.

In an action to foreclose liens upon several booms of logs, two of which had been eloigned and removed from the jurisdiction of the court by a defendant, he is a proper party to the foreclosure action, where it is alleged that he had also purchased the booms within the jurisdiction of the court, and damages may be awarded against him for the eloignment, and his demurrer for misjoinder of causes of action is properly overruled: *Id.*

CHAPTER VIII.

LIENS ON STEAMERS, BOATS, ETC.

§ 1182. (5953.*) Vessels, etc., Liable for Liens, When.

All steamers, vessels and boats, their tackle, apparel and furniture, are liable—

1. For service rendered on board at the request of, or under contract with, their respective owners, charterers, masters, agents or consignees.

2. For work done or material furnished in this state for their construction, repair or equipment at the request of their respective owners, charterers, masters, agents, consignees, contractors, subcontractors, or other person or persons having charge in whole or in part of their construction, alteration, repair or equipment; and every contractor, builder or person having charge, either in whole or in part, of the construction, alteration, repair or equipment of any steamer, vessel or boat, shall be held to be the agent of the owner for the purposes of this chapter, and for supplies furnished in this state for their use, at the request of their

respective owners, charterers, masters, agents or consignees, and any person having charge, either in whole or in part, of the purchasing of supplies for the use of any such steamer, vessel or boat, shall be held to be the agent of the owner for the purposes of this chapter.

3. For their wharfage and anchorage within this state.

4. For nonperformance or malperformance of any contract for the transportation of persons or property between places within this state, or to or from places within this state, made by their respective owners, masters, agents or consignees.

5. For injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state. Demands for these several causes constitute liens upon all steamers, vessels and boats, and their tackle, apparel and furniture, and have priority in the order of the subdivisions hereinbefore enumerated, and have preference over all other demands; but such liens continue in force only for a period of three years from the time the cause of action accrued. [L. '01, p. 21, § 1. Cf. L. '58, p. 29, § 1; L. '77, p. 216, § 1; Cd. '81, § 1939; 1 H. C., § 1678.]

See *supra*, § 183, notes, when survivor may sue.

Cited in 1 Wash. 612, 615; 3 Wash. 586; 47 Wash. 422; 51 Wash. 87.

Maritime liens: See 2 Remington's Digest, pp. 1796, 1797, §§ 1-8; Callahan v. Aetna Indemnity Co., 33 Wash. 583.

This section gives a lien for damages by a vessel to the pier of a bridge: *West v. Martin*, 51 Wash. 85.

Doubt expressed as to the power of the legislature to confer jurisdiction upon courts to entertain an in rem proceeding in admiralty, for materials furnished in the building of a vessel: *Waddell v. Str. Daisy*, 2 W. T. 76.

In determining whether a contract for the furnishing of materials in the construction of a vessel is a maritime contract, the test is, not the location of the hull, as to being on the ways or afloat, but rather, was she so far finished at the time that anything further done upon or about her would in its nature be maritime: *Id.*

Where it appears that a person has a contract for the furnishing of machinery for a vessel, and the materials of a third person, who had full knowledge, were used in the construction of such machinery, and it appearing that the owner of the steam vessel, or his agent, authorized the using of said materials, the steamer is not liable for the same: *Id.*

The libel averring that the material was used in the building of the vessel, demonstrates that the contract was not maritime, and that this court is without jurisdiction in rem: *Id.*

Under this chapter, providing for enforcing liens by civil action against vessels, for labor and materials furnished, there may be a decree of lien and foreclosure of the same, upon a vessel for the price of machinery and other material used in its construction; and such statute is valid, although it may contain no provision for re-

cording the lien, nor any provision authorizing the seizure of the vessel pending the litigation: *Wash. I. W. Co. v. Jensen*, 3 Wash. 584.

The foreclosure of a lien upon a vessel, and the appointment of a receiver, being matters of an equitable nature, in an action wherein such relief is sought, is properly brought on the equity side of the court: *Id.*

Materialmen have no lien upon a domestic vessel, in her home port, or that in which the owner resides. Peculiar circumstances, such as mentioned in the opinion, may qualify this rule: *Price v. Frankel*, 1 W. T. 33.

The common law, not favoring liens, deems a surrender of possession a waiver of lien: *Id.*

The statute of California, providing liability against vessels for supplies and materials furnished within that state, creates no lien upon vessels until proceedings are instituted to enforce the liability as contemplated by that statute. There being no such lien created in this case, this court sitting in admiralty can exercise no jurisdiction: *Id.*

This and the following section require that maritime torts be enforced in admiralty, and state courts have no jurisdiction thereof: *West v. Martin*, 47 Wash. 417.

Objection to the jurisdiction of the state superior court over an action to enforce a lien for damages against a vessel is not waived by the giving of a bond for the release of the vessel, conditioned to pay any judgment that might be recovered on the cause of action, where the bond is expressly stated to be a substitute for any security or claim the plaintiff might have against the vessel: *West v. Martin*, 47 Wash. 417.

In the absence of special proceedings in the foreclosure of liens upon vessels, it is within the power of the court, sitting as a court of chancery, to appoint a receiver to take charge of the property pending such proceedings: *Wash. I. W. Co. v. Jensen*, *supra*.

It is the settled rule in the construction of lien laws that the legislature will not be presumed to have provided a lien for the claims of persons, not in privity with the owner of the property against which the lien is sought, unless such provision is

made in unequivocal language; and such intention does not appear in the language of our lien law, but a fair construction shows the contrary: *Waddell v. Str. Daisy*, *supra*.

The personal representatives of passengers killed in a collision can maintain a suit in admiralty in a federal court against the vessel in fault, when the local law gives them a right of action, and makes the damages a lien on the vessel as provided in this chapter and in §§ 183, 194: *The Premier* (Wash.), 59 Fed. 797.

§ 1183. (5954.) Enforcement of Liens.

Such liens may be enforced, in all cases of maritime contracts or service, by a suit in admiralty, in rem, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime, by a civil action in any district court of this territory. [L. '77, p. 216, § 2; Cd. '81, § 1940.]

See § 1186, *infra*.

Cited in 47 Wash. 422.

§ 1184. Liens for Services of Stevedores.

All steamers, vessels and boats, their tackle, apparel and furniture shall be held liable at all ports and places within this state or within the jurisdiction of the courts of this state or within the jurisdiction of the courts of the United States in said state for services rendered by stevedores, longshoremen or others engaged in the loading, unloading, stowing or dunnaging of cargo in or from any steamer, vessel or boat in any harbor or at any other place within said state, or within the jurisdiction of the courts thereof as above stated, and said steamers, vessels and boats shall further be liable as per their contracts for all services performed upon wharfs or landing places by stevedores, longshoremen or others: Provided, that such services must have been so performed in and about and be connected with the loading, unloading, dunnaging or stowing of said cargo. [L. '01, p. 136, § 1.]

§ 1185. Priority.

Demands for wages and all sums due under contracts or otherwise for the performance of all or any of the services mentioned in the last preceding section shall constitute liens upon all steamers, vessels and boats, their tackle, apparel and furniture, and shall have priority over all other demands save and excepting the demands mentioned in the first three subdivisions of section 1182, *supra*, to which said demands the lien hereby provided shall be subordinate: Provided, that such liens shall only continue in force for the period of three years from the date when such work was done or the last services performed by such stevedores, longshoremen or others. [L. '01, p. 137, § 2.]

§ 1186. Suits in Rem.

The liens hereby created may be enforced by a suit, in rem, and the law regulating like proceedings shall govern in all such suits. [L. '01, p. 137, § 3.]

See, also, § 1183, *supra*.

§ 1187. Liens for Towage and Dunnage.

Whenever the owner, charterer, or any person or corporation operating, managing or controlling any steamship, vessel or boat shall willfully fail, neglect or refuse to carry out or perform any express contract or portion thereof for the towing, loading, unloading, dunnaging or stevedoring of such steamship, vessel or boat, any person or persons, firm or corporation sustaining thereby any loss or damage which is capable of definite ascertainment shall have a lien upon such steamship, vessel or boat for said loss or damage. The rank and priority of the lien hereby created and the manner of its enforcement shall be fixed, controlled and regulated by the provisions of the existing law pertaining to liens for similar services already performed. [L. '03, p. 286, § 1.]

CHAPTER IX.**LIENS ON FARM PRODUCTS.****§ 1188. (5957.) Farm Laborers' and Landlords' Liens.**

Any person who shall do labor upon any farm or land, in tilling the same or in sowing or harvesting or threshing any grain, as laborer, contractor, or otherwise, or laboring upon, or securing or assisting in securing or housing any crop or crops sown, raised, or threshed thereon during the year in which said work or labor was done, such person shall have a lien upon all such crops as shall have been raised upon all or any of such land, for such work or labor, and every landlord shall have a lien upon the crops grown or growing upon the demised lands of any year for the rents accrued or acquiring for such year, whether the same is paid wholly or in part in money or specific articles of property, or products of the premises, or labor, and also for the faithful performance of the lease; and the lien created by the provisions of this section shall be a preferred lien, and shall be prior to all other liens. [Cf. L. '79, p. 150, § 1; Cd. '81, § 1975; L. '86, p. 114, § 1; L. '91, p. 144, § 1; 1 H. C., § 1695.]

Cited in 10 Wash. 174; 14 Wash. 624, 625; 40 Wash. 201.

Agricultural liens: See 1 Remington's Digest, pp. 56, 57, §§ 1-6.

Employer cannot claim lien covering the labor of his employees. The above section was intended to secure and protect the personal earnings of laborers, and not to give a lien to contractors who hire the services of others. The lien is given to laborers actually performing the services with their teams or other implements of labor: *Mohr v. Clark*, 3 W. T. 440.

One who harvests and threshes grain is entitled to a lien thereon for wages, unless there is something in the nature of his contract showing that he did not look to such property for security. Leaving the grain thus harvested and threshed on the premises of the owner in charge of a third person is not a waiver of the lien against an attaching creditor with knowledge of the claim of lien: *Hogue v. Sheriff of Lewis Co.*, 1 W. T. 172.

Farm labor statute giving liens held constitutional: *Essency v. Essency*, 10

Wash. 375; but under the statute no lien can be claimed for a team, but might be maintained for a person and a team where there is no separate specification of contract price for person and team: *Id.*

The lien given by this section to laborers for work in growing farm crops is superior to all other liens thereon, including that of a prior chattel mortgage: *Sitton v. Dubois*, 14 Wash. 624.

An act giving farm laborers priority over all other liens upon crops which they have assisted in raising is not unconstitutional as impairing the obligation of contracts, although the crop had been mortgaged in advance of the labor thereon, where such act was in force at the time of the execution of the mortgage, and must therefore have entered into and formed a part of the contract: *Id.*

In an action to foreclose a laborer's lien on a certain quantity of wheat upon which it was alleged that a number of defendants had, or claimed, a lien, one defendant is not entitled to set up by cross-complaint that a codefendant converted

the property to his own use to the cross-complainant's damage, as such claim relates to matters not embraced in the original complaint: *Hill v. Frink*, 11 Wash. 562.

In an action to enforce a laborer's lien upon certain farm products, evidence is

competent which tends to show that plaintiff was in fact interested in the contract made by the owners of the products with another for the raising of the crops, and that the cost of production of such crops had been fully paid under the contract: *Essency v. Essency*, supra.

§ 1189. (5958.) **Priority of Liens.**

The liens provided for in the last section are preferred liens, and are prior to any other liens or encumbrance upon said crop or crops, except that the interest of any lessor in any portion of the crop raised where the premises are leased in consideration of a share of the crop raised, shall not be subject to such lien. [L. '79, p. 150, § 2; Cd. '81, § 1976; L. '83, p. 45, § 5.]

§ 1190. (5959.) **Claim to be Verified and Filed—How Enforced.**

Any person claiming the benefit of this chapter must, within forty days after the close of said work and labor, or after the expiration of the term, or after the expiration of each year of the lease, for which any lands were demised, file for record with the county auditor of the county in which said work and labor was performed, or said demised lands are situated, a claim which shall be in substance in accordance with the provisions of section 1168, so far as the same may be applicable, which said claim shall be verified as in said section provided, and said liens may be enforced in a civil action in the same manner, as near as may be, as provided in section 1172: Provided, that the lien hereby created in favor of landlords shall only apply when the lease has been recorded. [Cf. L. '79, p. 150, § 3; Cd. '81, § 1977; L. '86, p. 115, § 2; L. '88, p. 130, § 1; 1 H. C., § 1696.]

Compare Code of 1881, § 1978, rights secured to lienholders.

Cited in 11 Wash. 174.

Under this section giving farm laborers liens, all may join in filing claims, but the verification may be made by one of the number: *Payne v. Isaacs*, 10 Wash. 173; and in such case an attorney's fee may be allowed: *Id.*; see *Cheveret v. Mechanics' Mill Co.*, 4 Wash. 721.

A farm laborer's lien, when it appears that his labor was concluded more than forty days prior to the filing of the lien notice, his lien will be defeated: *Payne v. Isaacs*, supra.

In a claim of lien for farm labor where no demurrer is interposed for deficiency of description in the lien notice, the defect is cured by the decree of foreclosure: *Id.*

In a particular case of foreclosure on wheat a judgment was rendered for plain-

tiffs against attaching creditors of the tenant: *Id.*; and in such action against the tenant to enforce farm laborer's lien the landlord is neither a proper or necessary party: *Id.*

A notice of lien describing products as eight hundred and fifty sacks of wheat raised on certain described premises, without locating or describing the sacks, is insufficient, and cannot be amended: *Dexter v. Olson*, 40 Wash. 199.

Where nonlienable items are willfully and intentionally inserted in claim of lien along with lienable items, a court of equity will refuse to enforce the lien for any portion of the claim: See *Robinson v. Brooks*, 31 Wash. 60.

§ 1190a. (5984.) **Provisions Extended to Farm Laborers.**

All rights secured to the holders of liens upon logs, under the provisions of chapter VII, shall inure to the benefit of those holding liens under the provisions of this chapter, and the said lienholders hereunder, shall have the same right to have their liens recorded, the same right of foreclosure, of joinder of parties, of judgment over against the person primarily liable, and against any person who shall injure or impair their lien or any of their rights,

as are above secured to the holders of liens upon logs, under said chapter VII. [Cd. '81, § 1978.]

"This chapter" in the Code of 1881 included chapters IX, XIII and XIV of this Title; but this section relates only to chapter IX.

This section is still in force: *Pain v. Isaacs*, 10 Wash. 173, 174; *Gleason v. Tacoma Hotel Co.*, 16 Wash. 412, 416.

CHAPTER X.

LIENS FOR STORAGE AND ADVANCED CHARGES.

§ 1191. (5963.) When Lien Exists.

Whenever property upon which charges for advances, freight, transportation, wharfage, or storage, due and unpaid, and a lien shall remain and be held in store by the person or persons in whose favor such lien exists uncalled for, it shall be lawful for such person or persons to cause such property to be sold as is herein provided. [Cd. '81, § 1980; 1 H. C., § 1699.]

Lien of carriers: See 1 Remington's Digest, p. 438, §§ 34, 35; *Moses v. Port Townsend etc. R. Co.*, 5 Wash. 595; *Koyukuk Mining Co. v. Van De Vanter*, 30 Wash. 385.

§ 1192. (5964.) When Certain Property may be Sold for Charges.

If said property consists of livestock, the maintenance of which at the place where kept is wasteful and expensive in proportion to the value of the animals, or other of the perishable property liable, if kept, to destruction, waste, or great depreciation, the person or persons having such lien may sell the same upon giving ten days' notice. [Cd. '81, § 1981; 1 H. C., § 1700; see L. '63, p. 421, § 2.]

§ 1193. (5965.) When Other Property may be Sold.

All other property upon which such charges may be unpaid, due, and a lien, after the same shall have remained in store uncalled for for a period of thirty days after such charges shall have become due, may be sold by the person or persons having a lien for the payment of such charges upon giving ten days' notice: Provided, that where the property can be conveniently divided into separate lots or parcels, no more lots or parcels shall be sold than shall be sufficient to pay the charges due on the day of sale, and the expenses of the sale. [Cd. '81, § 1982; 1 H. C., § 1701.]

§ 1194. (5966.) Application of Proceeds of Sale.

The moneys arising from sales made under the provisions of this chapter shall first be applied to the payment of the costs and expenses of the sale, and then to the payment of the lawful charges of the person or persons having a lien thereon for advances, freight, transportation, wharfage, or storage, for whose benefit the sale shall have been made; the surplus, if any, shall be retained, subject to the future lawful charge of the person or persons for whose benefit the sale was made, upon the property of the same owner still remaining in store uncalled for, if any there be, and to the demand of the owner of the property who shall have paid such charges or otherwise satisfied such lien, and all moneys remaining uncalled for, for the period of three months, shall be paid to the county treasurer, and shall remain in his hands a special fund

for the benefit of the lawful claimant thereof. [Cd. '81, § 1983; 1 H. C., § 1702.]

Cited in 30 Wash. 391.

§ 1195. (5967.) Special Contract not Affected.

Nothing in this chapter contained shall be so construed as to alter or affect the terms of any special contract in writing, made by the parties, as to the advances, affreightment, wharfage, or storage; but when any such special contract shall have been made, its terms shall govern, irrespective of this chapter. [Cd. '81, § 1984; 1 H. C., § 1703.]

§ 1196. (5968.) Notices, How Given.

All notices required under this chapter shall be given as is or may be by law provided in cases of sales of personal property upon execution. [Cd. '81, § 1985; 1 H. C., § 1704.]

CHAPTER XI.

LIENS FOR KEEPING LIVESTOCK.

§ 1197. (5971.*) Creation of Lien.

Any farmer, ranchman, herder of cattle, tavern keeper, livery and boarding stable keeper or any other person, to whom any horses, mules, cattle or sheep shall be intrusted for the purpose of feeding, herding, pasturing, and training, caring for or ranching, shall have a lien upon said horses, mules, cattle or sheep for such amount that may be due for said feeding, herding, pasturing, training, caring for, and ranching, and shall be authorized to retain possession of said horses, mules or cattle or sheep, until said amount is paid. [L. '09, p. 636, § 1. Cf. L. '91, p. 151, § 1; 1 H. C., § 1705.]

Cited in 10 Wash. 28; 12 Wash. 46; 36 Wash. 129.

Agister's liens: See 1 Remington's Digest, p. 63, § 1; Lafond v. Smith, 8 Wash. 26; Hooker v. McAllister, 12 Wash. 46.

Where a horse trainer entitled to a lien

for services under this section accepts a bill of sale or chattel mortgage on the horse, he loses his priority over a mortgagee whose lien accrued subsequent to the rendition of service: Murray v. Guse, 10 Wash. 25.

§ 1198. (5972.) Enforcement.

Any person having a lien under the provisions of the last preceding section may enforce the same by an action in any court of competent jurisdiction; and said property may be sold on execution for the purpose of satisfying the amount of such judgment and costs of sale, together with the proper costs of keeping the same up to the time of said sale. [L. '91, p. 151, § 2; 1 H. C., § 1706.]

The "last preceding section" applies to the act of 1891, page 151, § 1, which expressly excepted "stolen stock" from liens for keeping, and omitted the words "any other person." Otherwise it was the same as § 1197.

Cited in 36 Wash. 129.

§ 1199. Possession to Secure Lien—Sale—Notice.

Any person having a lien under the provisions of section 1197 for feeding, herding, pasturing, training, caring for, or ranching any horses, mules, cattle or sheep, shall retain such animal for a period of ten (10) days, at the expiration of which time, if the owner of such animal does not satisfy such lien, the sheriff or any constable may sell such animal at public auction after

giving the owner ten days' notice of the time and place of such sale by delivering a copy of such notice to the owner, or in case personal service cannot be had, by publishing same in a newspaper of general circulation in said county where said feeding, herding, pasturing, training, caring for, and ranching was furnished; if there be no paper of general circulation in said county, then by posting notices of the time and place of such sale in three conspicuous places in said county, and after satisfying the lien and costs that may accrue, any residue remaining shall be paid to the owner of said animal or person who may be lawfully entitled to the same. [L. '09, p. 636, § 2.]

§ 1200. No Waiver by Delivery—Action to Enforce.

Whenever any horses, mules, cattle or sheep shall be intrusted for the purpose of feeding, herding, pasturing, training, caring for, and ranching to any farmer, ranchman, herder of cattle, tavern keeper, livery or boarding stable-keeper, continuously for some time, either definite or indefinite, the voluntary delivery of the same to the owner or his agent shall not waive or defeat the lien provided for in section 1197, and the person having such lien may enforce his lien against said property in any court of competent jurisdiction at any time within ten (10) days after parting with the possession thereof: Provided, that such lien shall not attach to the interest nor affect the rights of a third person who may have acquired an interest in or title to an animal against which a lien is claimed, for value and without knowledge of the claimed lien, while such animal is not in possession of the claimant. [L. '09, p. 637, § 3.]

CHAPTER XII.

LIENS OF INNKEEPERS AND THEIR LIABILITY.

§ 1201. (5975.) Lien upon Baggage, etc.

Hereafter all hotel-keepers, innkeepers, lodging-house keepers, and boarding-house keepers in this state shall have a lien upon the baggage, property, or other valuables of their guests, lodgers, or boarders brought into such hotel, inn, lodging-house, or boarding-house by such guests, lodgers, or boarders, for the proper charges due from such guests, lodgers, or boarders for their accommodation, board, or lodging, and such other extras as are furnished at their request, and shall have the right to retain in their possession such baggage, property, or other valuables until such charges are fully paid, and to sell such baggage, property, or other valuables for the payment of such charges in the manner provided in the next succeeding section of this chapter. [L. '90, p. 96, § 1; 1 H. C., § 2710.]

Cited in 38 Wash. 412.

Innkeeper's liens: See 2 Remington's Digest, p. 1511, § 2.

An innkeeper has no lien upon samples of a traveling salesman where he was

aware at the time of giving credit that the samples belonged to the salesman's employer: Wertheimer etc. Co. v. Hotel Stevens Co., 38 Wash. 409.

§ 1202. (5976.) Sale to Satisfy Lien—Notice.

Whenever any baggage, property, or other valuables which have been retained by any hotel-keeper, innkeeper, lodging-house keeper, or boarding-house keeper in his possession by virtue of the provision of the next preceding section of this chapter shall remain unredeemed for the period of three months after the same shall have been so retained, then it shall be lawful for such

hotel-keeper, innkeeper, lodging-house keeper, or boarding-house keeper to sell such baggage, property, or other valuables at public auction, after giving the owner thereof ten days' notice of the time and place of such sale, through the postoffice, or by advertising in some newspaper published in the county where such sale is made, or by posting notices in three conspicuous places in such county, and out of the proceeds of such sale to pay all legal charges due from the owner of such baggage, property, or other valuables, including proper charges for storage of the same, and the overplus, if any, shall be paid to the owner upon demand. [L. '90, p. 96, § 2; 1 H. C., § 2711.]

§ 1203. (5977.) Responsibility Limited.

No innkeeper who constantly has in his inn an iron safe or suitable vault in good order, and fit for the safe custody of money, bank notes, jewelry, articles of gold and silver manufacture, precious stones and bullion, and who keeps a copy of this section, printed by itself in large, plain Roman type, and framed, constantly and conspicuously suspended in the office, barroom, saloon, reading, sitting, and parlor room of his inn, and also a copy printed by itself in ordinary-sized plain Roman type, posted upon the inside of the entrance door of every public sleeping room of his inn, shall be liable for the loss of any such article suffered by any guest, unless such guest has first offered to deliver such property lost by him to such innkeeper for custody in such iron safe or vault, and such innkeeper has refused or neglected to receive and deposit such property in his safe or vault, and to give such guest a receipt therefor: Provided, that all doors to rooms furnished to guests shall be provided with slide-bolts inside of such rooms on all doors; otherwise he shall be liable; but every innkeeper shall be liable for any loss of the above enumerated articles by a guest in his inn, when caused by the theft or negligence of the innkeeper or any of his servants. [L. '90, p. 95, § 1; 1 H. C., § 2712.]

CHAPTER XIII.

PREFERENCE RIGHTS OF EMPLOYEES.

§ 1204. (5981.) Priority of Wages, etc., in Insolvency.

In all assignments of property made by any person to trustees or assignees on account of the inability of the person at the time of the assignment to pay his debts, or in proceedings in insolvency the wages of the miners, mechanics, salesmen, servants, clerks, or laborers employed by such persons to the amount of one hundred dollars each, and for services rendered within sixty days previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor. [L. '77, p. 223, § 34; Cd. '81, § 1972; 1 H. C., § 3122.]

Cited in 17 Wash. 186.

§ 1205. (5982.) Preference on Death of Employer.

In case of the death of any employer, the wages of each miner, mechanic, salesman, clerk, servant, and laborer for services rendered within sixty days next preceding the death of the employer, not exceeding one hundred dollars, rank in priority next after the funeral expenses, expenses of the last sickness, the charges and expenses of administering upon the estate, and the allowance to the widow and infant children, and must be paid before other claims

against the estate of the deceased person. [L. '77, p. 223, § 35; Cd. '81, § 1973; 1 H. C., § 3123.]

See *infra*, § 1568, order of payment of debts of estates.

§ 1206. (5983.) Notice and Presentment of Claims.

In cases of executions, attachments, and writs of similar nature issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers who have claims against the defendant for labor done, may give notice of their claims and the amount thereof, sworn to by the person making the claim to the creditor and the officer executing either of such writs at any time before the actual sale of property levied on, and unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within sixty days next preceding the levy of the writ, not exceeding one hundred dollars. If any or all the claims so presented and claiming preference under this chapter are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days from [for] the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim of priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim, until the determination of such action; and in case judgment be had for the claim or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim, with the same rank as the original claim. [L. '77, p. 223, § 36; Cd. '81, § 1974; 1 H. C., § 3124.]

Cited in 6 Wash. 621; 16 Wash. 413, 697.

Where property was attached, but before judgment the action was dismissed by plaintiff, and a chattel mortgage taken and foreclosed thereon, the fact that certain labor claim notices under this section were served in the original action will not give

such claimants a cause of action against the mortgagee: *Wells v. Columbia Nat. Bank*, 6 Wash. 621.

As to claims for labor against property levied on, see *Gleason v. Tacoma Hotel Co.*, 16 Wash. 412.

CHAPTER XIV.

THE CONSTRUCTION OF STATUTES RELATING TO LIENS.

§ 1208. (5985.) Construction of Lien Law.

In construing the provisions of the lien law, words used in the masculine gender include the feminine and neuter, the singular number includes the plural, and the plural the singular; the word "person" includes a corporation as well as a natural person, and the word "writing" includes printing. [L. '77, p. 224, § 37; Cd. '81, § 1979; 1 H. C., § 1707.]

See *supra*, §§ 144-148, construction of terms in general.

§ 1209. (5986.) Extent of Lien Law.

This act establishes the law of this state respecting the subject to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect its object. [L. '77, p. 224, § 39; Cd. '81, § 1979; 1 H. C., § 1980.]

"This act" in Laws of 1877, refers to liens of mechanics, loggers, and others, now covered in this title.

See *supra*, § 144, construction of statutes in general.

See *supra*, § 1147, construction.

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CHAPTER I.

THE COMPETENCY OF WITNESSES.

§ 1210. (5990.) **Who may Testify.**

Every person of sound mind and suitable age and discretion, except as hereinafter provided, may be a witness in any action or proceeding. [L. '54, p. 186, § 289; Cd. '81, § 388; 2 H. C., § 1645.]

See supra, § 81, examination of witnesses before legislative committee.

See supra, § 339, mode and procedure.

See supra, § 348, juror may be examined as witness.

See infra, § 2158, trial and procedure in criminal cases.

Capacity and qualifications of witnesses in general: See 2 Remington's Digest, p. 2887, §§ 10-26; State v. Bailey, 31 Wash. 89; State v. White, 10 Wash. 611; Birkel v. Chandler, 26 Wash. 241; State v. Dolan, 17 Wash. 499; Bullock v. White Star Steamship Co., 30 Wash. 443; Maitland v. Zanga, 14 Wash. 92; State v. Bringgold, 40 Wash. 12; Kellogg v. Scheuerman, 18 Wash. 293; Klehn v. Territory, 1 Wash. 584;

Czarecki v. Seattle & S. F. Ry. & Nav. Co., 30 Wash. 288; State v. Melvern, 32 Wash. 7.

The statutes (1863) relative to witnesses and evidence do not alter the common-law rule that an accessory before the fact is not a competent witness on behalf of the prisoner: Edwards v. Territory, 1 W. T. 195.

§ 1211. (5991.) **Not Excluded on Ground of Interest, Exception.**

No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility: Provided, however, That in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person, or by any such minor under the age of fourteen years: Provided further, that this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and who have no other or further interest in the action. [Cf. L. '54, p. 186, § 290; L. '67, p. 88, § 1; L. '73, p. 106, § 382; Cd. '81, § 389; L. '90, p. 91, § 1; 2 H. C., § 1646.]

See infra, § 1213, who incompetent.

See infra, § 1214, who disqualified.

See infra, § 1402, notes, proceedings in certain cases.

Cited in 2 Wash. 425; 6 Wash. 85; 12 Wash. 471; 13 Wash. 553; 14 Wash. 136; 17 Wash. 518; 24 Wash. 228, 672; 26 Wash. 49, 57; 27 Wash. 187; 29 Wash. 83; 30 Wash. 193; 31 Wash. 37; 34 Wash. 374; 42 Wash. 113; 43 Wash. 244; 45 Wash. 110, 111; 46 Wash. 251, 310; 47 Wash. 258; 48 Wash. 653; 49 Wash. 344; 50 Wash. 380.

Testimony of parties or persons interested, for or against representatives, survivors, or successors in title or interest of persons deceased or incompetent: See 2 Remington's Digest, pp. 2890-2893, §§ 30-48; Spencer v. Terrell, 17 Wash. 514; In re Alfstad's Estate, 27 Wash. 175; Kline v. Stein, 30 Wash. 189; Reynolds v. Reynolds, 42 Wash. 107; Marvin v. Yates, 26 Wash. 50; Whitney v. Priest, 26 Wash. 48; O'Toole v. Faulkner, 34 Wash. 371; Bay View Brewing Co. v. Grubb, 31 Wash. 34; Carr v. Jones, 29 Wash. 78; Newman v. Buzard, 24 Wash. 225; Rauh v. Scholl, 19 Wash. 30; Sackman v. Thomas, 24 Wash. 660; Erickson v. Modern Woodmen, 43 Wash. 242.

Under this section, in an action by an administrator against a son of the deceased, for appropriation of property belonging to the estate, a brother of the defendant is not interested adversely to the estate and may testify therein: McCoy v. Ayers, 2 W. T. 307.

The rule prohibiting conversations between a deceased person and a party in interest extends to a stockholder in a corporation, which is a party to an action, in which the stockholder is the real party in interest: Gilmore v. H. W. Baker Co., 12 Wash. 468; the reason of the rule is to require one to remain silent as to any transaction had by him with a deceased person: Id., 472; see Wolferman v. Bell, 6 Wash. 84, 85.

Where parties claim title in lands by, through or from a deceased person the declarations of the decedent to either party to the record cannot be testified to by them under this section: Smith v. Taylor, 2 Wash. 422, 425. The words "legal representative" as used in this section are not synonymous with "personal representative": Id.

The death of a party to an action and the substitution of his legal representative will not render inadmissible the deposition of an adverse party in interest, when at the time the deposition was taken the testimony of the witness was competent: Neis v. Farquharson, 9 Wash. 508.

In an action to recover for services as a domestic in the family of a decedent, testimony is admissible on the part of plaintiff to show that he was employed in the house of the decedent, and the character of the work performed by him there, as such testimony does not come within the prohibition of this section prohibiting testimony of conversations had with a deceased person: Ah How v. Furth, 13 Wash. 550.

In an action upon a promissory note alleged to have been executed by a decedent, and to which the defense has been set up that it is a forgery, evidence of statements made by decedent at about the time of the date of the note is admissible for the purpose of showing the improbability of his having executed it: Moore v. Palmer, 14 Wash. 134.

The rule prohibiting the introduction in evidence of conversations held between a deceased person and a party in interest will exclude the testimony of a stockholder in a corporation, which is a party to an action brought by the representatives of a decedent's estate upon a lease, when such stockholder, at the time of the alleged conversation, which was prior to the formation of the corporation to which he had assigned the lease, was the real party in interest. A party at whose request incompetent testimony has been admitted cannot complain of the errors: Gilmore v. The H. W. Baker Co., 12 Wash. 468.

The rule excluding the testimony of an interested party in an action against the executor of a deceased person will apply to one who has conveyed away his interest in the land which is the subject matter of the action by a deed absolute on its face, but in reality only a mortgage, even though, for the purpose of rendering his testimony competent, he executes a release of his right to redeem: Thorne v. Joy 15 Wash. 83.

Agreements and arrangements entered into with a deceased person cannot be given in evidence in an action against his executor by parties whose interests are adverse, even if competent as to another defendant in the action, when the relief sought against such other defendant is incidental to the principal object sought by the action against such executor, and when the court has not been sufficiently advised as to the restrictive purpose for which the evidence was offered: Id.

In an action between alleged partners, one of whom was insane, an adverse party cannot testify as to who composed the partnership under this section: Chlopeck v. Chlopeck, 47 Wash. 256.

This section does not disqualify an interested party, defending as administratrix, from testifying on behalf of the estate of such deceased as to such transactions had with him: O'Connor v. Slatter, 46 Wash. 308.

A widow, defending as executrix of her deceased husband's estate, does not waive her right to object to evidence by the adverse party as to transactions with the deceased by the fact that she fully testified to the same, since under our statute her testimony was competent and not barred by the statute: O'Connor v. Slatter, 48 Wash. 493.

In an action to recover an interest in property as an heir of defendant's alleged wife, the defendant is incompetent to tes-

tify that he was never married to the deceased, since it would be evidence of a transaction between himself and the deceased: *Nelson v. Carlson*, 48 Wash. 651.

A plaintiff claiming under a contract with a person since deceased may testify as to transactions between himself and a third person and as to services performed by him which appear to be the consideration for the contract, and the same does not fall within the statute prohibiting testimony of a transaction had with, or statements made to or by, a deceased person: *Kauffman v. Baillie*, 46 Wash. 248.

This section applies to transactions or statements prior to the date of the amending enactment, and is constitutional, since it merely declares a rule of evidence and relates only to the remedy, in which there is no vested right: *Kenney Presbyterian Home v. Kenney*, 45 Wash. 106.

Testimony by the adverse party as to whether notes had been changed since he received them from a person since deceased is inadmissible, because testimony of a transaction had with the deceased, being indirectly testimony as to their condition when received from the deceased: *O'Connor v. Slatter*, 48 Wash. 493.

The son of one of the parties is not incompetent to testify as to conversations had with the deceased, since a prospective heir is not a party in interest: *In re Sloan's Estate*, 50 Wash. 86.

In an action to enjoin the removal of timber sold by plaintiff to one M., who sold the same to defendants, brought after the death of M., the plaintiff is incompetent to testify to the transaction between himself and M. upon an issue as to the terms of the contract under this section: *Preston v. Hill-Wilson Shingle Co.*, 50 Wash. 377.

This section does not exclude evidence as to who was or was not present at the time certain notes were indorsed by the deceased: *O'Connor v. Slatter*, 48 Wash. 493.

In an action by an administrator to recover money paid by the deceased upon a settlement, a question as to what transpired at the settlement and all about it is objectionable, as calling for statements made by the deceased contrary to this section: *Moylan v. Moylan*, 49 Wash. 341.

Credibility and impeachment, in general: See 2 Remington's Digest, pp. 2903, 2904, §§ 97-101; *State v. Hoshor*, 26 Wash. 643; *Smith v. Seattle*, 33 Wash. 481; *State v. McPhail*, 39 Wash. 199; *State v. Melvern*, 32 Wash. 7; *Keim v. Rankin*, 40 Wash. 111; *State v. Shelton*, 16 Wash. 590; *Shoemaker v. Bryant Lum. & Shingle Mfg. Co.*,

27 Wash. 637; *Iverson v. McDonnell*, 36 Wash. 73; *Williams v. Spokane Falls & N. R. Co.*, 42 Wash. 597.

Interest and bias of witness: See 2 Remington's Digest, p. 2906, §§ 109-113; *State v. White*, 10 Wash. 611; *State v. McCann*, 16 Wash. 249; *Fleischner v. Beaver*, 21 Wash. 6; *Stossel v. Van de Vanter*, 16 Wash. 9; *Stowe v. La Conner Trad. & Transp. Co.*, 39 Wash. 28; *State v. Griffin*, 43 Wash. 591; *Sproul v. Seattle*, 17 Wash. 256.

Upon a trial for assault with intent to murder, a complaint in a civil action brought by the complaining witness against the accused to recover damages is properly excluded as immaterial, where the fact of the bringing of the suit had already been shown for the purpose of affecting the interest and credibility of the complaining witnesses: *State v. Constantine*, 48 Wash. 218.

Inconsistent statements by witness: See 2 Remington's Digest, p. 2907, §§ 114-125; *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346; *Bailey v. Seattle & Renton R. Co.*, 32 Wash. 640; *Brown v. Gillet*, 33 Wash. 264; *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227; *State v. Walters*, 7 Wash. 246; *French v. Seattle Traction Co.*, 26 Wash. 264; *State v. Burton*, 27 Wash. 528; *State v. Fetterly*, 33 Wash. 599; *State v. Coates*, 22 Wash. 601; *Wheeler v. Buck & Co.*, 23 Wash. 679.

Since an attempt to suppress evidence by paying money to the prosecuting witness may be shown as a corroborative circumstance against the defendant, it is error to refuse to allow the defendant to rebut evidence of such an attempt by contradicting evidence that a certain person had made such an offer on behalf of the defendant: *State v. Constantine*, 48 Wash. 218.

Where the prosecuting witnesses had testified to an attempt made by an emissary of the defendant to suppress his testimony by the payment of money, it is not necessary to lay the usual foundation for the impeachment of his evidence by calling attention of the witnesses to any particular conversation, time, and place, but he may be impeached by merely showing that the matter testified to is untrue: *Id.*

The defendant has a right to offer evidence in support of his answer to an impeaching question after the state has impeached it: *Id.*

Contradiction and corroboration of witness: See 2 Remington's Digest, p. 2909, §§ 126, 127; *Bailey v. Seattle & Renton R. Co.*, 32 Wash. 640; *State v. McLain*, 43 Wash. 267; *State v. Nelson*, 13 Wash. 523.

§ 1212. (5992.) Conviction of Crime. Effect of.

No person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility: Provided, that any person who shall have been convicted of

the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon. [L. '91, p. 33, § 1; 2 H. C., § 1647; see L. '54, p. 196, § 292; Cd. '81, § 390.]

See *infra*, § 2148, defendant as witness in his own behalf.

Cited in 6 Wash. 569, 570; 15 Wash. 19; 22 Wash. 59; 32 Wash. 187; 33 Wash. 350; 37 Wash. 408-410.

Conviction of crime as affecting credibility or competency: See 2 Remington's Digest, p. 2905, §§ 104-106; *Id.* p. 2888, § 14; *State v. Champoux*, 33 Wash. 339; *State v. Eder*, 36 Wash. 482; *State v. Pearson*, 37 Wash. 405; *State v. Gottfredson*, 24 Wash. 398; *State v. Ripley*, 32 Wash. 182.

The former conviction of a witness for the commission of a misdemeanor cannot be proven for the purpose of affecting his credibility: *State v. Payne*, 6 Wash. 563.

It is not error under § 2162, *infra*, to allow one indicted with the prisoner, but not put upon trial with him, to be used as a witness for the state prior to his discharge: *Edwards v. State*, 2 Wash. 291.

Proof that defendant in a criminal prosecution has formerly been confined in the county jail is irrelevant: *State v. Payne*, *supra*.

The only competent evidence of former conviction is the production of the judgment of a court of competent jurisdiction, founded upon an indictment or other proper accusation: *Id.*

A person under conviction for perjury is not a competent witness, although the judgment was erroneous, as the judgment of conviction is conclusive against collateral attack: *State v. Harras*, 22 Wash. 57.

Character and conduct of witness: See 2 Remington's Digest, pp. 2904, 2905, §§ 102-108; *State v. Coates*, 22 Wash. 601; *State v. Miles*, 15 Wash. 534; *Bringgold v. Bringgold*, 40 Wash. 121.

§ 1213. (5993.) Who Incompetent.

The following persons shall not be competent to testify:—

1. Those who are of unsound mind, or intoxicated at the time of their production for examination; and

2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. [L. '54, p. 186, § 293; L. '63, p. 154, § 330; L. '73, p. 106, § 384; Cd. '81, § 391; 2 H. C., § 1648.]

Cited in 34 Wash. 203; 45 Wash. 439.

Age and maturity of mind as affecting competency: See *State v. Bailey*, 31 Wash. 83.

As to use of drugs by witness: See *State v. White*, 10 Wash. 611.

Under this section it is error to permit a child under ten years of age to testify without first being sworn: *Hodd v. Tacoma*, 45 Wash. 436.

§ 1214. (5994.) Who Disqualified.

The following persons shall not be examined as witnesses:—

1. A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor shall either, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other;

2. An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment;

3. A clergyman or priest shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs;

4. A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient;

5. A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure. [Cf. L. '54, p. 187, § 294; L. '73, p. 107, § 385; L. '79, p. 118, § 1; Cd. '81, § 392; L. '86, p. 73, § 1; 2 H. C., § 1649.]

See *infra*, § 2147, competency of witnesses in criminal cases. A proviso to subdivision 1 of this section was added by the Laws of 1886, but the title of the act is insufficient; hence same is omitted.

Cited in 20 Wash. 462; 21 Wash. 662; 24 Wash. 683; 27 Wash. 29, 573; 42 Wash. 600; 44 Wash. 486; 47 Wash. 520.

A wife may be a witness in her own behalf in an action for divorce: *Lee v. Lee*, 3 Wash. 236.

A husband, being a party to a suit and calling his wife as a witness and interrogating her, thereby consents to her testifying under this section: *Columbia etc. Ry. Co. v. Hawthorne*, 3 W. T. 353.

If defendant, on direct examination, declares that he acted upon information derived from counsel, to cross-examine him as to advice his attorney gave concerning the advisability of resisting plaintiff's demands, does not violate the rule as to confidential communications, because the client himself first opened the matter: *Hall etc. Co. v. Wilbur*, 4 Wash. 644; followed in *Columbia etc. Ry. Co. v. Braillard*, 5 Wash. 492.

In an action by a husband for seduction of his wife, she cannot testify except with the consent of the husband: *Speck v. Gray*, 14 Wash. 589; following *State v. Halbert*, 14 Wash. 306.

Confidential relations and privileged communications: See 2 Remington's Digest, p. 2894, §§ 50-56; *State v. Nelson*, 39 Wash. 221; *Hartness v. Brown*, 21 Wash. 655; *Williams v. Blumenthal*, 27 Wash. 24; *Stanley v. Stanley*, 27 Wash. 570; *State v. Falsetta*, 43 Wash. 159; *Sackman v. Thomas*, 24 Wash. 660; *State v. Mann*, 39 Wash. 144; *Speck v. Gray*, 14 Wash. 589; *Lane v. Spokane F. & N. R. Co.*, 21 Wash. 119; *Dubeich v. Grand Lodge A. O. U. W.*, 33 Wash. 651; *Williams v. Spokane F. & N. R. Co.*, 33 Wash. 651.

The accused cannot allege error in permitting his wife to testify against him where, upon objection, he offered no proof

that the witness was his wife; nor where, after answering on cross-examination that she was his wife, he made no motion to strike out the evidence: *State v. Frye*, 45 Wash. 645.

In proceedings supplementary to execution brought against the wife, she may be examined as to whether she has any property in her possession belonging to her husband: See *Frankenthal v. Solomonson*, 20 Wash. 460.

In an action for professional services, letters showing that the services were rendered are not inadmissible, for the reason that they showed the defendant to be engaged in leasing houses for immoral purposes and the reflection upon his character might prejudice the jury against him: *Stern v. Daniel*, 47 Wash. 96.

In an action for personal injuries, the plaintiff does not waive the right to object to testimony by his physician by the fact that he himself testified as to the cause and extent of his injuries and described them as he saw and felt them, without reference to what his physician told him: *Noelle v. Hoquiam Lumber & Shingle Co.*, 47 Wash. 519.

In a prosecution for statutory rape upon one under the age of consent, evidence as to pregnancy, by a physician who had made an examination, is admissible, where the relation of physician and patient did not exist, and no confidence was violated: *State v. Winnett*, 48 Wash. 93.

Letters from a client to an attorney are not privileged as between themselves where the client charges mismanagement of the cause, and to enforce the privilege would deprive the attorney of the means of obtaining his rights: *Sterns v. Daniel*, 47 Wash. 96.

CHAPTER II.

THE MANNER OF COMPELLING THE ATTENDANCE OF WITNESSES.

§ 1215. (5995.) Witnesses, When Compelled to Attend.

No person shall be obliged to attend as a witness before any court of record, judge, justice of the peace, commissioner, referee, or other officer, in any civil action or proceeding out of the county in which he resides, unless his residence be within twenty miles of such court, judge, justice of the peace, commissioner, referee, or other officer; and no person shall be obliged to attend as a witness in any civil action or proceeding in a justice's court, unless his residence be within twenty miles of such court, whether within the county or not. Nor shall any person be compelled to attend as a witness in any civil action or proceeding, unless the fees be paid or tendered to him which are allowed by law for one day's attendance as a witness, and for traveling to and returning from the place where he is required to attend, provided such fees be demanded by him at the time of service of the subpoena. [L. '54, p. 187, § 295; L. '63, p. 156, § 332; L. '69, p. 104, § 388; Cd. '81, § 393; L. '91, p. 33, § 2; 2 H. C., § 1650.]

See supra, § 52, powers of justices respecting proceedings.

See supra, § 497, fees of witnesses.

See supra, § 507, fees of witnesses to be paid in advance.

See supra, § 1049 et seq., contempts and their punishment.

See infra, § 1220, liability of witness for failure to attend.

See infra, § 1892, contempt before justice of the peace.

See infra, § 1898, witnesses in justices' courts.

See infra, § 1964, commitment of, etc.

Cited in 5 Wash. 805.

Attendance of witnesses: See 2 Remington's Digest, p. 2886, §§ 1-3; United States v. Small, 3 W. T. 478; State ex rel. Carraher v. Graves, 13 Wash. 485; Wiseman v. Eastman, 21 Wash. 163; State v. Kennan, 33 Wash. 247.

If a person residing in another county has been summoned and refuses to attend, he cannot be adjudged guilty of contempt unless it be shown that his residence is within twenty miles of the place of trial: State v. Trounce, 5 Wash. 804.

§ 1216. (5996.) Subpoena Duces Tecum.

The subpoena may require not only the personal attendance of the person to whom it is directed at a particular time and place to testify as a witness, but may also require him to bring with him any books, documents, or things under his control; but no public officer or person having the possession or control of public records or papers which by law are required to be kept in any particular office or place shall be compelled to produce the same in any court. [L. '54, p. 188, § 296; Cd. '81, § 394; 2 H. C., § 1651.]

See supra, § 254, service of writ by telegraph.

See supra, § 284, and notes, bill of particulars.

See infra, § 1262, order for inspection and to take copy of writing.

The violation of an order of the court to produce certain books belonging to a bank for which a receiver had been appointed is not subject to punishment for contempt, although committed by the president of the bank, where the affidavit used as a basis for the contempt proceedings fails to show that it was within the power of the party prosecuted to comply with the order: State v. Allen, 14 Wash. 684.

The fact that proof subsequently introduced upon the trial tends to show that

one charged with contempt of court had books in his possession which he was ordered to produce, but that he violated the order, is immaterial when such fact is not sufficiently shown by the affidavit used as a basis for the proceeding: Id.

Failure to produce the documents raises a presumption that they are what the adverse party claims them to be, and it is for the jury to determine whether the witness complied with the subpoena: Thomas v. Fos, 51 Wash. 250.

§ 1217. (5997.) Subpoena Issued When.

The subpoena shall be issued as follows:

1. To require attendance before a court of record or at the trial of an issue therein, such subpoena may be issued in the name of the state of Washington and be under the seal of the court before which the attendance is required or in which the issue is pending: Provided, that such subpoena may be issued with like effect by the attorney of record of the party to the action in whose behalf the witness is required to appear, and the form of such subpoena in each case may be the same as when issued by the court except that it shall only be subscribed by the signature of such attorney;

2. To require attendance out of such court before a judge, justice of the peace, commissioner, referee or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state, it shall be issued by such judge, justice of the peace, commissioner, referee or other officer before whom the attendance is required;

3. To require attendance before a commissioner appointed to take testimony by a court of any other state, territory or county it may be issued by any judge or justice of the peace in places within their respective jurisdiction. [Cf. L. '54, p. 188, § 297; Cd. '81, § 395; 2 H. C., § 1652; L. '95, p. 189, § 1.]

See Const., Art. IV, § 27, process to run in the name of the state.

See infra, § 1235, subpoena of witness to take deposition.

See infra, § 1898, subpoena in justices' courts.

§ 1218. (5998.) Service, Proof of.

Such subpoena may be served by any suitable person over eighteen years of age, by exhibiting and reading it to the witness, or by giving him a copy thereof, or by leaving such copy at the place of his abode. When service is made by any other person than an officer authorized to serve process, proof of service shall be made by affidavit. [L. '54, p. 188, § 298; L. '53, p. 156, § 334; L. '69, p. 105, § 391; Cd. '81, § 396; 2 H. C., § 1653.]

See supra, § 244, service of notice and other process.

See supra, § 254, service by telegraph.

See infra, § 1776, false return or failure to execute process.

§ 1219. (5999.) Person in Court Required to Testify.

A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer. [L. '54, p. 188, § 299; Cd. '81, § 397; 2 H. C., § 1654.]

§ 1220. (6000.) Liability and Penalty for Failure to Attend.

If any person duly served with a subpoena, and obliged to attend as a witness, shall fail to do so, without any reasonable excuse, he shall be liable to the aggrieved party for all damages occasioned by such failure, to be recovered in a civil action. Such failure to attend as required by the subpoena shall also be considered a contempt, and, upon due proof, the witness may be punished by a fine not exceeding fifty dollars, and stand committed until said fine and costs are paid, or until discharged by due course of law. [L. '54, p. 188, §§ 300, 301; Cd. '81, §§ 398, 399; 2 H. C., § 1655.]

See supra, § 1049 et seq., contempts and their punishment.

See infra, § 1902, damages for nonattendance in justices' courts.

Cited in 13 Wash. 487.

§ 1221. (6001.) Attachment for Witness.

The court, judge, justice of the peace, or other officer, in such case, may issue an attachment to bring such witness before them to answer for contempt, and also testify as witness in the cause in which he was subpoenaed. [L. '54, p. 188, § 302; Cd. '81, § 400; 2 H. C., § 1656.]

A judge of the superior court has no jurisdiction to compel by attachment the attendance of a nonresident witness, who is outside of the jurisdiction, for the purpose of taking his deposition, although a subpoena was served upon him while he was temporarily within the county: *State ex rel. Hopkins v. Kennan*, 33 Wash. 247.

§ 1222. (6002.) To Whom Directed, How Executed.

Such attachment may be directed to the sheriff or any constable of any county in which the witness may be found, and shall be executed in the same manner as a warrant; and the fees of the officer for issuing and serving the same shall be paid by the person against whom the same was issued, unless he show reasonable cause, to the satisfaction of the justice, for his omission to attend; in which case the party requiring such attachment shall pay all such costs. [L. '91, p. 33, § 3; 2 H. C., § 1657.]

§ 1223. (6003.) Testimony of Prisoner, How Obtained.

If the witness be a prisoner confined in a jail or prison within this state, an order for his examination in prison, upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be issued. [L. '54, p. 189, § 303; Cd. '81, § 401; 2 H. C., § 1658.]

§ 1224. (6004.) Affidavit to Procure Order.

Such order can only be made upon affidavit, showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality. [L. '54, p. 189, § 304; Cd. '81, § 402; 2 H. C., § 1659.]

CHAPTER III.

THE EXAMINATION OF PARTIES.

§ 1225. (6008.) Examination of Adverse Party as Witness.

A party to an action or proceeding may be examined as a witness, at the instance of the adverse party, or of one of several adverse parties, and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witness to testify at the trial, or he may be examined on a commission. [L. '54, p. 189, § 305; Cd. '81, § 403; 2 H. C., § 1660.]

Cited in 10 Wash. 428; 11 Wash. 651; 20 Wash. 239; 21 Wash. 335.

Discovery in equity: See 1 Remington's Digest, p. 938, §§ 1-3; *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324; 51 Wash. 252.

While a technical bill of discovery is not proper under the civil procedure of this state, yet the defendant may, under this and following sections, in an action instituted for legal and equitable relief, be compelled to make a discovery of facts: *Le May v. Baxter*, 11 Wash. 649.

Grounds and purposes of examination—
Application: See 1 Remington's Digest, p. 939, §§ 5-7; *Du Clos v. Batcheller*, 17 Wash. 389; *Ingram v. Wishkah Boom Co.*, 35 Wash. 191; *Main v. Hadfield*, 41 Wash. 504; *Livesley v. O'Brien*, 6 Wash. 553.

Physical or surgical examination: See 1 Remington's Digest, p. 940, § 11; *Lane v. Spokane Falls & Northern R. Co.*, 21 Wash. 119; *Smith v. Spokane*, 16 Wash. 403; *Myrberg v. Baltimore etc. R. Co.*, 25 Wash. 364; *Helbig v. Gray's Harbor Elec. Co.*, 37 Wash. 130.

This section, and § 1229, *infra*, expressly authorize the examination of the adverse party as a witness, and the rebuttal of his evidence by adverse testimony, although he

was called as the party's own witness at the opening of the trial: *Thomas v. Fos*, 51 Wash. 250.

§ 1226. (6009.) Interrogatories to Adversary.

Instead of the examination being had at the trial, as provided by the last section, the plaintiff, at the time of filing his complaint or afterwards, and the defendant, at the time of filing his answer or afterwards, may file in the clerk's office interrogatories for the discovery of facts and documents material to the support or defense of the action, to be answered on oath by the adverse party. [L. '54, p. 189, § 306; Cd. '81, § 404; 2 H. C., § 1661.]

See *infra*, § 1903, party to action as witness in justice court.

Cited in 14 Wash. 135; 17 Wash. 391; 35 Wash. 245-247; 44 Wash. 31, 37.

inspection: *Cully v. Northern Pac. R. Co.*, 35 Wash. 241.

Doubted whether the production of documents can be enforced under this section, in view of § 1262 making provision for their

Waiver of right to demand interrogatories: See *Murrilla v. Guis*, 51 Wash. 93.

§ 1227. (6010.) Answers to Interrogatories.

Such interrogatories shall be served in the manner provided by law for the service of summons, or by service upon the attorney of the party to be interrogated, and the answers thereto shall be served and filed within twenty days after such service unless for cause shown a further time be allowed by the court. A private corporation may be interrogated in the same manner as individuals, and it shall not be excused for a failure to answer any proper interrogatory unless it shall show that no one in its employ or connected with, or interested in it, can give the desired answer or information. [Cf. L. '54, p. 189, § 307; Cd. '81, § 405; 2 H. C., § 1662; L. '97, p. 288, § 1.]

Interrogatories and answers thereto— Defects and objections: See 1 Remington's Digest, p. 940, §§ 8, 9; *Moore v. Palmer*, 14

Wash. 134; *Du Clos v. Batcheller*, 17 Wash. 389; *Lowry v. Moore*, 16 Wash. 476; *Knapp v. Order of Pendo*, 36 Wash. 601.

§ 1228. (6011.) Examination on Trial Notwithstanding Interrogatories.

A party to an action or proceeding, having filed interrogatories to be answered by the adverse party, as prescribed by the last two sections, shall not thereby be precluded from examining such adverse party as a witness at the trial, nor from taking his deposition to be read at the trial. [Cf. L. '54, p. 189, § 308; Cd. '81, § 406; L. '91, p. 34, § 4; 2 H. C., § 1663.]

§ 1229. (6012.) Testimony not Conclusive.

The testimony of a party, upon examination at the trial, or by deposition, or upon interrogatories filed, may be rebutted by adverse testimony. [Cf. L. '54, p. 189, § 309; Cd. '81, § 407; L. '91, p. 34, § 5; 2 H. C., § 1664.]

See *infra*, § 1904, in justices' courts.

Cited in 14 Wash. 135; 30 Wash. 354.

Use of evidence obtained by interrogatories: See 1 Remington's Digest, p. 941, § 12; *Island County v. Babcock*, 20 Wash. 238; *Sawdey v. Spokane Falls & N. R. Co.*, 30 Wash. 349; *Allend v. Spokane Falls*

& N. R. Co., 21 Wash. 324; *Moore v. Palmer*, 14 Wash. 134.

The answers to interrogatories propounded to a defendant may be put in evidence, and, as evidence, are subject to contradiction: *Denny v. Sayward*, 10 Wash. 422.

§ 1230. (6013.) Penalty for Refusal to Answer or Give Testimony.

If a party refuse to attend and testify at the trial, or to give his deposition, or to answer any interrogatories filed, his complaint, answer or reply

may be stricken out, and judgment taken against him, and he may also, in the discretion of the court, be proceeded against as in other cases for a contempt: Provided, that the preceding sections shall not be construed so as to compel any person to answer any question where such answer may tend to criminate himself. [Cf. L. '54, p. 190, § 310; Cd. '81, § 408; L. '91, p. 34, § 6; 2 H. C., § 1665.]

See *infra*, § 1905, penalty for refusal to testify in justice court.

Cited in 4 Wash. 326; 6 Wash. 553; 44 Wash. 31, 32; 44 Wash. 42.

Failure to answer interrogatories: See 1 Remington's Digest, p. 940, § 10; Fischer v. Woodruff, 25 Wash. 67; Knapp v. Order of Pendo, 38 Wash. 601; Fidelity Nat. Bank v. Adams, 38 Wash. 75; Le May v. Baxter, 11 Wash. 649.

Under this section if a party refuse to answer interrogatories filed the only judgment authorized is one of dismissal: Waite v. Wingate, 4 Wash. 324.

Judgment may be given against defendant in an action for failure to answer interrogatories within the time prescribed by statute, although no formal order requiring answer to same has been made: Livesley v. O'Brien, 6 Wash. 553.

Upon the granting of a motion to strike certain answers to interrogatories, for the reason that they are insufficient in certain particulars, it is error to grant judgment of default without requiring more specific answers and fixing a time for the filing thereof, in order that upon failure to file the same the time of a default may be

definitely known: Lawson v. Black Diamond Coal Min. Co., 44 Wash. 26.

This section is not unconstitutional as depriving a party of property without due process, since such failure to answer may be construed as an admission of material facts; hence such judgment is justified only where the failure to make discovery as to material facts is alleged and proved: *Id.*

In an action against a corporation to recover a broker's commission, interrogatories respecting negotiations, and correspondence had with a stockholder relate to immaterial matters, as the stockholder has no power to bind the corporation; and failure to answer the same does not warrant judgment: *Id.*

It is not error to deny an application for specific answers to each of one hundred and sixty interrogatories, where those relating to a single matter were grouped and fully answered by one answer, and the defendant was sufficiently informed to prepare its defense: Pearce v. Greek Boys' Min. Co., 48 Wash. 38.

CHAPTER IV.

DEPOSITIONS.

§ 1231. (6017.) Cases in Which may be Taken.

The testimony of a witness may be taken by deposition, to be read in evidence in an action, suit, or proceeding commenced and pending in any court in this state, in the following cases:—

1. When the witness resides out of the county, and more than twenty miles from the place of trial;

2. When the witness is about to leave the county, and go more than twenty miles from the place of trial, and there is a probability that he will continue absent when the testimony is required;

3. When the witness is sick, infirm, or aged, so as to make it probable that he will not be able to attend at the trial;

4. When the witness resides out of the state. [L. '54, p. 190, § 313; L. '69, p. 108, § 404; L. '77, p. 89, § 411; Cd. '81, § 409; 2 H. C., § 1666.]

See *supra*, § 1225 et seq., examination of adversary before trial.

See *infra*, § 1249 et seq., proceedings to perpetuate testimony.

See *infra*, § 1907, depositions in justices' courts.

Cited in 14 Wash. 458.

Depositions: See 1 Remington's Digest, pp. 926-928; Reformed Presbyterian Church v. McMillan, 31 Wash. 643.

The depositions of absent witnesses are inadmissible in a criminal action: State v. Paggett, 8 Wash. 579; State v. Hunter, 18 Wash. 670.

§ 1232. (6018.) When may be Taken.

Either party may commence taking testimony by depositions at any time after service of summons upon the defendants. [L. '77, p. 90, § 412; Cd. '81, § 410; 2 H. C., § 1667.]

§ 1233. (6019.) Before Whom Taken Within State—Notice.

Either party may have the deposition of a witness taken in this state before any judge of the superior court, justice of the peace, clerk of the supreme or superior court[s], mayor of a city or notary public, by serving on the adverse party or his attorney previous notice of the time and place of examination. The notice shall be served such time before the time when the deposition is to be taken as to allow the adverse party sufficient time by the usual route of travel to attend, and three days for preparation, exclusive of the day of service, and the examination may, if so stated in the notice, be adjourned from day to day. The notice shall specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used, and the time and place of taking the deposition. It shall be served upon the adverse party, his agent, or attorney of record, or be left at his usual place of abode. [L. '54, p. 190, § 314; Cd. '81, § 411; L. '88, p. 29, § 1; L. '91, p. 34, § 7; 2 H. C., § 1668.]

Notice: See 1 Remington's Digest, p. 927, §§ 5, 8; Phelps v. S. S. City of Panama, 1 W. T. 518; Mendenhall v. Kratz, 14 Wash. 453.

A defendant who appears and has a hearing continued to enable him to file cross-interrogatories, is estopped from claiming that he had insufficient notice: Hobart v. Jones, 5 Wash. 385.

§ 1234. (6020.) Time for Notice may be Limited.

The court, or a judge thereof, or in an action or proceedings before a justice of the peace, the justice, may, upon sufficient cause being shown by affidavit, prescribe a shorter time for notice than that specified in the last preceding section. A copy of the order shortening the time must be served with the notice. [L. '91, p. 35, § 8; 2 H. C., § 1669.]

§ 1235. (6021.) Witnesses Subpoenaed and Compelled to Attend.

Any witness may be subpoenaed and compelled, by any officer authorized to take depositions, to appear and give his deposition at any place within twenty miles of the abode of such witness, in like manner as he may be subpoenaed and compelled to attend as a witness in any court, and he shall suffer the same penalties for a failure to attend as are prescribed in section 1220. [Cf. L. '54, p. 192, § 321; Cd. '81, § 422; L. '91, p. 35, § 9; 2 H. C., § 1670.]

See supra, § 1215, witnesses, how compelled to attend.

See supra, § 1217, subpoena for witnesses.

§ 1236. Superior Court may Compel Attendance.

The superior court shall have power to compel the attendance of witnesses, within this state, before notaries public, justices of the peace or any other person authorized by the laws of this state to take depositions in causes pending in any court of the state, or in any court of any other state, or in any court of the United States, or in any court of a foreign country. [L. '01, p. 23, § 1.]

§ 1237. Application for Order.

The officer before whom the deposition is to be taken in case of the refusal of any witness to attend or testify shall report to the superior court in and for the county in which the witness resides, or is found, by petition, that due notice has been given of the time and place of taking the depositions and that the witness has been summoned in the same manner that witnesses are now summoned to appear and testify in the superior court of this state; and the fees and mileage of the witness has been paid, or tendered to the witness, for his attendance and testimony, and that the witness has failed and refused to attend or testify before such officer, in the cause mentioned in the notice and the subpoena; and ask an order of the court compelling the witness to attend and testify before such officer. [L. '01, p. 23, § 2.]

§ 1238. Citation—Contempt.

The court upon the petition of the officers, and the payment of the regular docket fee of four dollars (\$4) shall enter an order directing the witness to appear before the officer making the report, at a time and place to be fixed by the court in such order, and then and there give his testimony in such case. A copy of which order shall be served upon the witness in the same manner that summons and complaints are now served; and on failure or refusal of the witness to obey such order such witness shall be dealt with as for contempt. [L. '01, p. 24, § 3.]

§ 1239. (6022.) Before Whom Taken Out of the State.

Depositions may be taken out of the state by a judge, justice, or chancellor or clerk of any court of record, a justice of the peace, notary public, mayor, or chief magistrate of any city or town, or any person authorized by a special commission from any court [of record] of this state. [Cf. L. '54, p. 193, § 322; L. '77, p. 90, § 414; Cd. '81, § 412; 2 H. C., § 1671.]

§ 1240. (6023.) Commission to Take—How Issued.

Any superior court in this state, or any judge thereof, is authorized to grant a commission to take depositions within or without this state. The commission must be issued to a person or persons therein named, by the clerk, under the seal of the court granting the same, and depositions under it may be taken upon written interrogatories or upon oral questions or partly upon oral and partly upon written interrogatories. Before any such commission shall be granted, the person intending to apply therefor shall serve upon the adverse party a notice of his intention to make such application, stating the time when and the place where such application will be made, which notice shall be served in the same manner and for the same time as provided in section 1233, unless the court or judge, for sufficient cause shown by affidavit, prescribe a shorter time. At the time the application is presented, the court or judge shall settle the interrogatories, if any have been served and the parties have not settled the same. The clerk, upon issuing the commission, shall attach the interrogatories thereto, if any have been agreed upon or settled by the court, and immediately forward the same to the commissioner. At least five days' notice must be given to the party or witness to be examined out of the state, in case such examination shall be had upon oral interrogatories, and the person before whom the deposition of the witness shall be taken shall

have the same power to compel the attendance of such parties or witnesses as any person authorized to take such deposition within this state. [Cf. L. '54, p. 193, § 323; L. '73, p. 114, §§ 412, 413; L. '77, p. 90, § 415; Cd. '81, §§ 413, 414; L. '91, p. 35, § 10; 2 H. C., § 1672; L. '97, p. 206, § 1.]

Jurisdiction of probate court to issue formed Presbyterian Church v. McMillan, commission to take depositions: See Re- 31 Wash. 643.

§ 1241. (6024.) Notice to Nonresident Party.

When the party against whom the deposition is to be read is absent from or a nonresident of the state, and has no agent or attorney of record therein, he may be notified of the taking of the deposition [or] of the application for a commission, by publication. The publication must be made three consecutive weeks, in some newspaper printed in the county where the action or proceeding is pending, if there be any printed in such county, and if not, in some newspaper printed in this state, of general circulation in that county. The publication must contain all that is required in the written or printed notice, and may be proved in the manner prescribed in case of the publication of summons. [Cf. Cd. '81, § 415; L. '91, p. 35, § 11; 2 H. C., § 1673.]

§ 1242. (6025.) How Taken and Certified.

The deposition shall be written by the officer taking the same, or by the witness, or by some disinterested person, in the presence and under the direction of such officer. When completed, it shall be carefully read to or by the witness, corrected if desired, and subscribed by him. If taken upon notice, it shall be certified by the officer substantially as follows:—

State of Washington, County of——, ss.

I, A B, justice of the peace in and for said county (or judge, clerk, etc., as the case may be), do hereby certify that the above deposition was taken before me, and reduced to writing by myself (or witness, as the case may be), at ——, in said county, on the —— day of ——, 18——, at —— o'clock, in pursuance of notice hereto annexed; that the above-named witness, before examination, was sworn (or affirmed) to testify the truth, the whole truth, and nothing but the truth, and that the said deposition was carefully read to (or by) said witness, and then subscribed by him. A B, Justice of the Peace.

Dated at —— the —— day of ——, 18——.

If the deposition be taken upon a commission, the commission[er] shall testify [certify] it in substantially the same manner, and annex to it the commission and interrogatories. [Cf. L. '54, p. 191, § 315; Cd. '81, § 416; L. '91, p. 36, § 12; 2 H. C., § 1674.]

Making and requisites of return or certificate: See 1 Remington's Digest, p. 927, §§ 6, 7; Phelps v. S. S. City of Panama, 1 W. T. 518.

A certificate to a deposition taken under commission is sufficient when it states that "F. N. Hendrix, commissioner, does hereby

certify," and is signed "F. N. Hendrix, commissioner and notary public," especially when caption states that it is the "deposition of ——, taken before F. N. Hendrix, ——, pursuant to the annexed commission to take testimony": Hobart v. Jones, 5 Wash. 385.

§ 1243. (6026.) How Returned.

The deposition, whether taken upon notice or upon a commission, shall be inclosed in a sealed envelope, by the officer taking the same, and directed to the clerk of the court, arbitrators, referee, or justice of the peace before whom the action is pending, or to such persons as the parties, in writing, may agree

upon, and either delivered to the clerk of the court or other person, or transmitted through the mail or by some private person. [Cf. L. '54, p. 191, § 316; Cd. '81, § 417; L. '91, p. 36, § 13; 2 H. C., § 1675.]

Opening and publication: See 1 Remington's Digest, p. 927, § 8; *Mendenhall v. Kratz*, 14 Wash. 453.

Depositions being opened by clerk and placed on file without the order of court will not be received in evidence: *Phelps v. Steamship City of Panama*, 1 W. T. 615.

§ 1244. (6027.) Use of on Trial—Objections.

Such deposition may be used by either party upon the trial, or other proceeding, against any party giving or receiving the notice, subject to all legal exceptions to the competency or credibility of the witness, or the manner of taking the deposition. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was taken at the time of the examination. It shall be the duty of the person taking the deposition to propound to the witness every question proposed by either party, and to note all objections to the form of any interrogatory, and when any interrogatory is objected to on account of form, unless the form is amended and the objection waived, he shall write after the question, and before the answer, the words "objected to"; and when any witness declines to answer a question on the ground that it will [tend to] criminate himself, that fact shall also be noted after the question, if written down. The deposition may be taken in the form of a narrative, or by question and answer, or partly in either form, as either party present at the examination shall require. When taken by question and answer, the officer shall first write down the question and then the answer, as nearly as may be, in the language of the witness; but when the deposition is read to the witness previous to signing it, he shall be permitted to amend his answer to any question, or any part of his deposition; such amendment, however, unless both parties shall otherwise agree, shall not be made by way of interlining or erasing, but shall be added at the end of the deposition under the title "amendment by the witness," and such amendment shall intelligibly refer to the part so amended. [L. '54, p. 191, § 317; Cd. '81, § 418; 2 H. C., § 1676.]

See supra, § 351, depositions not to be taken to jury-room.

See notes to § 1233.

See infra, § 1246, depositions to remain in custody of court.

See infra, §§ 1962, 2131.

Admissibility in evidence, objections, etc.: See 1 Remington's Digest, pp. 927, 928, §§ 9-15; *McGraw v. Franklin*, 2 Wash. 17; *Brown v. Gillet*, 33 Wash. 264; *Von Tobel v. Stetson & Post Mill Co.*, 32 Wash. 683.

Depositions in a criminal case, tending to show good character of defendant, are inadmissible; the statutes of this state make no provision for the use of an ordinary deposition of an absent witness in criminal cases, nor was the same recognized at common law: *State v. Humason*, 5 Wash. 499, 504; *State v. Paggett*, 8 Wash. 584; see Const., Art. I, § 22.

That the complaint is amended after a deposition is taken will not be sufficient

to exclude it if it is upon and pertinent to the issues raised by the amended complaint: *Mendenhall v. Kratz*, 14 Wash. 453.

Depositions opened by the clerk by mistake, but at once sealed up and kept in his custody until regularly ordered to be published by the court, may, within the discretion of the court, be used upon the trial: *Id.*

Upon taking a deposition before a trial judge, where objections are ruled on at the time and exceptions taken, the exceptions need not be renewed at the trial: *Chicago, Milwaukee & St. Paul R. Co. v. Alexander*, 47 Wash. 131.

§ 1245. (6028.) Shall not be Used, When.

If it appear at the trial that the reason for taking the deposition no longer exist, the deposition shall not be read in evidence, unless the party offering it show that another of the causes specified by section 1231 then exists, or that the witness is dead, or cannot safely attend at the trial on account of sickness, age, or other bodily infirmity. [Cf. L. '54, p. 192, § 318; Cd. '81, § 419; L. '91, p. 36, § 14; 2 H. C., § 1677.]

Cited in 8 Wash. 93; 49 Wash. 648.

The death of a party to an action and substitution of his legal representative will not render inadmissible the deposition of an adverse party when the deposition was competent at the time the deposition was taken: *Neis v. Farquharson*, 9 Wash. 508.

Under this section, which provides that

a deposition shall not be read in evidence if it appears at the trial that the reason for taking the same no longer exists, it will be presumed that the reason continues to exist until the contrary is shown by the adverse party, and the deposition is admissible without any showing: *Heinzerling v. Agen*, 49 Wash. 647.

§ 1246. (6029.) Depositions Taken in One Cause may be Used in Another, When.

When the plaintiff in any action shall discontinue it, or when it shall be dismissed for any cause, and another action shall afterwards be commenced for the same cause between the same parties, or their respective representatives, all depositions lawfully taken in the first action may be used in the other, in the same manner and subject to the same conditions and objections as if originally taken for such other action: Provided, that the deposition shall have been duly filed in the court where the first action was pending, and shall have remained in the custody of the court from the termination of the first action until the commencement of the other. [L. '54, p. 192, § 319; Cd. '81, § 420; 2 H. C., § 1678.]

§ 1247. Certified Testimony of Deceased or Absent Witness.

The testimony of any witness, deceased, or out of the state, or for any other sufficient cause unable to appear and testify, given in a former action or proceeding, or in a former trial of the same cause or proceeding when reported by a stenographer, or reduced to writing, and certified by the trial judge, upon three days' notice to the opposite party or parties, together with service of a copy of the testimony proposed to be used may be given in evidence in the trial of any civil action or proceeding, where it is between the same parties and relates to the same matter. [L. '05, p. 50, § 1.]

§ 1248. (6030.) When may be Used on Appeal.

When any action shall have been appealed from one court to another, and is to be tried anew in the appellate court, all depositions lawfully taken to be used in the court from which the appeal was taken may be used in the appellate court in the same manner and subject to such exceptions for informality or irregularity, and none other, as were taken in writing to such depositions in the court below; and when an action is removed from one court to another by change of venue, all depositions previously taken in the action must be certified to the court to which the action is removed, and may be used in that court in the same manner and subject to the same exceptions as if originally taken for use therein. [Cf. L. '54, p. 192, § 320; Cd. '81, § 421; L. '91, p. 37, § 15; 2 H. C., § 1679.]

Use on appeal: See 1 Remington's Digest, p. 165, § 273; *Demaris v. Barker*, 33

Wash. 200; *State ex rel. Richardson v. Superior Court*, 41 Wash. 439.

CHAPTER V.

PERPETUATION OF TESTIMONY.

§ 1249. (6034.) Application for Order to Examine Witnesses.

When any person shall be desirous to perpetuate the testimony of any witness he shall make a statement in writing, setting forth briefly and substantially his title, claim or interest in or to the subject concerning which he desires to perpetuate the evidence, and the names of all the persons interested or supposed to be interested therein, and also the name of the witness proposed to be examined, which statement shall be under oath, and filed in the superior court. If the subject of the proposed deposition relate to real property within this state, the statement shall be filed in the county where the lands, or any part thereof, lie; in other cases, in the county where the parties interested, or some of them, reside. Upon such statement, an application may be made to such court, or judge thereof, to allow the examination of such witness. [Cf. L. '54, p. 193, § 327; L. '77, p. 93, § 425; Cd. '81, § 423; L. '91, p. 37, § 17; 2 H. C., § 1688.]

Cited in 37 Wash. 84.

§ 1250. (6035.) Hearing of Application—Notice.

The court or judge shall appoint a time and place for hearing such application, and shall order notice thereof and of the statement to be served on all persons mentioned therein as adversely interested in the matter; the notice shall be served personally on all those living in the state at least twenty days before the time of hearing the application; upon those who are not residents of the state, it shall be served by publication or otherwise, in the same manner as a notice is served upon a nonresident. [L. '54, p. 194, § 328; L. '77, p. 93, § 426; Cd. '81, § 424; 2 H. C., § 1689.]

See supra, § 228 et seq., notice of publication.

§ 1251. (6036.) Order for Examination—Commission.

If upon hearing of the parties, or of the applicant alone, should no adverse party appear, the court or judge shall be satisfied that there is sufficient cause for taking the deposition, an order shall be made allowing the examination of the witness; and such court or judge may direct a commission to issue therefor in like manner as a commission to take the testimony of witnesses in actions or proceedings pending in such court. [Cf. L. '54, p. 194, § 329; Cd. '81, § 425; L. '91, p. 37, § 18; 2 H. C., § 1690.]

See supra, § 1240, commission to take deposition.

§ 1252. (6037.) How Taken and Returned.

The deposition of such witness, whether residing in this state or not, shall be taken upon written interrogatories filed by the applicant and cross-interrogatories filed by any party adversely interested, if he shall think fit, and it shall be taken and returned substantially in the same manner as if taken upon commission to be used in any cause pending in the same court. [L. '54, p. 194, § 330; Cd. '81, § 426; 2 H. C., § 1691.]

See supra, § 1240, interrogatories to witnesses.

See supra, §§ 1242, 1243, depositions, how taken, certified and returned.

§ 1253. (6038.) Return and Filing—How Used—Objections.

The deposition, when returned, shall be filed in the office of the clerk of the court by whom the commission was issued; and if a trial be had between the person at whose request the deposition was taken and the person named in the statement, or any of them, or their successors in interest, upon proof of the death or insanity of the witness, or his inability to attend the trial by reason of age, sickness, or settled infirmity, the deposition, or a certified copy thereof, may be used by either party, subject to all legal objections. But if the parties attend at the examination, no objections to the form of the interrogatory shall be made at the trial, unless the same were taken at the time of the examination. [L. '54, p. 194, § 331; Cd. '81, § 427; 2 H. C., § 1692.]

CHAPTER VI.

DOCUMENTARY EVIDENCE.

§ 1254. (6040.) Court Records, etc., as Evidence.

The records and proceedings of any court of the United States, or any state or territory, shall be admissible in evidence in all cases in this state when duly authenticated by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of such court annexed. [L. '54, p. 195, § 334; Cd. '81, § 430; 2 H. C., § 1680.]

See supra, § 284, pleading written instrument.

See U. S. Rev. Stats., §§ 905, 906.

Cited in 2 Wash. 518; 3 Wash. 169; 44 Wash. 487.

Acts, records, and judicial proceedings of other states: See 1 Remington's Digest, p. 1142, §§ 122, 123; Id., p. 1141, § 115; Id., p. 1146, § 136; Id., p. 1119, § 27; Waldo v. Milroy, 19 Wash. 156; James v. James, 35 Wash. 650; Keim v. Rankin, 40 Wash. 111; Gilmore v. H. W. Baker Co., 12 Wash. 468; Kerstetter v. Thomas, 36 Wash. 620.

Under this section the records and proceedings of courts of another state are admissible in evidence without the certificate of the judge thereof that the attestation of the clerk having charge of the records of such court is in due form: Ritchie v. Carpenter, 2 Wash. 512.

Under § 905, U. S. Rev. Stats., it will be presumed, without being certified or otherwise shown, that the clerk attesting such records is the proper custodian thereof: Id. In attesting such records it is not necessary that the seal of the court be attached thereto, but only to the certificate of the clerk: Id. The signature of the judge to the journal entry of the judgment, offered in evidence, is not necessary to make it valid: Id.; Kentzler v. Kentzler, 3 Wash. 166, 169.

In an action upon a judgment of a court of record of another state, it will be presumed, in the absence of evidence to the contrary, that it is a court of general jurisdiction; and recitals in the record of jurisdiction of defendant's person are

prima facie evidence thereof: Ritchie v. Carpenter, supra.

Facts and circumstances affecting the action in the foreign forum can only be taken advantage of in that forum, but cannot be considered here: Id., 520.

Want of jurisdiction may be shown by defendant even to the extent of contradicting express recitals in the record: Id. 512.

The name of defendant in the record offered being identical with that of defendant in this action is prima facie proof of identity of person; and it is incumbent upon defendant to allege and prove every fact necessary to show want of jurisdiction of his person: Id.

Where there is no showing that the record of a decree in a court of another state has been lost or destroyed, the loss of a certified copy thereof, which plaintiff had obtained, will not warrant admission of parol proof to show nature and contents of the original: Kentzler v. Kentzler, supra.

The transcript of the record of the probate court of the state of Oregon showing that said court had assumed jurisdiction over certain chattels was admitted as prima facie evidence that said chattels were then within that state; and the rejection of such transcript would have been error: McCoy v. Ayers, 2 W. T. 203.

The copy of the record of a marriage certificate of another state, not appertaining to any court, the record appearing to

be the public record of a county, must be certified as required by U. S. Rev. Stats., § 906, to be admissible in evidence, and a certificate by a deputy clerk of such county to the effect that it was a true copy of the record in his office, under the seal of the county, is insufficient: *State v. Kniffen*, 44 Wash. 485.

Evidence, weight and sufficiency of foreign judgments: See 2 Remington's Digest, p. 1640, §§ 282-285; *Cunningham v. Spokane Hydraulic Min. Co.*, 20 Wash. 450;

Aultman, Miller & Co. v. Mills, 9 Wash. 68; *Trowbridge v. Spinning*, 23 Wash. 48; *Clark v. Eltinge*, 38 Wash. 376; *Olson v. Veazie*, 9 Wash. 481.

This and the next section appear to be in conflict with section 905 of the U. S. Rev. Stats., as not giving full faith and credit to the laws and usages of the courts of the state from which taken: See *Ritchie v. Carpenter*, 2 Wash. 512, 518.

§ 1255. (6041.) Faith Given to Judgments of Other States.

Judgment for debt rendered in any other state or any territory against any person or persons residents of this state at the time of the rendition of such judgment shall not be of any higher character as evidence of indebtedness than the original claim or demand upon which such judgment is rendered, unless such judgment shall be rendered upon personal services of summons, notice, or other due process against the defendant therein. [Cf. L. '66, p. 88, § 1; Cd. '81, § 739; L. '91, p. 70, § 1; 2 H. C., § 804.]

See supra, § 284, pleading instrument of writing.

See supra, § 287, pleading a judgment.

§ 1256. (6042.) Defenses to Suits on Foreign Judgments.

The same defense to suits on judgment rendered without such personal service may be made by the judgment debtor which might have been set up in the original proceeding. [L. '66, p. 88, § 2; Cd. '81, § 740; 2 H. C., § 805.]

See note to last section.

§ 1257. (6043.) Public Records as Evidence.

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state, when duly certified by the respective officers having by law the custody thereof, under their respective seals, where such officers have official seals, shall be admitted in evidence in the courts of this state. [Cf. L. '54, p. 195, § 336; Cd. '81, § 432; L. '91, p. 37, § 16; 2 H. C., § 1681.]

Cited in 38 Wash. 634.

Public records and documents: See 1 Remington's Digest, p. 1140, §§ 109-113; *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558; *Anderson v. Hilker*, 38 Wash. 632; *Greene v. Finnell*, 22 Wash. 186; *Bardsley v. Sternberg*, 18 Wash. 612.

Section 1682, 2 Hill's Code, probably covered by this section, is as follows:

"Any certificate of residence and cultivation of the public lands issued by the surveyor general of Oregon or state of Washington, or by the register and receiver of either of the land offices therein, or any certificate, receipt, or exemplification of the records of either of said offices issued to any settler upon or purchaser of said lands, or in any way affecting the rights of parties to lands in this state, issued or given in pursuance of law, or as evidence of any matter recorded in either of said offices, or any copies of maps, plats, or diagrams of land claims of every nature or kind, or plats of the public surveys, certified by either of said officers, shall be admitted as evidence

in all the courts of this state. In actions affecting real estate, such certificates shall be prima facie evidence that the title of the lands mentioned or described in such receipt is in the person or persons named therein."

If the holder of a United States register's certificate sells the land therein described and indorses the contract on the back thereof, a certified copy of such certificate and contract by the commissioner of the general land office is admissible to establish the contract: *Sayward v. Gardner*, 5 Wash. 247.

A certified copy of a notification to the surveyor general of intent to claim land settled upon as a donation claim, from the general land office at Washington, D. C., establishes the date of the giving of such notice, clearly appearing thereon, although the local surveyor general's and register's offices contain no record of the filing thereof: *Sylvester v. State*, 46 Wash. 585.

In a condemnation proceeding, maps showing the location of the railroad are admissible as illustrative of the evidence of

the witnesses, where they are shown to be accurate by witnesses who had scaled the maps and compared them with the government field-notes, although such witnesses had not surveyed the ground or made the maps: *Portland and Seattle R. Co. v. Ladd*, 47 Wash. 88; *Portland and Seattle R. Co. v. Clarke County*, 48 Wash. 509.

The court will take judicial notice of the population of its cities as shown by a pamphlet issued under the auspices of the state, and of the approximate increase since the date of such issue: *Times Printing Co. v. Star Publishing Co.*, 51 Wash. 667.

§ 1258. (6044.) Seal of Public Officer, How Affixed.

A seal of court or public office, when required to any writ, process, or proceeding to authenticate a copy of any record or document, may be affixed by making an impression directly on the paper, which shall be as valid as if made upon a wafer or on wax. [L. '54, p. 196, § 338; Cd. '81, § 434; 2 H. C., § 1683.]

Cited in 40 Wash. 631.

§ 1259. (6045.) Foreign Statutes Admissible in Evidence, When.

Printed copies of the statute laws of any state, territory, or foreign government, if purporting to have been published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts, shall be admitted in all courts in this state, and on all other occasions, as presumptive evidence of such laws. [L. '54, p. 196, § 339; Cd. '81, § 435; 2 H. C., § 1684.]]

See *infra*, § 7830, charters and ordinances of cities, how proven.

Evidence as to statutes of other states: See 2 Remington's Digest, p. 2638, § 96; *Dormitzer v. German S. & L. Soc.*, 23 Wash. 132; *Gunderson v. Gunderson*, 25 Wash. 459; *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411; *Clark v. Eltinge*, 29 Wash. 215.

Where the statutes of a state are not pleaded they are presumed to be the same as the laws of this state: *Mantle v. Dabney*, 44 Wash. 193..

§ 1260. (6046.) Certified Copies of Recorded Instruments as Evidence.

Whenever any deed, conveyance, bond, mortgage, or other writing shall have been recorded or filed in pursuance of law, copies of record of such deed, conveyance, bond, or other writing, duly certified by the officer having the lawful custody thereof, with the seal of the office annexed, if there be such seal, if there be no such seal, then with the official certificate of such officer, shall be received in evidence to all intents and purposes as the originals themselves. [Cf. L. '54, p. 195, § 335; L. '77, p. 95, § 433; Cd. '81, § 431; 2 H. C., § 1685.]

See *infra*, § 1304, copies of wills as evidence.

See *infra*, § 1386, copies of letters of administration as evidence.

See *infra*, § 3682, articles of incorporation as evidence.

See *infra*, § 9309, instruments transmitted by telegraph, effect of.

See *infra*, § 9311 et seq., telegraphic copies as evidence.

Cited in 8 Wash. 5; 16 Wash. 374; 26 Wash. 438.

Certified copies of records: See 1 Remington's Digest, pp. 1141, 1142, §§ 113-118; *Peters v. Gay*, 9 Wash. 383; *Smith v. Veysey*, 30 Wash. 18; *Greene v. Finnell*, 22 Wash. 186; *Seattle v. Parker*, 13 Wash. 450; *Powell v. Nolan*, 27 Wash. 318; *Mason v. McGee*, 15 Wash. 272; *Spokane & Idaho Lumber Co. v. Loy*, 21 Wash. 501; *Goon Gan v. Richardson*, 16 Wash. 373; *Roberts v. Center*, 26 Wash. 435; *New*

Whatcom v. Bellingham Bay Imp. Co., 16 Wash. 131; *Bringgold v. Spokane*, 27 Wash. 202.

The original deed itself, regularly acknowledged, is admissible in evidence without further proof; and the legislature did not intend by this section to give to a certified copy any greater legal sanctity than that accorded the original document: *Gardner v. Port Blakeley Mill Co.*, 8 Wash. 1.

The introduction of an original lien notice in evidence, with the auditor's certifi-

cate that it was "as the same appears of record," is sufficient proof of the fact and date of record: *Fairhaven Land Co. v. Jordan*, 5 Wash. 729.

In an action by a foreign corporation, a copy of its articles of incorporation and the appointment of an agent, certified by the Secretary of State as being of record in his office, are, under the statutes of

this state (§§ 3698, 6101, *infra*), prima facie proof of the organization of such corporation and the right to transact business in this state: *Knapp v. Strand*, 4 Wash. 686.

A certified copy of a recorded instrument is admissible in evidence as an admission: *Pearce v. Greek Boys' Mining Co.*, 48 Wash. 38.

§ 1260½. (1299.) Ordinances as Evidence.

All ordinances passed by any city council or board of trustees or other municipal corporation within the state of Washington shall be recorded in a book to be kept for that purpose by the city clerk, or clerk of such board of trustees or municipal corporation of such city, and when so recorded the record thereof so made shall be received in any court of this state as prima facie evidence of the due passage of such ordinances as recorded, and this chapter shall apply as well to all ordinances heretofore as hereafter so passed and recorded. And when the ordinances of any city or town are printed by authority of such municipal corporation, the printed copies thereof shall be received as prima facie evidence that such ordinances as printed and published were duly passed. [Cd. '81, § 2062; 1 H. C., § 766.]

Some of the provisions of this section are probably superseded by the statutes for the organization of cities and towns.

CITY OR TOWN LAWS AND ORDINANCES are by-laws, and not state laws; and are, in some respects, as distinct from laws of the state as are the laws of the several states from the laws of the United States: *Thornton v. Territory*, 3 W. T. 482.

Pleading and evidence: See 2 Remington's Digest, p. 2001, § 50; *Seattle v. Doran*, 5 Wash. 482; *Seattle v. Pearson*, 15 Wash. 575; *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131; *Seattle v. Turner*, 29 Wash. 515; *Hillman v. Seattle*, 33 Wash. 14; *Gove v. Tacoma*, 34 Wash. 434.

§ 1261. Certified Copy of Tax Deeds.

Whenever it shall be necessary in any action in any court of law or equity, wherein the title to any real estate is in controversy, to prove the conveyance to any county of such real estate in pursuance of a foreclosure of a tax certificate and sale thereunder, a copy of the tax deed issued to the county containing a description of such real estate, exclusive of the description of all other real estate therein described, certified by the county auditor of the county wherein the real estate is situated, to be such, shall be admitted in evidence by the court, and shall be proof of the conveyance of the real estate in controversy to such county, to the same extent as would a certified copy of the entire record of such tax deed. [L. '05, p. 266, § 1.]

§ 1262. (6047.) Order for Inspection and to Take Copy of Writings, etc.

Any court, or judge thereof, in which an action is pending may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document, or paper in his possession, or under his control, containing evidence relating to the merits of the action or defense therein. If compliance with the order be refused, the court may exclude the book, document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be, and the court may also

punish the party refusing as for contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers, or documents where he is examined as a witness. [L. '54, p. 195, § 332; Cd. '81, § 428; 2 H. C., § 1686.]

See supra, § 284, bill of particulars.

See supra, § 1216, and notes, subpoena duces tecum.

See supra, § 1226, interrogatories to adversary for discovery.

See infra, § 9309 et seq., proof of telegraphic copies.

Cited in 35 Wash. 246, 247; 44 Wash. 36, 37.

Doubted, whether the production of documentary evidence can be enforced by interrogatories under § 1226, in view of this section: Cully v. Northern Pac. R. Co., 35 Wash. 241.

A party upon whom a demand is made for the inspection of papers or documents as provided by this section has the right to defeat the demand by showing that such documents or papers sought are not material to the support or defense of the action: Lawson v. Black Diamond Coal Min. Co., 44 Wash. 26.

After failure of a defendant to specifically answer interrogatories, filed for a discovery of facts and documents material to the support of the action, under § 1226, the court is not warranted in striking the answer and entering a default judgment for failure to produce and attach to the answer certain correspondence called for by the plaintiff under this section; since it was not the intention of the legislature to furnish a cumulative remedy by these two sections: Id.

§ 1263. (6048.) When Writing may be Read in Evidence, etc.

If either party, at any time before trial, allow the other an inspection of any writing material to the action, whether mentioned in the pleadings or not, and deliver to him a copy thereof, with notice that he intends to read the same in evidence on the trial of the cause, it may be so read without proof of its genuineness or execution, unless denied by affidavit before the commencement of the trial. If such denial be made of any writing not mentioned in the pleadings, the court may give time to either party to procure evidence, when necessary for the furtherance of justice. [L. '54, p. 195, § 333; Cd. '81, § 429; 2 H. C., § 1687.]

See supra, § 284, bill of particulars, etc.

Cited in 35 Wash. 619.

The fact that notice had been served upon the state to produce a certain memorandum-book at the trial of a criminal prosecution which the state was unable to produce for the reason that it had been removed from the jurisdiction of the court, will not preclude the state from contradicting oral testimony on the part of the defendant as to the contents of an entry in dispute: State v. Baldwin, 15 Wash. 15.

The failure to offer an inspection and serve a copy of a writing, before trial, is not a valid objection to the writing as evidence: Beebe v. Redward, 35 Wash. 615.

ADMISSIBILITY OF PRIVATE WRITINGS AND PUBLICATIONS—CONVEYANCES, CONTRACTS, ETC.: See 1 Remington's Digest, p. 1143, §§ 124-126; Seattle & Walla Walla R. Co. v. Ah Kow, 2 W. T. 36; Coleman v. Yesler, 1 W. T. 591; Fox v. Burlington Mfg. Co., 7 Wash. 391; First Nat. Bank of Olympia v. Root, 19 Wash. 111; Murray v. Briggs, 29 Wash. 245; Pickle v. Smalley, 21 Wash. 473;

Foster v. Pacific Clipper Line, 30 Wash. 515; Mace v. Duffy, 39 Wash. 597; Fairhaven v. Cowgill, 8 Wash. 686.

Books of account, private memoranda, and statements: See 1 Remington's Digest, p. 1144, §§ 127-129; Bartlett v. Morgan, 4 Wash. 723; Ah How v. Furth, 13 Wash. 550; Willamette Casket Co. v. McGoldrick, 10 Wash. 229; Union Electric Co. v. Seattle Theater Co., 18 Wash. 213; Bergman v. Shoudy, 9 Wash. 331; Callahan v. Washington Water P. Co., 27 Wash. 154; Powell v. Nolan, 27 Wash. 318; Brotton v. Langert, 1 Wash. 227; Tingley v. Fairhaven Land Co., 9 Wash. 34.

As to letters, see 1 Remington's Digest, p. 1145, § 130; Tacoma Coal Co. v. Bradley, 2 Wash. 600; Hill v. Phoenix Ins. Co., 14 Wash. 164; Beach v. Brown, 20 Wash. 266; Rector v. Thompson, 26 Wash. 400; Barnes v. German Savings & L. Soc., 21 Wash. 448; Lost Lake Lumber Co. v. Smith, 29 Wash. 713; State v. Bringgold, 40 Wash. 12.

Maps, plats, diagrams and photographs: See 1 Remington's Digest, pp. 1145, 1146, §§ 131, 132; Saylor v. Montesano, 11 Wash.

328; *Franklin v. Engel*, 34 Wash. 480; *Gustin v. Jose*, 11 Wash. 348; *Schwede v. Hemrich*, 29 Wash. 124; *Crane v. Dexter Horton Co.*, 5 Wash. 479; *Miller v. Dumon*, 24 Wash. 648.

A map upon which a witness designated the location of objects is admissible in connection with his testimony where it is reasonably accurate: *Spokane v. Patterson*, 46 Wash. 93.

Books, mortality tables, etc.: See 1 *Remington's Digest*, p. 1146, §§ 133, 134; *First National Bank of Snohomish v. Loggie*, 14 Wash. 699; *Swope v. Seattle*, 36 Wash. 113; *Brown v. Blaine*, 41 Wash. 287.

Production, authentication and effect of private writings and publications: See 1 *Remington's Digest*, pp. 1146, 1147, §§ 135-141; *Powell v. Nolan*, 27 Wash. 318; *State v. McCauley*, 17 Wash. 88; *State v. Bringgold*, 40 Wash. 12; *Keim v. Rankin*, 40 Wash. 111; *Lohse v. Burch*, 42 Wash. 156; *Gardner v. Port Blakely Mill Co.*, 8 Wash. 1; *Blewett v. Bash*, 22 Wash. 536; *Chrast v. O'Connor*, 41 Wash. 360; *Washington Iron Works v. McNaught*, 35 Wash. 10; *State v. White*, 10 Wash. 611; *Jefferson County v. Trumbull*, 34 Wash. 276.

CHAPTER VII.

OATHS AND AFFIRMATIONS.

§ 1264. (6054.) Who Authorized to Take and Administer Oaths.

Every court, judge, clerk of a court, justice of the peace, or notary public is authorized to take testimony in any action, suit, or proceeding, and such other persons in particular cases as authorized by law. Every such court or officer is authorized to administer oaths and affirmations generally, and every such other persons in such particular case as authorized. [L. '69, p. 378, § 1; 2 H. C., § 1693.]

See supra, § 52, subd. 7, power to administer oaths.

See supra, § 59, subd. 3, power of judge, affidavit.

§ 1265. (6055.) Oath, How Administered.

An oath may be administered as follows: The person who swears holds up his hand, while the person administering the oath thus addresses him: "You do solemnly swear that the evidence you shall give in the issue (or matter) now pending between — and — shall be the truth, the whole truth, and nothing but the truth, so help you God." If the oath be administered to any other than a witness giving testimony, the form may be changed to: "You do solemnly swear you will true answers make to such questions as you may be asked," etc. [L. '69, p. 378, § 2; 2 H. C., § 1694.]

§ 1266. (6056.) Form Varied to Suit Witnesses' Opinion.

Whenever the court or officer before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing connected with or in addition to the usual form of administration, which, in witness' opinion, is more solemn or obligatory, the court or officer may, in its discretion, adopt that mode. [L. '69, p. 379, § 3; 2 H. C., § 1695.]

§ 1267. (6057.) Form Adapted to Suit Religious Belief.

When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the [peculiar] ceremonies of his religion, if there be any such. [L. '69, p. 379, § 4; 2 H. C., § 1696.]

Where an oath has been administered to a Chinese witness according to the custom and religion of his country, the subsequent administration to him of an oath

in the form prescribed by statute is not prejudicial error: *State v. Gin Pon*, 16 Wash. 425.

§ 1268. (6058.) Affirmation, Form of.

Any person who has conscientious scruples against taking an oath may make his solemn affirmation, by assenting, when addressed, in the following manner: "You do solemnly affirm that," etc., as in section 1265. [L. '69, p. 379, § 5; 2 H. C., § 1697.]

§ 1269. (6059.) Affirmation Equivalent to Oath—Perjury.

Whenever an oath is required, an affirmation as prescribed in the last section is to be deemed equivalent thereto, and a false affirmation is to be deemed perjury equally with a false oath. [L. '69, p. 379, § 6; 2 H. C., § 1698.]

See *infra*, §§ 2851-2854, penalty for perjury.

CHAPTER VIII.

THE RESTORATION OF LOST RECORDS.

§ 1270. (6063.) Substitution of Copy.

Whenever a pleading, process, return, verdict, bill of exceptions, order, entry, stipulation, or other act, file, or proceeding in any action or proceeding pending in any court of this state shall have been lost or destroyed by fire or otherwise, or is withheld by any person, such court may, upon the application of any party to such action or proceeding, order a copy or substantial copy thereof to be substituted. [L. '90, p. 337, § 1; 2 H. C., § 1699.]

Where an information is lost, the substitution of a new information at the trial, which is given a new number, is not an institution of a new prosecution: *State v. McFadden*, 42 Wash. 1.

§ 1271. (6064.) Court Records Lost or Destroyed—How Replaced.

Whenever the record required by law of the proceedings, judgment, or decree in any action or other proceeding of any court in this state in which a final judgment has been rendered, or any part thereof, is lost or destroyed by fire or otherwise, such court may, upon the application of any party interested therein, grant an order authorizing such record or parts thereof to be supplied or replaced,—

1. By a certified copy of such original record or part thereof, when the same can be obtained;

2. By a duly certified copy of the record in the supreme court of such original record of any action or proceeding that may have been removed to the supreme court, and remain recorded or filed in said supreme court;

3. By the original pleadings, entries, papers, and files in such action or proceeding, when the same can be obtained;

4. By an agreement in writing, signed by all the parties to such action or proceeding, their representatives or attorneys, that a substituted copy of such original record is substantially correct. [L. '90, p. 338, § 2; 2 H. C., § 1700.]

Under this section, a duly certified copy of a recorded deed is admissible without proof of the genuineness of the signatures to the deed: *Chrast v. O'Connor*, 41 Wash. 360.

§ 1272. (6065.) Action to Restore—Proceedings.

Whenever the record required by law, or any part thereof, of the proceeding or judgment or decree in any action or other proceeding of any court

in this state in which the final judgment has been rendered is lost or destroyed by fire or otherwise, and such loss cannot be supplied or replaced as provided in the last preceding section, any person or party interested therein may make a written application to the court to which said record belongs, setting forth the substance of the record so lost or destroyed, which application shall be verified in the manner provided for the verification of pleadings in a civil action, and thereupon summons shall issue, and actual service, or service by publication, shall be made upon all persons interested in or affected by said original judgment or final entry, in the manner provided by law for the commencement of civil actions, provided the parties may waive the issuing or service of summons, and enter their appearance to such application; and upon the hearing of such application, without further pleadings, if the court finds that such record has been lost or destroyed, and that it is enabled, by the evidence produced, to find the substance, or effect thereof, material to the preservation of the rights of the parties thereto, it shall make an order allowing a record, which record shall recite the substance and effect of said lost or destroyed record, or part thereof, and the same shall thereupon be recorded in said court, and shall have the same effect as the original record would have if the same had not been lost or destroyed, so far as it concerns the rights of the parties so making the application, or persons or parties so served with summons, or entering their appearance, or persons claiming under them by a title acquired subsequently to the filing of the application. [L. '90, p. 338, § 3; 2 H. C., § 1701.]

§ 1273. (6066.) Hearing on Application—Evidence.

Upon the hearing of the application provided in the last preceding section, the court may admit in evidence oral testimony, and any complete or partial abstract of such record, docket entries, or indices, and any other written evidence of the contents or effect of such records and published reports concerning such actions or proceedings, when the court is of opinion that such abstracts, writings, and publications were fairly and honestly made before the loss of such records occurred. [L. '90, p. 339, § 4; 2 H. C., § 1702.]

§ 1274. (6067) Lost Records—Time Extended for Appeal, When.

Whenever a lost or destroyed judgment or order is one to which either party has a right to a proceeding in error or of appeal, the time intervening between the filing of the application mentioned in section 1272 and the final order of the court thereon shall be excluded in computing the time within which such proceeding or appeal may be taken as provided by law. [L. '90, p. 339, § 5; 2 H. C., § 1703.]

§ 1275. (6068.) Costs.

The costs to be taxed upon an application to restore a lost or destroyed record shall be the same as are provided for like service in civil actions, and may be adjudged against either or any party to such proceeding or application, or may, in the discretion of the court, be apportioned between such parties. [L. '90, p. 339, § 6; 2 H. C., § 1704.]

See *supra*, § 476 et seq., costs in civil cases.

See *infra*, § 1277, costs, by whom paid.

§ 1276. (6069.) Restoration of Lost or Destroyed Probate Records.

In case of the loss or destruction by fire or otherwise of the records, or any part thereof, of any probate court, or superior court having probate jurisdiction, the superior court may proceed, upon its own motion, or upon application in writing of any party in interest, to restore the records, papers, and proceedings of either of said courts relating to the estates of deceased persons, including recorded wills, wills probated or filed for probate in such courts, all marriage records, and all other records and proceedings, and for the purpose of restoring said records, wills, papers, or proceedings, or any part thereof, may cause citations or other process to be issued to any and all parties to be designated by him, and may compel the attendance in court of any and all witnesses whose testimony may be necessary to the establishment of any such record or part thereof and the production of any and all written or documentary evidence which may be by him deemed necessary in determining the true import and effect of the original record, will, paper, or other document belonging to the files of said court; and may make such orders and decrees establishing such original record, will, paper, document, or proceeding, or the substance thereof, as to him shall seem just and proper. [L. '90, p. 340, § 7; 2 H. C., § 1705.]

§ 1277. (6070.) Costs, by Whom Paid.

The costs incurred in the superior courts in proceedings under this chapter shall be paid by the party or parties interested in such proceedings, or in whose behalf such proceedings are instituted. [L. '90, p. 340, § 8; 2 H. C., § 1706.]

See *supra*, § 1275, costs.

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CHAPTER I.

JURISDICTION AND POWERS OF THE COURT.

§ 1278. (6075.) Powers of Court.

The superior courts, in the exercise of their jurisdiction of matters of probate, shall have power,—

1. To take proof of wills, and to grant letters testamentary and of administration, and to bind apprentices as by law provided;
2. To settle the estates of deceased persons, and the accounts of executors, administrators, and guardians;

3. To allow or reject claims against the estates of deceased persons as hereinafter provided;

4. To hear and determine all controversies between masters and their apprentices;

5. To award process, and cause to come before them all persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators, or guardians, or otherwise, shall be intrusted with or in any way accountable for any property belonging to a minor, orphan, or person of unsound mind, or estate of any deceased person;

6. To order and cause to be issued all writs which may be necessary to the exercise of their jurisdiction. [Cf. L. '54, p. 309, § 3; L. '73, p. 253, § 3; Cd. '81, § 1299; L. '91, p. 380, § 1; 2 H. C., § 845.]

See Const., Art. IV, § 6.

Cited in 17 Wash. 489; 28 Wash. 70.

Courts of probate jurisdiction: See 1 Remington's Digest, pp. 729, 730, §§ 47-51; State ex rel. Cox v. Superior Court, 21 Wash. 575; In re Macdonald's Estate, 29 Wash. 422; Reformed Presbyterian Church v. McMillan, 31 Wash. 643; Ball v. Clothier, 34 Wash. 299; In re Alfstad's Estate, 27 Wash. 175; In re Belt's Estate, 29 Wash. 535; Winston v. Crowe, 28 Wash. 65. See, also, 1 Remington's Digest, p. 1198, § 4; Dooley v. Russell, 10 Wash. 195; Furth v. United States Mtg. & T. Co., 13 Wash. 73; State ex rel. Warren v. Ayer, 17 Wash. 127.

Where the court acquires jurisdiction of a decedent's estate through a petition to appoint an administrator, which it denied, the court has power to proceed regularly to final distribution, although the widow may protest against any administration: In re Wilbur's Estate, 8 Wash. 35, 40 Am. St. Rep. 886.

The probate court has no jurisdiction to try title to real estate as between the representatives of an estate and the husband of the decedent, where the latter claims an interest adverse thereto: Stewart v. Lohr, 1 Wash. 341, 22 Am. St. Rep. 150; and where the probate court had no jurisdiction of the subject matter the appellate court could gain none: Id.

Under this section probate courts were invested with jurisdiction over the estates of deceased persons, and when such powers have been invoked by petition setting forth the jurisdictional facts, among others, absence of a party for more than

seven years and that there is no evidence that he is still living, the court is warranted in finding that he is dead, and in ordering administration on his estate: Scott v. McNeal, 5 Wash. 309.

In such a case, the supposed deceased person, after his return to this state, cannot, as against an innocent purchaser or his grantees, maintain an action of ejectment to recover property sold under the decree of the probate court: Id.; overruled in 154 U. S. 34.

The power given probate courts by the legislature of Washington territory to make distribution of testator's estate to his minor children, when they were not provided for in his will, was not in contravention of the organic act (10 Stats. at L. 172) creating such courts: Webster v. Seattle Trust Co., 7 Wash. 642.

Under § 1444, infra, where the testator directs the management and settlement of his estate without the intervention of the probate court, the acts of the trustees cannot be called in question by any court, so long as they faithfully comply with the provisions of the will: Newport v. Newport, 5 Wash. 114.

A finding that a decedent was a resident of this state, with property therein, authorizes the court to administer thereon, and if the fact of residence is erroneously determined, the remedy is by appeal: State v. Superior Court, 11 Wash. 111.

Decree of territorial probate court, when cannot be collaterally attacked: Magee v. Big Bend Land Co., 51 Wash. 406.

§ 1279. (6076.) Records to be Kept.

There shall be kept in the office of the clerk of the superior court the following books of record of probate matters:—

1. A journal, in which shall be entered all orders, decrees and judgments made by the court, or the judge thereof, and the minutes of the court, in probate proceedings;

2. A record of wills, in which shall be recorded all wills admitted to probate;

3. A record of letters testamentary and of administration, in which all letters testamentary and of administration shall be recorded;

4. A record of bonds, in which all bonds and obligations required by law to be approved by the court or judge in matters of probate shall be recorded;

5. A record of petitions, in which all petitions for orders of sale of real estate shall be recorded;

6. A record of claims, in which at least one page shall be given to each estate, or case, wherein shall be entered, under the title of each estate, or case, in separate columns properly ruled,—1. The names of claimants against the estate; 2. The date of filing proof of claim; 3. The amount claimed; 4. The amount allowed; 5. The date of allowance; 6. The nature of the claim; 7. The amount paid; 8. The number of the voucher for each payment; 9. The date of filing the voucher;

7. A memorandum of the files, in which at least one page shall be given to each estate or case, wherein shall be noted each paper filed in the case, except proof of claims and vouchers noted in record of claims, and the date of filing each paper;

8. A record of marriages, in which certificates of all marriages solemnized in the county shall be recorded. [Cf. L. '54, p. 310, § 5; L. '60, p. 235, § 5; Cd. '81, § 1300; L. '91, p. 380, § 2; 2 H. C., § 846; Abb. R. P. S., pp. 360-373.]

Cited in 17 Wash. 489.

§ 1280. (6077.) Powers of Judge at Chambers.

The judges of the superior courts may, at chambers, appoint appraisers, receive inventories and accounts, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant letters of administration or guardianship, approve claims and bonds, and direct the issuance of all writs and process necessary in the exercise of their powers. [Cf. L. '65, p. 24, § 1; L. '73, p. 472, § 2; L. '75, p. 36, § 2; Cd. '81, § 2138; L. '91, p. 94, § 15; 2 H. C., § 847.]

See *infra*, § 1414, hearing in court or at chambers.

For power of judge at chambers, see 2 v. Schwabacher, 2 W. T. 130; Kalb v. Remington's Digest, p. 1570, § 15; Murne German S. & L. Soc., 25 Wash. 349.

CHAPTER II.

NOTICES AND CITATIONS.

§ 1281. (6081.) Personal Notice—Citation.

Whenever personal notice is required to be given to any party to a proceeding in matters of probate, and no other mode of giving notice is prescribed, it shall be given by citation issued from the court, signed by the clerk and under the seal of the court, directed to the sheriff of the proper county, requiring him to cite such person to appear before the court or judge, as the case may be, at a time and place to be named in such citation. In the body of the citation shall be briefly stated the nature or character of the proceedings. [L. '54, p. 305, § 226; Cd. '81, § 1311; L. '91, p. 381, § 3; 2 H. C., § 848.]

§ 1282. (6082.) Service and Return.

The officer to whom the citation is directed shall serve it by delivering a copy to the person or persons named therein, and shall return the original to

the court according to its direction, indorsing thereon the time and manner of service. [Cf. L. '54, p. 305, § 227; L. '73, p. 255; § 17; Cd. '81, § 1312; 2 H. C., § 849.]

§ 1283. (6083.) Time of Service.

In all cases in which citations are issued from the superior court in probate proceedings, they shall be served at least ten days before the term [time] at which they are made returnable, except when issued from the court in cases where the law requires the judge to issue them upon his own motion, and he does so issue them; and in such cases they shall be served in sufficient time to allow the person served to be in attendance on the court. [Cf. L. '63, p. 206, § 46; L. '73, p. 256, § 18; Cd. '81, § 1313; L. '91, p. 381, § 4; 2 H. C., § 850.]

Cited in 40 Wash. 214, 215.

CHAPTER III.

VENUE.

§ 1284. (6087.) Letters, etc., Granted in What County.

Wills shall be proved and letters testamentary or of administration shall be granted,—

1. In the county of which deceased was a resident or had his place of abode at the time of his death;
2. In the county in which he may have died, leaving estate therein, and not being a resident of the state;
3. In the county in which any part of his estate may be, he having died out of the state, and not having been a resident thereof at the time of his death. [L. '60, p. 173, § 43; Cd. '81, § 1340; 2 H. C., § 851.]

Cited in 26 Wash. 254; 30 Wash. 241; 33 Wash. 173; 39 Wash. 559; 43 Wash. 346.

Domicile of decedent, or situs of assets, as affecting the jurisdiction: See 1 Remington's Digest, p. 1198, §§ 5, 6; 2 Remington's Digest, pp. 2874, 2876, §§ 17, 22; Stern v. Sill, 39 Wash. 557; In re Clayson's Estate, 26 Wash. 253; Rader v. Stubblefield, 43 Wash. 334; Higgins v. Nethery, 30 Wash. 239.

A decree of one probate court escheating property to the territory, because the owner died intestate, leaving no heirs, is void, where the probate court of another county had already granted letters of administration of the estate, the decedent having been a nonresident, having died out of the territory, and leaving property in both counties: Territory v. Klee, 1 Wash. 183.

§ 1285. (6088.) Jurisdiction When Estate in Two Counties.

When the estate of the deceased is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, the superior court of that county in which the application is first made for letters testamentary or of administration shall have exclusive jurisdiction of the settlement of the estate. [L. '60, p. 173, § 44; Cd. '81, § 1341; 2 H. C., § 852.]

Cited in 1 Wash. 188.

Upon the probate of a will of a non-resident, his personal property in this

state should be administered according to the laws of his domicile: Rader v. Stubblefield, 43 Wash. 334.

§ 1286. (6089.) Venue in Subsequent Proceedings.

All orders, settlements, trials and other proceedings in probate shall be had or made in the county in which letters testamentary or of administration were granted. [Cf. L. '63, p. 206, § 47; Cd. '81, § 1314; L. '91, p. 381, § 5; 2 H. C., § 853.]

Cited in 5 Wash. 381.

CHAPTER IV.**THE CUSTODY AND PROOF OF WILLS.****§ 1287. (6090.) Deposit of Will.**

Any last will and testament in writing, being inclosed in a sealed envelope or wrapper, and having indorsed thereon the name of the testator or testatrix, and his or her place of residence, and the day when and the person by whom it is delivered, may be deposited by the person making the same, or by any person for him, in the office of the clerk of the superior court, in the county where the maker resides, and such clerk of court shall receive and safely keep the same in a place to be provided therefor and to be marked and designated as the "Files of Wills," and shall give a certificate of deposit thereof to the person so depositing the same, and said will shall be surrendered and redelivered to the maker, or to such person as may be designated by the written order of the maker upon a surrender of such certificate. [L. '93, p. 49, § 1.]

See *infra*, chapter V, wills.

See *infra*, chapters VI and VII, descent and distribution of property.

§ 1288. (6091.) Custody, Delivery and Publication.

Such will when so deposited shall, during the lifetime of the testator or testatrix, be delivered only to himself or herself, or to some person by the maker authorized by order in writing, duly signed, executed and acknowledged before a notary public or other qualified officer in the same manner as is required by the laws of this state in the execution of instruments for the conveyance of real property, and upon the surrender of such certificate; and after the death of the maker said will shall be opened in public before witnesses by the judge of said court and may be retained therein for probate if necessary. [L. '93, p. 49, § 2.]

§ 1289. (6092.) Custodian to Produce, When—Penalty.

Any person having the custody or control of any will, shall, within thirty days after he shall have received knowledge of the death of the testator or testatrix, deliver said will into the superior court which has jurisdiction, or to the person named in said will as executor; and any person who shall willfully fail or neglect to deliver any such will in accordance with the provisions of this section, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the county jail for a period not exceeding six months or by both such fine and imprisonment. [Cf. L. '60, p. 174, § 45; Cd. '81, § 1342; 2 H. C., § 854; L. '93, p. 49, § 3.]

§ 1290. (6093.) Executor to Produce Will, When.

Any person named as executor in any will shall, within thirty days after he has knowledge that he is executor, present the will, if in his possession,

to the superior court which has jurisdiction. [L. '60, p. 174, § 46; Cd. '81, § 1343; 2 H. C., § 855.]

§ 1291. (6094.) Acceptance or Renunciation.

An executor named in the will may decline to act by filing a written renunciation at the time of filing said will; but if he intends to accept, he shall present with the will a petition praying that the will be admitted to probate, and that letters testamentary be issued to him. [L. '60, p. 174, § 47; Cd. '81, § 1344; 2 H. C., § 856.]

§ 1292. (6095.) Damages for Failure to Comply.

Any person violating either of the last three preceding sections, without reasonable excuse, shall be liable to every person interested in the will for damages caused by such neglect. [Cf. L. '60, p. 174, § 48; Cd. '81, § 1345; L. '91, p. 382, § 6; 2 H. C., § 857.]

§ 1293. (6096.) Petition by Executor for Production and Probate of.

Any person named as an executor in a will, not having the same in his possession, may petition the court of proper jurisdiction for an order to have the same produced, that it may be admitted to probate, and that letters testamentary may be issued to him. [L. '60, p. 174, § 49; Cd. '81, § 1346; 2 H. C., § 858.]

§ 1294. (6097.) Petition by Other Interested Persons.

Any person having an interest in the will may in like manner present a petition praying that it may be required to be produced and admitted to probate. [L. '60, p. 174, § 50; Cd. '81, § 1347; 2 H. C., § 859.]

§ 1295. (6098.) Court may Compel Production.

The said court may compel by citation and attachment any person in whose possession any will may be to produce it in court at such time as the court may order. [L. '60, p. 175, § 51; Cd. '81, § 1348; 2 H. C., § 860.]

§ 1296. (6099.) Application, to Whom Made—Power to Enforce.

Applications for the probate of a will, or for letters testamentary, may be made to the judge of the superior court, and he may also at any time issue all necessary orders and process to enforce the production of any will. [L. '60, p. 175, § 52; Cd. '81, § 1349; 2 H. C., § 861.]

§ 1297. (6100.) Certificate of Probate or Rejection.

When any will is exhibited to be proven, the court may immediately receive the proof and grant a certificate of probate, or if such will be rejected, issue a certificate of rejection. [L. '54, p. 315, § 17; Cd. '81, § 1350; 2 H. C., § 862.]

Evidence as to testamentary capacity:
See 2 Remington's Digest, p. 2871, §§ 3-7; Higgins v. Nethery, 30 Wash. 230; Rathjens v. Merrill, 38 Wash. 442; In re Gorkow's Estate, 20 Wash. 563; Richardson v. Moore, 30 Wash. 406; Hunt v. Phillips, 34 Wash. 362; Hartley v. Lord, 38 Wash. 221.

When a will is offered for probate, there must be proof that the deceased was of sound mind when the will was made: In re Baldwin's Estate, 13 Wash. 666; Higgins v. Nethery, 30 Wash. 230.

Title to lands in this state devised by will vests in the devisee fully, after probate of the will, the title relating back

to the death of the testator: *Christoffer-son v. Pfennig*, 16 Wash. 491.

A record of a will is competent to show the nature of plaintiff's possession, even though the will is void as to children not named therein: *Cullen v. Bowen*, 36 Wash. 665.

Questions as to the construction of a will and as to the vesting of the property mentioned in it are not cognizable in a proceeding to have the will established in probate, the only question for consideration in such a proceeding being the validity of the will: *Montrose v. Byrne*, 24 Wash. 288.

§ 1298. (6101.) Testimony of Absent Witnesses.

If any witness be prevented by sickness from attending at the time when any will may be produced for probate, or reside out of the state or more than thirty miles from the place where the will is to be proven, such court may issue a commission, annexed to such will, and directed to any judge, justice of the peace, or mayor, or other person, empowering him to take and certify the attestation of such witness. [L. '54, p. 315, § 18; Cd. '81, § 1351; 2 H. C., § 863.]

§ 1299. (6102.) Effect of Such Testimony.

If such witness appear before such officer and make oath or affirmation that the testator signed the writing annexed to such commission as his last will, or that some other person signed it by his direction and in his presence, that he was of sound mind, that the witness subscribed his name thereto in presence of the testator, the testimony so taken shall have the same force as if taken before the court. [L. '54, p. 315, § 19; Cd. '81, § 1352; 2 H. C., § 864.]

§ 1300. (6103.) Proof Where One Witness is Dead, etc.

When one of the witnesses to such will shall be examined, and the other witnesses are dead, insane, or their residence unknown, then such proof shall be taken of the handwriting of the testator, and of the witness dead, insane, or residence unknown, and of such other circumstances as would be sufficient to prove such will. [L. '54, p. 315, § 20; Cd. '81, § 1353; 2 H. C., § 865.]

Cited in 10 Wash. 558.

§ 1301. (6104.) Proof Where All Witnesses are Dead.

If it shall appear, to the satisfaction of the court, that all the subscribing witnesses are dead, insane, or their residence unknown, the court shall take and receive such proof of the handwriting of the testator and subscribing witnesses to the will, and of such other facts and circumstances as would be sufficient to prove such will. [L. '54, p. 315, § 21; Cd. '81, § 1354; 2 H. C., § 866.]

§ 1302. (6105.) Testimony, How Taken and Authenticated.

All the testimony adduced in support of the will shall be reduced to writing, signed by the witnesses, and certified by the judge of the court. [L. '54, p. 315, § 22; Cd. '81, § 1355; 2 H. C., § 867.]

§ 1303. (6106.) Recording Wills.

All wills shall be recorded in a book kept for that purpose, within thirty days after probate, and the originals shall be carefully filed. [L. '54, p. 316, § 26; Cd. '81, § 1356; 2 H. C., § 868.]

See *supra*, § 1276, restoration of lost probate records.

§ 1304. (6107.) Admissible in Evidence, When.

Every will proved according to the provisions of this chapter, recorded and certified by the judge of the superior court, and attested by the seal of said court, may be read as evidence without any further proof. [L. '54, p. 316, § 27; Cd. '81, § 1357; 2 H. C., § 869.]

See *supra*, § 1260, certified copies of records as evidence.

§ 1305. (6108.) Copies Admissible, When.

The record of any will made, proved, and recorded as aforesaid, and the exemplification of such record by the clerk in whose custody the same may be, shall be received as evidence, and shall be as effectual in all cases as the original would be if produced and proven. [Cf. L. '54 p. 316, § 28; Cd. '81, § 1358; L. '91, p. 382, § 7; 2 H. C., § 870.]

Cited in 25 Wash. 296.

§ 1306. (6109.) Recorded in Other Counties, When.

In all cases where lands devised by last will are situated in different counties, a copy of such will shall be recorded in the county auditor's office in each county within six months after probate. [L. '54, p. 316, § 29; Cd. '81, § 1359; 2 H. C., § 871.]

§ 1307. (6110.) Contest of Will.

If any person interested in any will shall appear within one year after the probate or rejection thereof, and, by petition to the superior court having jurisdiction, contests the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. Issue shall be made up, tried and determined in said court respecting the competency of the deceased to make last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representation, or for any other cause affecting the validity of such will. [Cf. L. '54, p. 316, § 30; L. '60, p. 176, § 63; L. '73, p. 264, § 64; Cd. '81, § 1360; L. '91, p. 382, § 8; 2 H. C., § 872.]

See *infra*, § 1319 et seq., and notes, provisions relating to wills.

Cited in 10 Wash. 540; 25 Wash. 297; 40 Wash. 212; 43 Wash. 347.

In an action to contest a will by persons claiming to be children of the testator, to whose complaint a motion is interposed requiring it to be made more specific in stating whether they are natural or adopted children, and, if adopted, how, when, and where it was done, an allegation setting up that the contestants believed that they had been legally adopted at some time and place not remembered or discovered, but evidence of which they expected to produce at the

trial, does not show such interest in the will as entitles them to contest under the provisions of this section: *In re Renton's Estate*, 10 Wash. 533.

Actions to contest wills: See 2 Remington's Digest, pp. 2874-2877, §§ 14-37; *Montrose v. Byrne*, 24 Wash. 288; *Rader v. Stubblefield*, 43 Wash. 334; *In re Sullivan's Estate*, 40 Wash. 202; *Morrison v. Morrison*, 25 Wash. 466; *In re Clayson's Estate*, 26 Wash. 253; *Richardson v. Moore*, 30 Wash. 406; *Hunt v. Phillips*, 34 Wash. 362.

§ 1308. (6111.) Interested Parties to be Cited.

Upon the filing of the petition referred to in the next preceding section, a citation shall be issued to the executors who have taken upon them the execution of the will, or to the administrators with the will annexed, and to all legatees named in the will residing in the state, or to their guardians if any

of them are minors, or their personal representatives if any of them are dead, requiring them to appear before the court on a day therein specified, to show cause why the petition should not be granted. [Cf. L. '60, p. 176, § 64; Cd. '81, § 1361; L. '91, p. 382, § 9; 2 H. C., § 873.]

See *supra*, § 1281, citation.

§ 1309. (6112.) Adjudication Binding, When.

If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding, save to infants, married women, persons absent from the United States, or of unsound mind, a period of one year after their respective disabilities are removed. [Cf. L. '54, p. 316, § 32; L. '60, p. 176, § 65; Cd. '81, § 1362; 2 H. C., § 874.]

See *infra*, § 1378, disability of married women removed.

Cited in 25 Wash. 296; 28 Wash. 680.

§ 1310. (6113.) Evidence Admitted at Time of Probate, Sufficient When.

In all trials respecting the validity of a will, if any subscribing witness be deceased, or cannot be found, the oath of such witness, examined at the time of probate, may be admitted as evidence. [L. '54, p. 317, § 33; L. '60, p. 177, § 66; Cd. '81, § 1363; 2 H. C., § 875.]

§ 1311. (6114.) Probate Annulled, When.

If, upon the trial of said issue, it shall be decided that the will is for any reason invalid, or that it is not sufficiently proved to have been the last will of the testator, the will and probate thereof shall be annulled and revoked. [L. '60, p. 177, § 67; Cd. '81, § 1364; 2 H. C., § 876.]

§ 1312. (6115.) Effect of Revocation.

Upon the revocation being made, the powers of the executor, or administrator with the will annexed shall cease, but such executor or administrator shall not be liable for any act done in good faith previous to service of written notice of intention to contest said will. [L. '60, p. 177, § 68; Cd. '81, § 1365; 2 H. C., § 877.]

§ 1313. (6116.) Costs and Expenses, by Whom Paid.

The fees and expenses shall be paid by the losing party. If the probate be revoked or the will annulled, the party who shall have resisted such revocation shall pay the cost and expenses of proceedings out of the property of the deceased. [L. '60, p. 177, § 69; Cd. '81, § 1366; 2 H. C., § 878.]

Costs, counsel fees and expenses: See 2 Remington's Digest, p. 2877, §§ 36, 37; *State ex rel. Richardson v. Superior Court*, 28 Wash. 677; *In re Gorkow's Estate*, 20 Wash. 563; *Hunt v. Phillips*, 34 Wash. 362.

The unsuccessful contestant of a will, who claimed the estate under another will, is not entitled to an allowance out of the estate for costs of the contest, either in the lower or appellate court: *In re Rathjen's Estate*, 45 Wash. 55.

§ 1314. (6117.) Proof of Lost or Destroyed Will.

Whenever any will be lost or destroyed, by accident or design, the superior court shall have power to take proof of the execution and validity of the will, and to establish the same, notice to [all] persons interested having first been given; such proof shall be reduced to writing, and signed by the witnesses. But no will shall be allowed to be proved as a lost or destroyed will,

unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses. [L. '60, p. 177, § 70; L. '73, p. 265, § 71; Cd. '81, § 1367; 2 H. C., § 879.]

Cited in 10 Wash. 557.

Under this section the provisions of a lost will must be proved by at least two credible witnesses, and the declarations of the testator are inadmissible for that purpose: *In re Harris' Estate*, 10 Wash. 555.

In proceeding to establish a lost will its execution is sufficiently proved in the absence of any contradictory testimony, when one of the attesting witnesses testifies that he saw the testator and the

other attesting witness, who had since died, sign an instrument which the former declared to be his will: *Id.*

An allegation in a petition to establish and prove a lost will stating that "said deceased, at the time of his death, left a will which your petitioner alleges to be the last will and testament of said deceased," is equivalent to alleging that the will was in existence at the time of the death of the testator, as required in this section, in such cases: *Id.*

§ 1315. (6118.) Decree—Recording.

When any such will shall be established, the provisions thereof shall be distinctly stated in the judgment establishing it, and a copy of such decree shall be certified by the clerk, under the seal of the court; and such copy, together with the testimony upon which the decree is founded, shall be recorded as other wills are required to be recorded, and letters testamentary or of administration, with the will annexed, shall be issued thereon, in the same manner as upon wills produced and duly proved. [Cf. L. '60, p. 177, § 71; Cd. '81, § 1368; L. '91, p. 382, § 10; 2 H. C., § 880.]

See *supra*, § 1276, restoration of lost probate records.

§ 1316. (6119.) Restraining Order Pending Such Proceedings.

If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration be granted on the estate of the testator, or letters testamentary of any previous will of the testator be granted, the court shall have authority to restrain the administrators or executors so appointed from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will. [L. '60, p. 177, § 72; Cd. '81, § 1369; 2 H. C., § 881.]

§ 1317. (6120.) Foreign Wills, How Proved.

Wills probated in any other state or territory of the United States, or in any foreign country or state, shall be admitted to probate in this state on the production of a copy of such will and of the original record of probate thereof, authenticated by the attestation of the clerk of the court in which such probate was made; or if there be no clerk, by the attestation of the judge thereof, and by the seal of office of such officers, if they have a seal. [L. '77, p. 284, § 1; Cd. '81, § 1370; 2 H. C., § 882.]

Cited in 52 Wash. 151.

Upon the death of a nonresident testator, and the original probate of his will in a county in this state, wherein he left the bulk of his real and personal property, the administration of the estate in

the court of such county should be considered the principal one, and a subsequent probate at the place of his domicile only ancillary thereto: *Rader v. Stubblefield*, 43 Wash. 334.

§ 1318. (6121.) Foreign Wills, Proceedings After Probate.

All provisions of law relating to the carrying into effect of domestic wills after probate shall, so far as applicable, apply to foreign wills admitted to

probate in this state, as contemplated in the preceding section. [L. '77, p. 284, § 2; Cd. '81, § 1371; 2 H. C., § 883.]

Cited in 52 Wash. 151.

The provisions of this section make all provisions relating to probate of domestic wills applicable to a foreign will when admitted to probate in this state: *Dunn v. Peterson*, 4 Wash. 170, 172.

The personal property of a nonresident testator will be distributed according to the law of his domicile: *Rader v. Stubblefield*, 43 Wash. 334.

CHAPTER V.

WILLS.

§ 1319. (4594.) Who may Devise.

Every person who shall have attained the age of majority, of sound mind, may by last will devise all his or her estate, real and personal. [L. '54, p. 313, § 1; L. '60, p. 169, § 18; L. '63, p. 207, § 51; Cd. '81, § 1318; 1 H. C., § 1458.]

See supra, § 1287 et seq., and notes, probate of wills.

See infra, § 1341 et seq., descent and distribution.

Married woman can devise her property by will to the same extent and in the same manner that her husband can property belonging to him: See infra, § 5918.

Cited in 7 Wash. 411; 47 Wash. 78-81.

Testamentary capacity: See 2 Remington's Digest, pp. 2871, 2872, §§ 1-7; *Kromer v. Friday*, 10 Wash. 621; *Jackson v. Thompson*, 38 Wash. 282; *Higgins v. Nethery*, 30 Wash. 239; *Rathjens v. Merrill*, 38 Wash. 442.

The right to make a testamentary disposition of property is governed by the laws in force at the date of the testator's death, and wills must conform thereto: *Strand v. Stewart*, 51 Wash. 685.

Where there was ample testimony that the testator was sane at all times and rarely intoxicated, and that he was both sane and sober at the time of the execution of the will, a finding of testamentary capacity will not be disturbed on appeal, although there was conflicting testimony to the effect that he was frequently intoxicated and insane at intervals: *In re Rathjen's Estate*, 45 Wash. 55.

A finding of want of testamentary capacity is warranted by the evidence where it appears that the decedent was seventy-eight years of age, that his wife died nine days before, causing him great mental anguish, that he languished physically until his death nine days there-

after, the will being made four days before his death, at night, in the house of the sole devisee, who was not related to him, no mention being made of his children or grandchildren, and no disposition made of a small amount of the property excepted from the general devise, and where there was evidence that at the time his mind was wandering, weak and feeble: *In re Wetmore's Estate*, 44 Wash. 567.

There is sufficient evidence to support findings of testamentary capacity and want of undue influence in the making of a will, revoking a will made seventeen days before in favor of the testator's wife, where it appears that the husband and wife were estranged, that divorce suits had been instituted with charges and counter-charges, that she refused to respond to his repeated appeals for a reconciliation, that the beneficiaries in the will were miles away for two months immediately preceding the execution of the will, and that just before committing suicide, the testator left a note declaring that he was about to kill himself on account of his wife, and to will his property to his friends: *In re Rathjen's Estate*, 45 Wash. 55.

§ 1320. (4595.) Requisites, and Execution of.

Every will shall be in writing, signed by the testator or testatrix, or by some other person under his or her direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator. [L. '54, p. 313, § 4; Cd. '81, § 1319; 1 H. C., § 1459.]

See supra, notes to § 1314, proof of lost or destroyed wills.

See supra, note to § 1319, what law governs.

Cited in 10 Wash. 558; 30 Wash. 242.

§ 1321. (4596.) Signing Testator's Name.

Every person who shall sign the testator's or testatrix's name to any will by his or her direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request. [L. '54, p. 313, § 5; Cd. '81, § 1320; 1 H. C., § 1460.]

§ 1322. (4597.) Will in Writing, Revocation of.

No will in writing, except in cases hereinafter mentioned, nor any part thereof, shall be revoked except by a subsequent will in writing, or by burning, canceling, tearing, or obliterating the same, by the testator or testatrix, or in his or her presence, or by his or her consent or direction. [L. '54, p. 313, § 6; Cd. '81, § 1321; 1 H. C., § 1461.]

Revocation of will: See note to § 1329, *infra*.

Cited in 47 Wash. 80.

§ 1323. (4598.) Revocation of by Subsequent Marriage, When.

If, after making any will, the testator shall marry and the wife shall be living at the time of the death of the testator, such will shall be deemed revoked, unless provision shall have been made for her by marriage settlement, or unless she be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received. [L. '54, p. 313, § 7; Cd. '81, § 1322; 1 H. C., § 1462.]

Cited in 47 Wash. 78, 79, 80, 81, 82, 84; 52 Wash. 541, 543, 547.

The will of a feme sole is revoked by her marriage if her husband survives her, under this section, so providing as to a man whose wife survives, and § 1340, providing that words importing the masculine gender may be extended to females, when such construction is necessary, in view of our community property laws placing man and wife upon an equal-

ity as to property rights, testamentary capacity, and right of inheritance: In *re* Pettridge's Will, 47 Wash. 77.

Under this section marriage does not revoke a former will making a bequest in favor of the person who became the wife of the testator, where there was nothing in the will to show a counter intent, revocation of wills by implication not being favored: In *re* Adler's Estate, 52 Wash. 539.

§ 1324. (4599.) Bond to Convey not Deemed Revocation.

A bond, covenant, or agreement made for a valuable consideration by a testator to convey any property, devised or bequeathed in any last will previously made, shall not be deemed a revocation of such previous devise or bequest, but such property shall pass by the devise or bequest, subject to the same remedies on such bond, covenant, or agreement, for specific performance or otherwise, against devisees or legatees, as might be had by law against the heirs of the testator or his next of kin, if the same had descended to him. [L. '54, p. 314, § 9; Cd. '81, § 1323; 1 H. C., § 1463.]

§ 1325. (4600.) Charge or Encumbrance not Deemed Revocation.

A charge or encumbrance upon any real or personal estate for the purpose of securing the payment of money, or the performance of any covenant or agreement, shall not be deemed a revocation of any will relating to the same estate, previously executed. The devises and legacies therein contained shall pass and take effect, subject to such charge or encumbrance. [L. '54, p. 314, § 10; Cd. '81, § 1324; 1 H. C., § 1464.]

§ 1326. (4601.) Void When Children not Provided for.

If any person make his last will and die, leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making of such will, or the death of the testator, every such testator, so far as he shall regard such child or children, or their descendants, not provided for, shall be deemed to die intestate, and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part. [L. '54, p. 314, § 11; Cd. '81, § 1325; 1 H. C., § 1465.]

See *infra*, § 1699, descent as to adopted children.

Cited in 5 Wash. 226, 391; 7 Wash. 410, 411; 20 Wash. 571; 34 Wash. 102, 103, 326; 38 Wash. 390.

Requisites and validity: See 2 Remington's Digest, pp. 2873, 2874, §§ 8-13; Van Brocklin v. Wood, 38 Wash. 384; Morrison v. Morrison, 25 Wash. 467; Webster v. Thorndyke, 11 Wash. 390; McKnight v. McDonald, 34 Wash. 98; In re Gorkow's Estate, 20 Wash. 563; Cross v. Cross, 23 Wash. 673.

This section applies to the testator's community as well as to his separate property: Hill v. Hill, 7 Wash. 409; and under the settled construction proof of the testator's intention to make provision for his children, outside the language of the will itself, is inadmissible: *Id.*

Under this section parol evidence is inadmissible, where a testator devised all his property to his wife and her heirs, to show that at the time the will was made he had in mind his children, and that in devising his property to his wife he thereby intended to, and did, provide for them: Bower v. Bower, 5 Wash. 225.

A bequest of all of decedent's property to her husband must be held void, under this section, there being a child living, when the only reference to him was in a proviso to the bequest to the husband providing that if he "should marry again after my demise all my property, both real and personal, is to belong to any one or more children that may be born to me before my demise": Purdy v. Davis, 13 Wash. 164; following Bower v. Bower, 5 Wash. 225; In re Barker's Estate, 5 Wash. 390.

A will, by the terms of which the testator gives and bequeaths all her property to her beloved husband, "to the exclusion of every one else who may be or might be entitled to the same," is ineffectual as against the testator's children, under this section: In re Barker's Estate, *supra*.

Where a will is void as to children for the reason that it fails to comply with this section, the proper remedy is to move

the court to proceed with the administration of the testator's estate, and, as a part of such administration, to decree and set over to the children the proportion to which they would be entitled if the testator had died intestate: *Id.*

Although a will may, under the provisions of this section, be inoperative as to the testator's children, and they entitled to share in his estate as if he had died intestate, yet the will is valid for all other purposes, and a devise of all the testator's estate to his wife during her lifetime, with remainder to his heirs, will operate, where there are two children, to give the widow but a life estate in one-third of the testator's separate property: Webster v. Seattle Trust Co., 7 Wash. 642.

A will devising all the testator's real estate to his wife, and which expressly declares that it is the last will and testament of testator, cannot be construed as a codicil to a former will whereby all the realty was devised to the wife, and certain sums bequeathed to the children, but such former will was necessarily revoked by the last; and the last will, not naming or providing for the children, is inoperative as to them: Mason v. McLean, 6 Wash. 31.

A decree vesting one-half of community property in the children of a testator remains unaffected by the setting aside of a decree rendered in the same cause upon proceedings in intervention declaring the rights of the parties to be as decreed in the original action, except that the interests of all should be subject to the lien of a certain mortgage: *Id.*

Where a testator dies leaving any child not named or provided for in his will, he is, under this section, deemed to have died intestate as to such child: Bower v. Bower, 5 Wash. 225; In re Barker's Estate, 5 Wash. 390; Mason v. McLean, 6 Wash. 31; Hill v. Hill, 7 Wash. 409; Webster v. Seattle Trust Co., 7 Wash. 642; Purdy v. Davis, 13 Wash. 164; In re Gorkow's Estate, 20 Wash. 563; Morrison v. Morrison, 25 Wash. 466.

§ 1327. (4602.) Advancements, Effect of.

If such child or children, or their descendants, shall have an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they shall take nothing by virtue of the provisions of the preceding sections. [L. '54, p. 314, § 12; Cd. '81, § 1326; 1 H. C., § 1466.]

See *infra*, § 1348 et seq., advancements by decedent dying intestate.

§ 1328. (4603.) Of Devise, Where Devisee Dies Before Testator.

When any estate shall be devised to any child, grandchild, or other relative of the testator, and such devisee shall die before the testator, having lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator. [L. '54, p. 314, § 13; Cd. '81, § 1327; 1 H. C., § 1467.]

See *supra*, § 1307, and notes, contest of will.

Cited in 10 Wash. 538, 539.

A wife is not a "relative" of her husband within the terms of this section: *In re Renton's Estate*, 10 Wash. 533.

§ 1329. (4604.) Revocation of Second Will Revives First, When.

If, after making any will, the testator shall duly make and execute a second will, the destruction, canceling, or revocation of such second will shall not revive the first will unless it appears by the terms of such revocation that it was his intention to revive and give effect to the first will, or unless he shall duly republish his first will. [L. '54, p. 315, § 14; Cd. '81, § 1328; 1 H. C., § 1468.]

§ 1330. (4605.) Nuncupative Will Valid, When.

No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, unless the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator, at the time of pronouncing the same, did bid some person present to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness and at the dwelling house of the deceased, or where he had been residing for the space of ten days or more, except where such person was taken sick from home and died before his return. Nothing herein contained shall prevent any mariner at sea or soldier in the military service from disposing of his wages or other personal property by nuncupative will. [L. 54, p. 315, §§ 23, 24; Cd. '81, § 1329; 1 H. C., § 1469.]

Upon the probate of a nuncupative will, the court may, in the exercise of its sound discretion, permit the alleged will and records to be amended to conform to the facts found: *In re Miller's Estate*, 47 Wash. 253.

A nuncupative will is made "during the last sickness" of the testator, without reference to the fact of extremis or that there was opportunity to reduce it to writing, where the testator expected he was in his last sickness and about to die, and did thereafter die thereof: *Id.*

§ 1331. (4606.) Proof of Nuncupative Will.

No proof shall be received of any nuncupative will unless it be offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, be first committed to writing, and a citation issued to the widow or next of kin of the deceased, that they may contest the

will if they think proper. [L. '54, p. 316, § 25; Cd. '81, § 1330; 1 H. C., § 1470.]

Cited in 40 Wash. 214.

Proof required: See *In re Sullivan's Estate*, 40 Wash. 202.

§ 1332. (4607.) Devises to Witnesses Void, When.

All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, shall be void unless there are two other competent witnesses to the same; but a mere charge on the estate of the testator for the payment of debts shall not prevent his creditors from being competent witnesses to his will. If such witness, to whom any beneficial devise, legacy, or gift may have been made or given, would have been entitled to any share in the testator's estate in case the will is not established, then so much of the estate as would have descended or would have been distributed to such witness shall be saved to him as will not exceed the value of the devise or bequest made to him in the will; and he may recover the same from the devisees or legatees named in the will in proportion to and out of the parts devised and bequeathed to him. [L. '60, p. 171, §§ 34, 35; Cd. '81, § 1331; 1 H. C., § 1471.]

§ 1333. (4608.) Devise of Land, How Construed.

Every devise of land in any will shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that he intended to convey a less estate. [L. '60, p. 172, § 36; Cd. '81, § 1332; 1 H. C., § 1472.]

Cited in 24 Wash. 285.

A sale of land by virtue of a partition proceeding brought by the purchaser of a wife's community half interest is not subject to a deceased husband's will providing for the retention of the land until his children arrive at majority: *Kromer v. Friday*, 10 Wash. 621.

Under the legislation of this state relating to the property rights of husband and wife, a wife cannot claim a homestead in the separate property of her deceased husband, which he has by will de-

vised to another: *In re Eyre's Estate*, 7 Wash. 291.

Under this section a will passes an absolute fee simple title instead of a life estate, when the will devises the residue "to my cripple son, Charles. . . . In case of his death it is my desire that my sole property shall be applied to the school fund of Wilbur," since it must be construed that the testator had reference to the possibility of the devisee's death before his own: *Reeves v. School District*, 24 Wash. 282.

§ 1334. (4609.) Estate for Life, Remainder in Fee.

If any person, by last will, devise any real estate to any person for the term of such person's life, such devise vests in the devisee an estate for life, and without the remainder is specially devised to the heirs of said devisee, it shall revert to the heirs at law of the testator. [L. '54, p. 318, § 45; Cd. '81, § 1333; 1 H. C., § 1473.]

Cited in 47 Wash. 254.

§ 1335. (4610.) After-acquired Lands Pass by Will.

Any estate, rights, or interest in lands acquired by the testator after the making of his or her will shall pass thereby, and in like manner as if it passed at the time of making the will, if such shall manifestly appear by the will to have been the intention of the testator. [L. '60, p. 172, § 38; Cd. '81, § 1334; 1 H. C., § 1474.]

§ 1336. (4611.) Contribution Among Legatees.

When any testator in his last will shall give any chattel or real estate to any person, and the same shall be taken in execution for the payment of the testator's debts, then all the other legatees, devisees, and heirs shall refund their proportional part of such loss to such person from whom the bequest shall be taken. [L. '54, p. 318, § 47; Cd. '81, § 1335; 1 H. C., § 1475.]

§ 1337. (4612.) Contribution, When Court may Enforce.

When any devisees, legatees, or heirs shall be required to refund any part of the estate received by them, for the purpose of making up the share, devise, or legacy of any other devisee, legatee, or heir, the superior court, upon the petition of the person entitled to contribution or distribution of such estate, may order the same to be made, and enforce such order. [L. '54, p. 318, § 48; Cd. '81, § 1336; 1 H. C., § 1476.]

A judgment creditor of a devisee under a will acquires no lien against the devisee's interest in the realty of the es-

tate, when the devisee is indebted to the state in excess of the value of his share: *Boyer v. Robinson*, 26 Wash. 117.

§ 1338. (4613.) Term "Will" Construed.

The term "will," as used in this chapter, shall be so construed as to include all codicils attached to any will. [L. '54, p. 319, § 49; Cd. '81, § 1337; 1 H. C., § 1477.]

§ 1339. (4614.) Construction of Wills.

All courts and others concerned in the execution of last wills shall have due regard to the direction[s] of the will, and the true intent and meaning of the testator, in all matters brought before them. [L. '54, p. 319, § 50; Cd. '81, § 1338; 1 H. C., § 1478.]

See notes to § 1444, *infra*.

Cited in 23 Wash. 675.

Construction: See 2 Remington's Digest, pp. 2878-2880, §§ 38-54; *In re Stewart's Estate*, 26 Wash. 32; *Hunt v. Phillips*, 34 Wash. 362; *McCullough v. Lauman*, 38 Wash. 227; *Taylor v. Horst*, 23 Wash. 446; *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643; *Rathjens v. Merrill*, 38 Wash. 442; *Hunt v. Hunt*, 18 Wash. 14.

The fact that technical and apt words of conveyance are not used in framing a will is immaterial if the intent of the testator to pass the title to real estate appears from the language used, when construed as a whole: *Webster v. Thorn-dyke*, 11 Wash. 390.

In the particular case, held that the will must be construed as passing title to the realty to the executor, and that he was given full power to sell the property and apply the proceeds as directed in the will: *Id.*

If a testator provides by will that the trustees of his estate shall manage and settle the estate in the manner directed in his will without the intervention of a court having jurisdiction, the power of such trustees is derived from the will and their duty prescribed by it, and, so long as they faithfully comply with its provisions,

their acts cannot be called in question by any court: *Newport v. Newport*, 5 Wash. 114.

Upon the death of one of the devisees under such will before having attained his majority, the administrator of his estate is entitled to demand and receive his portion from the executor: *Rogers v. Strobach*, 15 Wash. 472.

A will bequeathing to each of the testator's two children one-half of all the moneys that may be realized from the sale of all his real and personal property, to be paid to them on their attaining the age of twenty-one years, respectively, is a devise to the children and not to the executor, though the will may further provide that all the property is devised to an executor in trust, with power to sell same and invest the proceeds in securities, until the children attain their majority, when principal and interest is to be paid over to them: *Id.*

A will devising and bequeathing to certain persons all the testator's property, "in trust, nevertheless, to and for the following uses and purposes," etc., constitutes such persons trustees, though they may be denominated in the will as executors, especially when it appears from

the will construed as an entirety, that such was the intent of the testator, inasmuch as a nonresident is named as one of the executors and certain trust property of the testator is included in the devise: *Smith v. Smith*, 15 Wash. 239.

A will making the executrix a trustee for the purpose of paying creditors applies only to creditors who qualify by proving their claims, after publication of notice to creditors: *Foley v. McDonnell*, 48 Wash. 272.

§ 1340. (4615.) Words Importing Number and Gender, How Construed.

Words in this chapter contained, or in this act, which import the singular number only, may also be applied to the plural of persons and things, and words importing the masculine gender only may be extended to females also, when such construction shall be necessary. [Cd. '81, § 1339; 1 H. C., § 1479.]

Cited in 47 Wash. 82, 84.

CHAPTER VI.

DESCENT.

§ 1341. (4620.) Descent of Real Property—Rule of.

When any person shall die seised of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having devised the same, they shall descend subject to the debts as follows:—

1. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child, or issue of such child; if the decedent leaves a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child by right of representation; if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent, they share equally; otherwise they take according to the right of representation;

2. If the decedent leaves no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father and mother, if both survive. If there be no father nor mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brothers or sisters, by right of representation. If decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother;

3. If there be no issue, nor husband nor wife, nor father and mother, nor either, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation;

4. If the decedent leaves a surviving husband or wife and no issue, and no father nor mother, nor brother nor sister, the whole estate goes to the surviving husband or wife;

5. If the decedent leaves no issue, nor husband nor wife, and no father nor mother, nor brother nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote, however;

6. If the decedent leaves several children, or one child and the issue of one or more other children, and any such surviving child dies under age, and not having been married, all the estate that comes to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation;

7. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent and if all the issue are in the same degree of kindred to the child, they share the estate equally; otherwise they take according to the right of representation;

8. If the decedent leaves no husband, wife, or kindred, the estate escheats to the state, for the support of common schools in the county in which the decedent resided during lifetime, or where the estate may be situated. [L. '75, p. 53, § 1; Cd. '81, § 3302; 1 H. C., § 1480.]

For former laws on the subject of this chapter see: L. '54, pp. 305-308; L. '57, p. 24; L. '59, p. 7; L. '60, pp. 221-223; L. '63, pp. 261-264, Abb. R. P. S., pp. 373-377.

See *supra*, § 1326, and notes, wills.

See *infra*, § 1343, this section applies only to separate property, as between husband and wife.

See § 1356 et seq., *infra*, administration of escheated estates.

See *infra*, § 1364, distribution of personal estate.

See *infra*, § 1366, title to real property vests in heirs, when.

See *infra*, § 1465 et seq., probate homestead and widow's allowance.

See *infra*, notes to § 1576, order of payment of legacies.

See *infra*, § 1699, descent of property in cases of adopted children.

See *infra*, notes to §§ 5917, 5918, community property.

See *infra*, § 7138, proceeds of unclaimed and lost property escheat.

See *infra*, § 7147, unclaimed moneys, escheat to permanent school fund.

Cited in 1 Wash. 187; 3 Wash. 562; 10 Wash. 539; 14 Wash. 12, 15, 247; 18 Wash. 512; 25 Wash. 296; 47 Wash. 81; 48 Wash. 638.

It is the decedent's separate property that is spoken of in this section: *Morgan v. Bell*, 3 Wash. 554, 562.

The statutes of descent make the wife an heir of the husband, but no reason exists for enlarging its provisions: In *re Renton's Estate*, 10 Wash. 533, 539.

If the owner of lands dies intestate, leaving no husband or wife, or kindred, the lands escheat to the state under this section (subdivision 8), and the title vests immediately in the state on the death of owner, without the aid or intervention of the probate court: *Territory v. Klee*, 1 Wash. 183.

A decree of one probate court escheating property to the territory for the support of public schools, because the owner died intestate, leaving no kindred or wife, is void, where the probate court of another county has already granted letters of administration of the estate, the decedent having been a nonresident, and having died outside of the territory, leaving property in both counties: *Id.*

An action to quiet title cannot be maintained by an heir until after the close of the administration upon his ancestor's es-

tate: *Hazelton v. Bogardus*, 8 Wash. 102; see *Dunn v. Peterson*, 4 Wash. 170; *Balch v. Smith*, 4 Wash. 497; but see *infra* § 1366 et seq., later enactment.

The passage of the act of 1875 regulating the descent of property did not operate to prevent the act passed on the same day relating to adoption from becoming a law, but the two must be construed together as one act: In *re Wilbur's Estate*, 14 Wash. 242.

Under statutes 11 and 12 William III, chapter 6, modifying the common law of England so as to enable English subjects to inherit from an alien, and which is a part of our common law, and under our constitution giving an alien a right to take title by inheritance, no disability exists in an alien to transmit title by inheritance, and aliens may receive title by inheritance from an alien: *Abrams v. State*, 45 Wash. 327.

First cousins take to the exclusion of second cousins under subdivision 5, providing that in the absence of issue, husband, wife, father, mother, brothers or sisters, the estate shall go to the next of kin, in equal degree, excepting that, of collateral kindred claiming through different ancestors, those claiming through the nearest ancestor shall be preferred: In *re Sullivan's Estate*, 48 Wash. 631.

§ 1342. (4621.) Descent of Community Property.

Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration. [Cf. L. '75, p. 55, § 2; Cd. '81, §§ 3303, 2411, 2412; 1 H. C., § 1481.]

See last section and notes.

See Ballinger on Community Property, §§ 243-250.

See-supra, § 1326, and notes, wills.

See infra, § 1366, title, when vests in heir.

See infra, §§ 5917, 5918, and notes, community property.

Cited in 7 Wash. 410, 411; 10 Wash. 661; 14 Wash. 13, 154; 18 Wash. 107.

Descent and distribution—Persons entitled and their shares: See 1 Remington's Digest, p. 931, §§ 4-8; Id., p. 1446, §§ 97, 98; *Mabie v. Whittaker*, 10 Wash. 656; *Warburton v. White*, 18 Wash. 511; *Philbrick v. Andrews*, 8 Wash. 7; *Ahern v. Ahern*, 31 Wash. 334; *Cox v. Tompkinson*, 39 Wash. 70; *In re Renton's Estate*, 10 Wash. 533; *Sawyer v. Vermont Loan etc. Co.*, 41 Wash. 524; *Griffin v. Warburton*, 23 Wash. 231; *Legg v. Legg*, 34 Wash. 132; *Bank of Montreal v. Buchanan*, 32 Wash. 480; *In re Cannon's Estate*, 18 Wash. 101.

Upon the death of a husband his community real property descends one-half to the wife and one-half, share and share alike, to his children, who become tenants in common: *Schlarb v. Castaing*, 50 Wash. 331.

Under this section, upon the death of either husband or wife, the whole community estate, and not merely the decedent's interest therein, is subject to administration proceedings for the payment of community debts: *Ryan v. Ferguson*, 3 Wash. 356; see, also, *In re Hill's Estate*, 6 Wash. 288; *Sadler v. Neisz*, 5 Wash. 193.

Under the statute requiring the property of the community to be administered with the estate of that member of the community who is first deceased, the widow of a decedent cannot maintain an action for her half interest in a community contract until after a decree of distribution in the probate proceedings is had: *Lawrence v. Bellingham Bay etc. Ry. Co.*, 4 Wash. 664.

Although it is proper that the community estate should be administered upon by the legal representatives of the wife, she having died first, yet, where an administrator

with the will annexed has been appointed for the wife's estate subsequent to death of husband, who was acting as executor thereof, and such administrator does not proceed with diligence to obtain possession of the community property, but sits by for a year and a half and sees the same administered, in the settlement of the estate of the husband, such administrator is estopped from asserting any claim of right to administer the community estate: *In re Hill's Estate*, 6 Wash. 285.

Where a husband acts as administrator of a deceased wife's will, but, at the time of his death, has not completed administration upon her estate, and the executors of his own will take possession and administer upon all the property the husband held, including the separate and community estate of the deceased wife, such administration by his executors is merely irregular and not void, nor do the ordinary rules relating to the liability of executors *de son tort* apply thereto: *Id.*

Under the statutes of this state providing for the descent of community property, one-half of which shall go to the survivor and the other half to the children, the portion received by any child, whether real or personal, will, on its decease, descend to its brothers and sisters and not to the surviving parent: *In re Forts' Estate*, 14 Wash. 10.

Where there has been no administration upon the estate of the wife, or upon the community property, for a period of eight years after her death, her husband and only child surviving her, the presumption is that as to the community property there was no necessity for administration, and that the right of the child to the possession of his share in the community real estate as heir of his mother is complete: *Hill v. Young*, 7 Wash. 33.

Where all the parties are before the court concerning an application for the sale of decedent's lands, a decree that a marriage existed between the decedent and a woman claiming to be his wife, and that certain land left by decedent was community property, in which she had a half interest, must stand against collateral attack, if the court had jurisdiction: *Kromer v. Friday*, 10 Wash. 621.

Upon the death of a wife the power of the husband to dispose of community realty, although acquired before the act of 1869, ceased, and the property became vested by moieties in the husband and the children: *Hill v. Young*, supra.

Under this section a mortgage by the survivor purporting to embrace his whole estate is valid as to his undivided one-half interest: *Wortman v. Voorhies*, 14 Wash. 152, 154; citing *Tucker v. Brown*, 9 Wash. 357; *Hill v. Young*, 7 Wash. 33.

Real property acquired by the community under the provisions of the law of 1869 which gave the husband power to convey the entire title by his separate deed, could not be conveyed away by the husband after his wife's death, so as to pass her interest, while the law of 1871 (Laws 1871, p. 73, § 22), declaring that one-half the community property should belong to the wife and her heirs forever, was in force: *Mabie v. Whittaker*, 10 Wash. 656.

The legislature has power to change the law of descent as to community lands previously acquired: *Id.*

If a party dies possessed of an interest in community property which is not required to pay the community debts, and is not otherwise exempt, such interest is liable for his separate debts when his separate property is exhausted: *Columbia Nat. Bank v. Embree*, 2 Wash. 331.

Under §§ 1528, 1530, infra, authorizing the probate court to order a sale of the mortgaged property of a decedent, if the redemption thereof is not deemed expedient, community property mortgaged by a decedent and his wife may be ordered sold for the purpose of paying the mortgaged debt: *Ryan v. Ferguson*, 3 Wash. 356.

A sale by a father of his minor children's portion of a community estate inherited from their deceased mother, when not made under order of the probate court, cannot in an action against the children by the grantees to quiet title, be treated as having been made for the benefit of the heirs and as subject to confirmation in such action, on the theory of necessity for such sale, even though the grantees had in good faith purchased and improved the property, as the children would not be estopped by any dishonest conduct on the part of their father in making the sale: *Bjmerland v. Eley*, 15 Wash. 101.

§ 1343. (4622.) Tenancy in Dower and by Curtesy Abolished.

The provisions of section 1341, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents, and take the place of tenancy in dower and tenancy by curtesy, which are hereby abolished. [L. '75, p. 55, § 3; Cd. '81, § 3304; 1 H. C., § 1482.]

See infra, § 5922, prohibition against such tenancy.

See Ballinger on Community Property, §§ 218, 253.

Cited in 10 Wash. 539; 14 Wash. 15.

This section is not void for the reason that it is not embraced within the objects of the law within which it is found and enacted: *Richards v. Bellingham Bay L. Co.*, 54 Fed. 209.

The inchoate right of dower is not such a vested right or interest as cannot be taken away by legislative action: *Richards v. Bellingham Bay L. Co.*, supra; and dower as it existed in Washington territory prior to the Laws of 1879, page 79, § 18, which abolished dower, was not a right "established, accrued, or accruing," as to which, by § 31, such act was not to

be construed as operating retrospectively: *Richards v. Bellingham Bay L. Co.*, supra.

At a time when the right of dower existed in Washington territory, a husband conveyed land without joining his wife in the deed, and, at the time of his death, this section and § 5923, infra, were in force, abolishing dower. Held, that the widow was not entitled to dower in the land so conveyed (47 Fed. 854, affirmed): *Richards v. Bellingham Bay L. Co.*, supra.

This section limits the operation of § 1341, supra, in husbands and wives inheriting from each other, to separate property: *In re Forts' Estate*, 14 Wash. 10, 15.

§ 1344. (4623.) Survivorship Between Joint Tenants Abolished.

If partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but descend, or pass by devise, and shall be subject to debts and other legal charges, or transmissible to executors or administrators, and be considered, to every intent and purpose, in the same

view as if such deceased joint tenants had been tenants in common: Provided, that community property shall not be affected by this section. [L. '86, p. 165, § 1; 1 H. C., § 1483.]

Cited in 10 Wash. 659.

§ 1345. (4624.) **Illegitimate Child, Rights of.**

Every illegitimate child shall be considered as an heir to the person who shall in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father, after such marriage, shall have acknowledged him as aforesaid, and adopted him into his family, in which case such child and the legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate, and without issue, the others shall inherit his estate, and he theirs, as heretofore provided in like manner as if all the children had been legitimate, saving to the father and mother, respectively, their rights in the estates of all the said children, as provided heretofore, in like manner as if all had been legitimate. [L. '75, p. 55, § 4; Cd. '81, § 3305; 1 H. C., § 1484.]

See references to § 1341, and notes.

Cited in 20 Wash. 567; 22 Wash. 153.

Right of inheritance: See 1 Remington's Digest, p. 344, §§ 1-3; In re Gorkow's Estate, 20 Wash. 563; In re Rohrer, 22 Wash. 151.

Where a white man procures an Indian woman to live with him on the pay-

ment of a few dollars to her relatives, no marriage ceremony being celebrated, the issue of such a union is illegitimate and incapable of inheriting the father's estate: Kelley v. Kitsap Co., 5 Wash. 521.

§ 1346. (4625.) **Property of Illegitimate Child, Descent of.**

If any illegitimate child shall die intestate without lawful issue, his estate shall descend to his mother, or in case of her decease, to her heirs at law. [L. '75, p. 65, § 5; Cd. '81, § 306; 1 H. C., § 1485.]

See references to § 1341.

§ 1347. (4626.) **Degree of Kindred, How Computed.**

The degree of kindred shall be computed according to the rules of the civil law, and the kindred of the half-blood shall inherit equally with those of the whole blood in the same degree. [L. '75, p. 56, § 6; Cd. '81, § 3307; 1 H. C., § 1486.]

See references to § 1341.

See infra, § 1348, effect of advancements.

§ 1348. (4627.) **Advancement, How Considered.**

Any estate, real or personal, that may have been given by the intestate in his lifetime as an advancement to any child, or other lineal descendant, shall be considered a part of the intestate's estate, so far as regards the division and distribution thereof among his issue, and shall be taken by such child or

other descendant, toward his share of the intestate's estate. [L. '75, p. 56, § 7; Cd. '81, § 3308; 1 H. C., § 1487.]

See references to § 1341.

See supra, § 1327, advancement by testator.

Cited in 26 Wash. 121.

§ 1349. (4628.) Effect of Advancements on Distributive Shares.

If the amount of such advancement then exceed the share of the heir so advanced, he shall be excluded from any further portion in the division and distribution of the estate, but he shall not be required to refund any part of such advancement, and if the amount so received shall be less than his share, he shall be entitled to so much more as will give him his full share of the estate of the deceased. [L. '75, p. 56, § 8; Cd. '81, § 3309; 1 H. C., § 1488.]

See references to § 1341, supra.

§ 1350. (4629.) Advancement of Realty, Effect on Distributive Shares.

If any such advancement shall have been made in real estate, the value thereof shall, for the purposes of the preceding section, be considered as part of the real estate to be divided, and if it be in personal estate, and if in either case it shall exceed the share of real or personal estate respectively that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make the whole share equal to those of the other heirs who are in the same degree with him. [L. '75, p. 56, § 9; Cd. '81, § 3310; 1 H. C., § 1489.]

See references to § 1341.

§ 1351. (4630.) Advancement, What is.

All gifts and grants shall be deemed to have been made in advancement, if expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant. [L. '75, p. 57, § 10; Cd. '81, § 3311; 1 H. C., § 1490.]

See references to § 1341.

Advancements: See 1 Remington's Digest, p. 935, § 22; Girault v. Hotaling Co., 7 Wash. 90; Van Brocklin v. Wood, 38 Wash. 384.

§ 1352. (4631.) Value of Estate Advanced.

If the value of the estate so advanced shall be expressed in the conveyance, or in the charge thereof made by the intestate, or in the acknowledgment by the party receiving it, it shall be considered of that value in the division and distribution of the estate; otherwise it shall be estimated at its value when given. [L. '75, p. 57, § 11; Cd. '81, § 3312; 1 H. C., § 1491.]

See references to § 1341.

§ 1353. (4632.) Death of Descendant to Whom Advancement Made.

If any child or lineal descendant so advanced shall die before the intestate, leaving issue, the advancement shall be taken into consideration in the division and distribution of estate, and the amount thereof shall be allowed accordingly by the representatives of the heir so advanced, as so much received towards their share of the estate, in like manner as if the advance-

ment had been made directly to them. [L. '75, p. 57, § 12; Cd. '81, § 3313; 1 H. C., § 1492.]

See references to § 1341.

§ 1354. (4633.) Words "Issue" and "Real Estate" Defined.

The word "issue," as used in this chapter, includes all the lawful lineal descendants of the ancestor, and the words "real estate" include all lands, tenements, and hereditaments, and all rights thereto, and all interest therein possessed and claimed in fee simple, or for the life of a third person. [L. '75, p. 57, § 13; Cd. '81, § 314; 1 H. C., § 1493.]

See references to § 1341.

§ 1355. (4634.) Right of Representation—Posthumous Children, Inheritance by.

Inheritance or succession by right of representation takes place when the descendants of any deceased heir take the same share or right in the estate of another that their parent would have taken if living. Posthumous children are considered as living at the death of their parent. [L. '75, p. 57, § 14; Cd. '81, § 315; 1 H. C., § 1494.]

See references to § 1341.

§ 1356. Escheats for Want of Heirs.

Whenever any person possessed of any property within this state shall die intestate leaving no heirs, such property shall escheat to, and the title thereto immediately vest in the state of Washington, subject, however, to existing liens thereon, the payments of decedent's debts, and the expenses of administration. [L. '07, p. 253, § 1.]

See §§ 1341, 1364, escheat for the support of the common schools of county of residence, earlier laws.

See *infra*, § 7138, escheat of proceeds of unclaimed property.

See *infra*, § 7147, escheat of unclaimed money.

Escheats, jurisdiction, proceedings and 1680, §§ 1-4; *Territory v. Klee*, 1 Wash. effect: See 1 Remington's Digest, pp. 1679, 183; *Helm v. Johnson*, 40 Wash. 420.

§ 1357. Administration of Escheated Estates.

Such estates shall be administered and settled in the same manner as other estates. If at the expiration of eighteen months after the issuance of letters of administration no heirs shall have appeared and established their claim thereto, the court having jurisdiction of such estate shall render a decree escheating all the property and effects of such decedent to the state of Washington. [L. '07, p. 253, § 2.]

§ 1358. Personal Property to be Sold.

After any estate shall have been escheated as aforesaid, it shall be the duty of the administrator thereof, under the supervision and direction of the court, to sell all the personal property, such sales to be made in such manner and upon such terms and conditions as the court may deem to the best advantage to the estate. The proceeds of such personal property shall be first exhausted before any real property shall be subjected to the debts of decedent, expenses of administration, or the satisfaction of liens thereon. [L. '07, p. 254, § 3.]

§ 1359. Tax Commission—Powers in Relation to Escheats.

The state board of tax commissioners shall have supervision of all matters relating to escheats. Whenever the said board shall have information that any person possessed of property within this state has died intestate and without known heirs, said board, or any member thereof, may apply to the court for the appointment of an administrator, or take such other steps as it may deem proper. No sale of any property of such estate, except perishable goods or settlement of any final account, shall be made or be valid until after fifteen days' notice thereof in writing shall have been first served upon the said board of tax commissioners. Said board, or any member thereof, may demand of any administrator, other officer or person having charge of or being in possession of such estate or property, or any portion thereof, and it shall be the duty of such officer or person to furnish said board, or any member thereof, any information or copies of any papers, vouchers, claims or reports in his possession, relating thereto, and failure or refusal so to do shall be cause for his removal by the court. [L. '07, p. 254, § 4.]

§ 1360. Account of Administrator—Lists of Property.

Upon the settlement of any escheated estate, and before the discharge of the administrator, officer or person in charge thereof, all moneys in his hands shall be paid to the state treasurer who shall issue his receipt therefor in duplicate, one of which shall be filed with the state board of tax commissioners, and he shall prepare a duplicate list accurately describing all real property so escheated, one of which shall be filed with the said state board of tax commissioners and one in the office of the commissioner of public lands. [L. '07, p. 254, § 5.]

§ 1361. Record of Escheats.

The state board of tax commissioners shall keep a record in which shall be entered memoranda of all matters and proceedings in relation to escheats, and in which shall be entered a description of all real property escheated, and they shall also keep an account of all moneys collected and paid into the state treasury under the provisions of this act. [L. '07, p. 255, § 6.]

§ 1362. Escheats to Permanent School Fund.

All escheats shall inure to and become a part of the permanent common school fund of the state, and all escheated real property shall be managed, sold and handled in the manner provided by law for the management, disposition and sale of the state common school lands. [L. '07, p. 255, § 7.]

§ 1363. Attorney General—Duty as to Escheats.

It shall be the duty of the attorney general and of the several county attorneys of the state to advise and assist the said state board of tax commissioners in any and all of the matters and proceedings that may be had under the provisions of this act. [L. '07, p. 255, § 8.]

CHAPTER VII.
DISTRIBUTION.

§ 1364. (4638.) Distribution of Separate Personal Estate.

When any person shall die possessed of any separate personal estate, or of any right or interest therein not lawfully disposed of by his last will, the same shall be applied and distributed as follows:—

1. The widow, if any, shall be allowed all articles of her apparel or ornament, according to the degree and estate of her husband, and such provisions and other necessities, for the use of herself and family under her care, as shall be allowed and ordered in pursuance of the provisions of any law; and this allowance shall be made as well when the widow receives the provision made for her in the will of her husband as when he dies intestate;

2. The personal estate remaining after such allowance shall be applied to the payment of the debts of the deceased, with the charges for the funeral and the settling of the estate;

3. The residue, if any, of the personal estate shall be distributed among the same persons as would be entitled to the real estate by section 1341, and in the same proportion as provided, excepting as herein further provided;

4. If the intestate leave a husband and issue, the husband shall be entitled to one-half the residue;

5. If there be no issue, the husband shall be entitled to the whole of the residue;

6. If the intestate leave a widow and issue, the widow shall be entitled to one-half of said residue;

7. If there be no issue, the widow shall be entitled to the whole of the residue;

8. If there be no husband, widow, or kindred of the intestate, the said personal estate shall escheat to the state, for the use of common schools in the particular county in which the intestate shall have resided at time of death. [L. '75, p. 57, § 15; Cd. '81, § 3316; 1 H. C., § 1495.]

Section specified, in subdivision 3, in place of "this act."

See references to § 1341, and notes.

See *infra*, § 1468, distribution of property set apart in probate.

Cited in 10 Wash. 539; 14 Wash. 15.

§ 1365. (4639.) Effect of Advancement Where Widow and Issue Survive.

If the intestate leave a widow and issue, and any relation have received an advancement from the intestate in his lifetime, the value of such advancement shall not be taken into consideration in computing the one-half part to be assigned to the widow, but she shall be entitled to the one-half part only of the said residue, after deducting the value of the advancement. [L. '75, p. 58, § 16; Cd. '81, § 3317; 1 H. C., § 1496.]

See references to § 1341.

See *supra*, § 1348 et seq., advancements.

See *supra*, § 1327, advancements by testator.

§ 1366. (4640.) Real Property Vests in Whom—Rights of Heirs in.

When a person dies seised of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of an-

other, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent: Provided, that no person shall be deemed a devisee until the will has been probated. The title and right to possession of such lands, tenements, or hereditaments so vested in such heirs or devisees, together with the rents, issues and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees, excepting only the executor or administrator when appointed, and persons lawfully claiming under such executor or administrator; and any one or more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interests in any such lands, tenements, or hereditaments and the rents, issues and profits thereof, whether letters testamentary or of administration be granted or not, from any person except the executor or administrator and those lawfully claiming under such executor or administrator. [L. '95, p. 197, § 1.]

See supra, § 1342, descent of community property.

See notes to § 1449, infra, rights under former laws.

See infra, §§ 1449, 1534, right of executor or administrator to possession.

Cited in 10 Wash. 661; 16 Wash. 493; 18 Wash. 107; 23 Wash. 235; 25 Wash. 541; 27 Wash. 19; 33 Wash. 207; 38 Wash. 264; 41 Wash. 529; 42 Wash. 147, 148, 157, 351-354; 46 Wash. 186-189; 49 Wash. 290.

Title of heirs or distributees: See 1 Remington's Digest, pp. 933-935, §§ 12-21; Anrud v. Scandinavian-Amer. Bank, 27 Wash. 16; In re Sullivan's Estate, 36 Wash. 217; Murphy v. Murphy, 42 Wash. 142; Griffin v. Warburton, 23 Wash. 231; Demaris v. Barker, 33 Wash. 200; Bjmerland v. Eley, 15 Wash. 101; Vermont Loan & T. Co. v. Cardin, 19 Wash. 304; Prefontaine v. McMicken, 16 Wash. 16; Boyer v. Robinson, 26 Wash. 117.

The title to lots does not vest in legatees upon the death of the testator, as provided by this section, in the case of a devise, where a nonintervention will provides that one-half of the proceeds of the interest in certain lots remaining unsold at the testator's death shall "when sold" belong to a daughter, and the other half to be invested to make a fund for a son on arriving at majority; since the intention is clear, and is to be implied, that the lots were to be conveyed and the proceeds divided by the executor, who is a trustee for all purposes necessary to execute the will: Martin v. Moore, 49 Wash. 288.

§ 1367. (4641.) Titles of Heirs Confirmed.

This act shall apply to and govern the transmission of title of lands, tenements and hereditaments in the case of the estates of persons hereafter dying and of persons already deceased, whether letters testamentary or of administration have been granted on such estates or not, and the title of all heirs and devisees, and their grantees, to any such real property is hereby confirmed and made valid to the same extent as if this act had been passed before the death of such decedent. [L. '95, p. 198, § 2.]

"This act" included §§ 1366-1371.

Cited in 42 Wash. 147, 148.

§ 1368. (4642.) Debts.

No real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of the death of such decedent. [L. '95, p. 198, § 3.]

Cited in 32 Wash. 468; 42 Wash. 147, 1196, § 1; Id., p. 1211, §§ 69, 70; Murphy v. Murphy, 42 Wash. 142; Fuhrman v. Power, 43 Wash. 533; In re Smith's Estate, 25 Wash. 539.

§ 1369. (4643.) "Heirs," Meaning of.

The word "heirs" shall be construed as meaning the person or persons to whom land, tenements and hereditaments descend as defined in sections from 1341 to 1355, both inclusive. [L. '95, p. 198, § 4.]

Sufficiency of proof of heirship: See In re Sullivan's Estate, 48 Wash. 631.

§ 1370. (4644.) Community Interests.

This act shall apply to community real property and also to separate estate; and upon the death of either husband or wife, title of all community real property shall vest immediately in the person or persons to whom the same shall go, pass, descend or be devised, as provided in section 1342, subject to all the charges mentioned in section 1366 of this act. [L. '95, p. 199, § 5.]

See note to § 1367.

§ 1371. (4645.) Liability of Existing Estates.

Nothing in this act shall have the effect to prevent the real estate of a person deceased for six years prior to the going into effect of this act from being liable for his debts, where letters testamentary or of administration of the estate of such deceased person shall be issued prior to one year after the going into effect of this act. [L. '95, p. 199, § 6.]

See note to § 1367.

CHAPTER VIII.

LETTERS TESTAMENTARY AND OF ADMINISTRATION.

§ 1372. (6125.) Letters Testamentary, When and to Whom Granted.

After probate of any will letters testamentary shall be granted to the persons therein appointed executors. If a part of the persons thus appointed refuse to act, or be disqualified, the letters shall be granted to the other persons appointed therein. If all such persons refuse to act, letters of administration with the will annexed shall be granted to the person to whom administration would have been granted if there had been no will. [L. '54, p. 268, § 5; Cd. '81, § 1372; 2 H. C., § 884.]

See supra, § 1291, acceptance or renunciation.

See infra, § 1374, when executor is a minor, etc.

See infra, § 1384, affidavit of nonexistence of other or subsequent will.

See infra, § 1389, who entitled to letters of administration.

See infra, § 1443, who disqualified.

See infra, § 1444, settlement without administration.

Cited in 4 Wash. 171; 52 Wash. 151.

§ 1373. (6126.) Objections.

Any person interested in a will may file objections in writing to the granting of letters testamentary to the persons named as executors, or any of them, and the objection shall be heard and determined by the court. [L. '60, p. 179, § 74; Cd. '81, § 1373; 2 H. C., § 885.]

§ 1374. (6127.) Letters During Minority or Absence of Executor.

If the executor be a minor, or absent from the state, letters of administration with the will annexed shall be granted, during the time of such minority or absence, to some other person, unless there be another executor, who shall accept the trust, in which case the estate shall be administered by such other executor until the disqualification shall be removed, when such minor, having arrived at full age, or such absentee, shall be admitted as joint executor with the former. [L. '54, p. 269, § 9; L. '60, p. 180, § 75; Cd. '81, § 1374; 2 H. C., § 886.]

§ 1375. (6128.) Discovery of Will Revokes Letters.

If, after letters of administration are granted, a will of the deceased be found, and probate thereof be granted, the letters shall be revoked, and letters testamentary or of administration with will annexed shall be granted. [L. '54, p. 272, § 27; Cd. '81, § 1375; 2 H. C., § 887.]

§ 1376. (6129.) Setting Aside Will Revokes Letters.

If, after a will has been found and letters thereon granted, the will shall afterwards be set aside, the letters shall be revoked, and letters of administration granted on the goods unadministered. [L. '54, p. 272, § 28; Cd. '81, § 1376; 2 H. C., § 888.]

One who has been appointed executor under a will whose probate is afterward revoked has a remedy by appeal from an order made in a subsequent application for the appointment of a general administrator of the estate and not by certiorari: State ex rel. Richardson v. Superior Court, 28 Wash. 677.

§ 1377. (6130.) Marriage of Executrix, etc., not to Affect Interest, etc.

If any executrix or administratrix marry, her husband shall not thereby acquire any interest in the effects of her testator or intestate, nor shall the administration thereby devolve on him. [L. '54, p. 272, § 29; Cd. '81, § 1377; 2 H. C., § 889.]

See infra, § 1430, accounting upon revocation of letters.

See infra, § 1443, who disqualified.

§ 1378. (6130a.) Marriage No Disqualification.

No woman shall be disqualified from acting as executrix of the last will of a deceased person, nor from acting as administratrix of the estate of any deceased person by reason of being a married woman. [L. '97, p. 24, § 1.]

§ 1379. (6131.) Revocation of Letters, When.

If an executor or administrator become of unsound mind, or be convicted of felony or infamous crime, or become an habitual drunkard, or otherwise incapable of or unsuitable for executing the trust reposed in him, or so fail to discharge his official duties, or waste or mismanage the estate, or so act as to endanger any coexecutor or coadministrator, the superior court, upon complaint in writing made by any person interested, supported by affidavit, and due notice given to the person complained of, shall hear the complaint, and if found to be just, shall revoke the letters granted. [L. '54, p. 272, § 30; Cd. '81, § 1378; 2 H. C., § 890.]

See supra, § 1281, citation.

See supra, § 1375, discovery of will revokes.

See infra, § 1415, suspension.

See *infra*, § 1488, revocation for failure to give notice to creditors.

See *infra*, § 1555, revocation for failure to make exhibit.

See *infra*, § 1557, cited to account.

See *infra*, § 1558, revocation for failure to account.

Revocation: See 1 Remington's Digest, Superior Court, 28 Wash. 677; *Murphy v. p. 1202, § 24; State ex rel. Richardson v. Murphy*, 42 Wash. 142.

§ 1380. (6132.) Executor of Executor Administers What.

No executor of an executor shall, as such, be authorized to administer upon the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator left unadministered, shall be issued. [L. '60, p. 180, § 80; Cd. '81, § 1379; 2 H. C., § 891.]

§ 1381. (6133.) Acts of Portion of Executors Valid, When.

When all the executors named shall not be appointed by the court, such as are appointed shall have the same authority to perform every act and discharge every trust required by the will, and their acts shall be as effectual for every purpose as if all were appointed and should act together. [L. '60, p. 180, § 81; Cd. '81, § 1380; 2 H. C., § 892.]

§ 1382. (6134.) Administrator with Will Annexed, Power of.

Administrators with the will annexed shall have the same authority as the executor named in the will would have had, and their acts shall be as effectual for every purpose. [L. '60, p. 180, § 82; Cd. '81, § 3881; 2 H. C., § 893.]

There is no justification for administration with the will annexed, in this state, thirteen years after the death of the testator, where he died in a sister state, and the widow was appointed executrix in that state, notice to creditors was duly

given there, her accounts approved, and nothing remained to be done there except to distribute the estate according to the law of that state vesting the same in the devisees: *State ex rel. Speckart v. Superior Court*, 48 Wash. 141.

§ 1383. (6135.) Letters to be Signed and Under Seal.

Letters testamentary and of administration with the will annexed shall be signed by the clerk of the court, and be under the seal of the court, and a copy of the will shall be attached to the letters. [L. '60, p. 181, § 83; Cd. '81, § 1382; 2 H. C., § 894.]

See *infra*, § 1388, form of letters.

See *infra*, §§ 1394, 1395, oath and bond.

§ 1384. (6136.) Affidavit as to Knowledge of Other Will.

Every administrator with the will annexed, and executor, at the time letters are granted him, shall make an affidavit that he knows of no other and subsequent will of the deceased. [L. '54, p. 270, § 18; Cd. '81, § 1383; 2 H. C., § 895.]

§ 1385. (6137.) Recording Letters—Certificate.

The clerk shall record, in a well-bound book kept for that purpose, all letters testamentary and of administration, before they are delivered to the executors or administrators, and shall certify on such letters that they have been so recorded. [Cf. L. '54, p. 271, § 22; Cd. '81, § 1384; L. '91, p. 383, § 11; 2 H. C., § 896.]

See *infra*, § 1388, form of letters.

See *infra*, § 1389, who entitled to letters.

§ 1386. (6138.) Certified Copies are Evidence.

Copies of such letters, or copies of the records thereof, certified by the clerk, and under the seal of the superior court, shall be received as evidence in any court in this state. [Cf. L. '54, p. 271, § 23; Cd. '81, § 1385; L. '91, p. 383, § 12; 2 H. C., § 897.]

See supra, § 1260, certified copies of records as evidence.

§ 1387. (6139.) Form of Letters Testamentary.

Letters testamentary to be issued to executors under the provisions of this chapter may be in the following form:—

State of Washington, County of —.

In the superior court of the county of —.

Whereas, the last will of A B, deceased, was, on the — day of —, A. D. —, duly exhibited, proven, and recorded in our said superior court, a copy of which is hereto annexed; and whereas, it appears in and by said will that C D is appointed executor thereon, now, therefore, know all men by these presents, that we do hereby authorize the said C D to execute said will according to law.

Witness my hand and the seal of said court this — day of —, A. D. 18—. [L. '54, p. 271, § 24; Cd. '81, § 1386; 2 H. C., § 898.]

See supra, § 1383, how issued.

See infra, §§ 1394, 1395, oath and bond.

§ 1388. (6140.) Form of Letters with Will Annexed.

Letters of administration with the will annexed may be substantially in the following form:—

State of Washington, County of —.

In the superior court of the county of —.

The last will of A B, deceased, a copy of which is hereunto annexed having been proved and recorded in the said superior court, and — (as the case may be), —, C D, is hereby appointed administrator with the will annexed.

Witness my hand and the seal of said court this — day of —, A. D. 18—. [L. '60, p. 181, § 88; Cd. '81, § 1387; 2 H. C., § 899.]

See supra, § 1383, how issued.

§ 1389. (6141.) Who Entitled to Letters of Administration.

Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order:—

1. The surviving husband or wife, or such person as he or she may request to have appointed;

2. The next of kin, in the following order: 1. Child or children; 2. Father or mother; 3. Brothers or sisters; 4. Grandchildren;

3. To one or more of the principal creditors: Provided, that if the persons so entitled or interested shall neglect for more than forty days after the death of the intestate to present a petition for letters of administration, or if there be no relatives or next of kin, or if the heirs or one or more of the principal creditors, in writing, waive their right to administration, or if there be no principal creditor or creditors, then the court or judge may appoint any suit-

able and competent person to administer such estate. [L. '54, p. 268, § 4; L. '60, p. 181, § 89; L. '73, p. 269, § 90; Cd. '81, § 1388; 2 H. C., § 900.]

See supra, § 1372, when and to whom letters issued.

See supra, § 1382, and note.

See infra, § 1443, who disqualified.

Cited in 6 Wash. 191; 20 Wash. 219; 25 Wash. 435, 542; 31 Wash. 342; 33 Wash. 169, 173; 52 Wash. 151.

Right to appointment as administrator—Renunciation—Appointment: See 1 Remington's Digest, pp. 1199, 1201, §§ 8-19; McLean v. Roller, 33 Wash. 166; Stern v. Sill, 39 Wash. 557; In re Hill's Estate, 6 Wash. 285; Lawrence v. Bellingham Bay etc. R. R. Co., 4 Wash. 664; In re Sullivan's Estate, 25 Wash. 430; Farnham's Estate, In re, 41 Wash. 570; In re Sutton's Estate, 31 Wash. 340; McKenna v. Cosgrove, 41 Wash. 332; State ex rel. Richardson v. Superior Court, 28 Wash. 677.

The right to administer upon an estate is statutory, with no discretion in the court where proper application is made: State ex rel. Mann v. Superior Court, 52 Wash. 149.

Upon the death of a nonresident, leaving real property in this state, there is the same

necessity for administration in this state as in the case of resident decedents, regardless of proceedings in another state: Id.

In the administration upon the estate of a widower, without there having been any previous administration upon the estate of his deceased wife, the court has jurisdiction to administer the whole of their community property: Magee v. Big Bend Land Co., 51 Wash. 406.

Upon the death of a wife, the court has jurisdiction to administer upon her undivided one-half interest in community real property, no objection being made, although the proceeding may be irregular and the proper course would have been to administer upon the entire community estate; and a sale of such half interest to pay community debts cannot be collaterally attacked for want of jurisdiction: Wiley v. Verhaest, 52 Wash. 475.

§ 1390. (6142.) Application for Letters, How Made.

Application for letters of administration shall be made by petition in writing, signed by the applicant or his attorney, and filed in the superior court, which petition shall set forth the facts essential to giving the court jurisdiction of the case, and such applicant, at the time of making such application, shall make an affidavit, stating, to the best of his knowledge and belief, the names and places of residence of the heirs of the deceased, and that the deceased died without a will. [L. '54, p. 270, § 17; Cd. '81, § 1389; 2 H. C., § 901.]

See notes and references to last section.

Cited in 33 Wash. 169, 173.

A failure to verify a petition which is the foundation of probate proceedings is a mere irregularity, and does not render the proceedings subject to collateral attack: McCoy v. Ayers, 2 W. T. 203.

Section 286, in regard to requiring pleadings to be made more specific upon motion is applicable to petitions necessary in probate practice: In re Renton's Estate, 10 Wash. 533.

§ 1391. (6143.) Application for Letters de Bonis Non.

A similar affidavit, with such variations as the case may require, shall be made by administrators of the goods remaining unadministered, and by administrators during the time of a contest about a will, or the granting of letters of administration. [L. '54, p. 270, § 16; Cd. '81, § 1390; 2 H. C., § 902.]

§ 1392. (6144.) Notice of Application.

When a petition praying for letters of administration is filed, the clerk must give notice thereof, by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the applicant will be heard. Such notice must be given at least

ten days before the hearing. [Cd. '81, § 1391; L. '83, p. 29, § 1; 2 H. C., § 903.]

See notes and references to § 1389, *supra*.

Cited in 33 Wash. 170.

§ 1393. (6145.) Form of Letters of Administration.

Letters of administration shall be signed by the clerk, and be under the seal of the court, and may be substantially in the following form:—

State of Washington, County of —.

Whereas, A B, late of —, on or about the — day of —, A. D. —, died intestate, leaving, at the time of his death, property in this state subject to administration, now, therefore, know all men by these presents, that we do hereby appoint — administrator upon said estate, and hereby authorize him to administer the same according to law.

Witness my hand and the seal of said court this — day of —, A. D., 18—. [Cf. L. '54, p. 271, § 25; L. '60, p. 182, § 92; Cd. '81, § 1392; 2 H. C., § 904.]

See *supra*, § 1383, how issued.

§ 1394. (6146.) Oath.

Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath, before some person authorized to administer oaths, that he will perform, according to law, the duties of his trust as executor or administrator, which oath must be attached to and recorded with the letters. [L. '77, p. 211, § 4; Cd. '81, § 1393; 2 H. C., § 905.]

§ 1395. (6147.) Bond.

Every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of Washington, with two or more sufficient sureties, to be approved by the judge. In form the bond must be joint and several, and the penalty must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits, and issues of the real property belonging to the estate; which values must be ascertained by the judge by examining on oath the party applying, and any other persons. [Cf. L. '54, p. 268, § 7; L. '77, p. 211, § 4; Cd. '81, § 1394; 2 H. C., § 906.]

See *infra*, §§ 1400, 1401, qualification and justification of sureties.

See *infra*, § 1409, order for further security.

See *infra*, § 1410, who disqualified as sureties.

See *infra*, § 1411, care necessary in taking sureties.

See *infra*, § 1413, bond not to fail for want of form.

See *infra*, § 1421, bond of special administrator.

See *infra*, § 1439, bond of administrator of partnership.

§ 1396. (6148.) Conditions of Bond.

The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law. [Cf. L. '54, p. 268, § 7; L. '77, p. 211, § 4; Cd. '81, § 1396; 2 H. C., § 907.]

§ 1397. (6149.) Additional Bond Before Sale of Property.

The judge must require an additional bond whenever the sale of any real estate belonging to an estate is ordered by him; but no such additional bond

must be required when it satisfactorily appears to the court that the penalty of the bond given, before receiving letters, or of any bond given in place thereof, is equal to twice the value of the personal property remaining in or that may come into the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold. [Cf. L. '54, p. 268, § 7; L. '77, p. 211, § 4; Cd. '81, § 1395; 2 H. C., § 908.]

See *infra*, § 1498 et seq., sale of real estate.

§ 1398. (6150.) Separate Bonds, When.

When two or more persons are appointed executors or administrators, the judge must require and take a separate bond from each of them. [Cf. L. '54, p. 269, § 8; L. '60, p. 183, § 94; Cd. '81, § 1397; 2 H. C., § 909.]

§ 1399. (6151.) Successive Recoveries on Bond.

The bond shall not be void upon the first recovery, but may be sued and recovered upon, from time to time, by any person aggrieved in his own name, until the whole penalty is exhausted. [L. '77, p. 211, § 4; Cd. '81, § 1398; 2 H. C., § 910.]

§ 1400. (6152.) Qualifications of Sureties.

In all cases where bonds or undertakings are required to be given under this chapter, the sureties must possess the qualifications and justify thereon in the same manner as required for bail upon an arrest, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. All such bonds or undertakings must be approved by the judge before being filed or recorded. [Cf. L. '77, p. 211, § 4; Cd. '81, § 1399; L. '91, p. 383, § 13; 2 H. C., § 911.]

See *supra*, § 765, qualifications of bail on arrest.

See *supra*, § 1395, bond.

See *infra*, § 1410, who not to be sureties.

§ 1401. (6153.) Justification of Sureties.

Before the judge approves any bond required under this chapter, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one or more of them, are not worth as much as they have justified to, order a citation to issue, requiring such sureties to appear before him at a designated time and place, to be examined touching their property and its value; and the judge must, at the same time, cause notice to be issued to the executor or administrator, requiring his appearance on the return of the citation, and on its return he may examine the sureties and such witnesses as may be produced touching the property of the sureties and its value; and if upon such examination he is satisfied that the bond is insufficient, he must require sufficient additional security. [L. '77, p. 211, § 4; Cd. '81, § 1400; 2 H. C., § 912.]

See *supra*, § 1281, citation.

See *infra*, § 1409, order for further security.

See *infra*, § 1410, who disqualified as sureties.

See *infra*, § 8336, release of sureties.

§ 1402. (6154.) New Bond Discharges Former Sureties.

Such additional bond, when given and approved, shall discharge the former sureties from any liability arising from the misconduct of the principal after the filing of the same, and such former sureties shall only be liable for such misconduct as happened prior to the giving such new bond. [L. '73, p. 272, § 101; Cd. '81, § 1401; 2 H. C., § 913.]

See *infra*, § 8336, release of sureties.

§ 1403. (6155.) Failure to Give Security Annuls Powers.

If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who shall execute a sufficient bond, must be appointed to the administration. [Cf. L. '73, p. 272, § 102; L. '77, p. 211, § 4; Cd. '81, § 1402; 2 H. C., § 914.]

§ 1404. (6156.) No Bond When Will so Provides.

When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue and sale of real estate be made and confirmed without any bond, unless the court for good cause require one to be executed; but the executor may at any time afterwards, if it appear from any cause necessary or proper, be required to file a bond, as in other cases. [Cf. L. '60, p. 184, § 103; L. '73, p. 272, § 103; L. '77, p. 211, § 4; Cd. '81, § 1403; 2 H. C., § 915.]

See *infra*, § 1444, settlement without administration.

§ 1405. (6157.) Additional Security, When.

Any person interested in an estate may, by verified petition, represent to the judge that the sureties of the executor or administrator thereof have become, or are becoming, insolvent, or that they have removed, or are about to remove, from the state, or from any other cause the bond is insufficient, and ask that further security be required. [Cf. L. '77, p. 211, § 4; Cd. '81, § 1404; L. '91, p. 383, § 13½; 2 H. C., § 916.]

Cited in 48 Wash. 428.

§ 1406. (6158.) Citation for Additional Security—Service of.

If the judge is satisfied that the matter requires investigation, citation must be issued to the executor or administrator requiring him to appear, at a time and place specified, to show cause why he should not give further security. The citation must be served personally on the administrator or executor, at least five days before the return day. If he has absconded or cannot be found, it may be served by leaving a copy of it at his last place of residence, or by such publication as the court or judge may order. [L. '77, p. 211, § 4; Cd. '81, § 1405; 2 H. C., § 917.]

§ 1407. (6159.) Hearing and Order.

On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proof and allegations of the parties. If it satisfactorily appears that the security is from any cause insufficient, he may make an order requiring the executor or administrator to give further secur-

ity, or to file a new bond in the usual form, within a reasonable time, not less than five days. [L. '77, p. 211, § 4; Cd. '81, § 1406; 2 H. C., § 918.]

§ 1408. (6160.) Letters Revocable for Failure to Comply With Order.

If the executor or administrator neglects to comply with the order within the time prescribed, the judge must by order revoke his letters, and his authority must thereupon cease. [L. '77, p. 211, § 4; Cd. '81, § 1407; 2 H. C., § 919.]

§ 1409. (6161.) Further Security on Motion of Court.

When it comes to his knowledge that the bond of any executor or administrator is from any cause insufficient, the judge, without any application, must cause him to be called to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested. [L. '77, p. 211, § 4; Cd. '81, § 1408; 2 H. C., § 920.]

See supra, § 1281, citation.

§ 1410. (6162.) Who Disqualified as Sureties.

No judge of the superior court, no sheriff, clerk of a court, or deputy of either, and no attorney at law, shall be taken as surety in any bond required to be taken in any proceeding in probate. [Cf. L. '54, p. 270, § 19; Cd. '81, § 1409; L. '91, p. 383, § 14; 2 H. C., § 921.]

See supra, § 765, qualifications in arrest and bail.

§ 1411. (6163.) Special Care in Taking Sureties.

The judge shall take special care to take as sureties men who are solvent and sufficient, and who are not bound in too many other bonds; and to satisfy himself, he may take testimony, and examine, on oath, the applicant or person offered as surety. [Cf. L. '54, p. 271, § 20; Cd. '81, § 1410; L. '91, p. 384, § 15; 2 H. C., § 922.]

See supra, §§ 1400, 1401, qualification and justification of sureties.

§ 1412. (6164.) Bonds to be Recorded.

The clerk shall record, in a well-bound book kept for that purpose, all bonds given by executors and administrators, and preserve the originals in regular file. [Cf. L. '54, p. 271, § 22; Cd. '81, § 1411; L. '91, p. 384, § 16; 2 H. C., § 923.]

§ 1413. (6165.) Bond not to Fail for Want of Form.

No bond required under the provisions of this chapter, and intended as such bond, shall be void for want of form or substance, recital or condition; nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond. [Cd. '81, § 1412; 2 H. C., § 924.]

See supra § 777, bonds not to fail for want of form.

See supra, § 1395, bond.

§ 1414. (6166.) Hearing and Orders.

The applications and acts authorized by the foregoing sections in this chapter may be heard and determined in court or at chambers. All orders

made therein must be entered upon the minutes of the court. [Cf: L. '77, p. 211, § 4; Cd. '81, § 1413; L. '91, p. 384, § 17; 2 H. C., § 925.]

See supra, § 1280, hearing in court or at chambers.

§ 1415. (6167.) Suspension by Judge, When.

Whenever the judge has reason to believe, from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle, the property of the estate committed to his charge, or has committed, or is about to commit, a fraud upon the estate, or is incompetent to act, or has permanently removed from the state, or has wrongfully neglected the estate, or has long neglected to perform any acts as such executor or administrator, he must, by order entered upon the minutes of the court, suspend the powers of such executor or administrator until the matter is investigated. [L. '77, p. 211, § 4; Cd. '81, § 1414; 2 H. C., § 926.]

See supra, § 1379, revocation of letters.

See infra, § 1488, revocation for failure to give notice to creditors.

Cited in 32 Wash. 488.

§ 1416. (6168.) Hearing and Determination After Suspension.

When such suspension is made notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or if, appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked, and letters of administration granted anew, as the case may require. [Cf. L. '77, p. 211, § 4; Cd. '81, § 1415; L. '91, p. 384, § 18; 2 H. C., § 927.]

See supra, § 1281, citation.

Revocation of letters—Removal: See 1 Remington's Digest, p. 1202, §§ 24-28; In re Hill's Estate, 6 Wash. 285; In re Dietrich's Estate, 39 Wash. 520; Murphy v. Murphy, 42 Wash. 142; State ex rel. Richardson v. Superior Court, 28 Wash. 677; Filley v. Murphy, 30 Wash. 1.

§ 1417. (6169.) Issues at Hearing.

At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed, to which the executor or administrator may demur or answer. [L. '77, p. 211, § 4; Cd. '81, § 1416; 2 H. C., § 928.]

§ 1418. (6170.) Service of Notice by Publication.

If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the state, notice may be given him of the pendency of the proceedings by publication in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served. [L. '77, p. 211, § 4; Cd. '81, § 1417; 2 H. C., § 929.]

§ 1419. (6171.) Answer of Executor or Administrator.

In the proceedings authorized by the preceding section[s] for the removal of an executor or administrator, the court may compel his attendance by attachment, and may compel him to answer questions on oath touching

his administration, and upon his refusal so to do, may commit him to jail until he obey, or may revoke his letters, or both. [L. '77, p. 211, § 4; Cd. '81, § 1418; 2 H. C., § 930.]

§ 1420. (6172.) Special Administrator Appointed, When.

When, by reason of an action concerning the proof of a will, or from any other cause, there shall be a delay in granting letters testamentary or of administration, the judge may, in his discretion, appoint a special administrator (other than one of the parties) to collect and preserve the effects of the deceased; and in case of an appeal from the decree appointing such special administrator, he shall, nevertheless, proceed in the execution of his trust, until he shall be otherwise ordered by the appellate court. [L. '54, p. 269, § 11; Cd. '81, § 1419; L. '91, p. 384, § 19; 2 H. C., § 931.]

Cited in 17 Wash. 130; 38 Wash. 434.

The insufficiency of the showing made for the appointment of a special administrator is nothing more than an irregularity, which would not affect the ques-

tion of the jurisdiction of the court: State ex rel. Warren v. Ayer, 17 Wash. 127.

The executor of a will is a party within the meaning of this section: Hartley v. Lord, 38 Wash. 432.

§ 1421. (6173.) Bond of Special Administrator.

Every such administrator shall, before entering on the duties of his trust, give bond, with sufficient surety or sureties, in such sum as the judge shall order, payable to the state of Washington, with condition as required of an executor or in other cases of administration, to make and return into court, as soon as practicable, a true inventory of the goods, chattels, rights, and credits of the deceased which have or shall come into his possession or knowledge; and that he will truly account for all the goods, chattels, debts, and effects of the deceased that shall be received by him as special administrator, whenever required by the court, and will deliver the same to the person who shall be appointed executor or administrator of the deceased, or to such other person as shall be lawfully authorized to receive the same. [L. '54, p. 269, § 12; Cd. '81, § 1420; 2 H. C., § 932.]

See supra, § 1395, bond of general administrator.

§ 1422. (6174.) Duties of Special Administrator.

Such special administrator shall collect all the goods, chattels, and debts of the deceased, and preserve the same for the executor or administrator who shall thereafter be appointed; and for that purpose may commence and maintain suits as an administrator, and may also sell such perishable and other goods as the court shall order sold, and he shall be allowed such compensation for his service as the said court shall deem reasonable. [L. '54, p. 270, § 13; Cd. '81, § 1421; 2 H. C., § 833.]

§ 1423. (6175.) Powers of Special Administrator Cease, When.

Upon granting letters testamentary or of administration, the power of the special administrator shall cease, and he shall forthwith deliver to the executor or administrator all the goods, chattels, money, and effects of the deceased in his hands, and the executor or administrator may be admitted to prosecute any suit commenced by the special administrator, in like manner as an administrator de bonis non is authorized to prosecute a suit com-

menced by a former executor or administrator. [L. '54, p. 270, § 14; Cd. '81, § 1422; 2 H. C., § 934.]

§ 1424. (6176.) Special Administrator not Liable to Creditors.

Such special administrator shall not be liable to an action by any creditor of the deceased, and the time for limitation of all suits against the estate shall begin to run from the time of granting letters testamentary or of administration in the usual form, in like manner as if such special administration had not been granted. [L. '54, p. 270, § 15; Cd. '81, § 1423; 2 H. C., § 935.]

§ 1425. (6177.) Account of Special Administrator.

The special administrator shall also render an account, under oath, of his proceedings, in like manner as other administrators are required to do. [L. '60, p. 185, § 109; Cd. '81, § 1424; 2 H. C., § 936.]

§ 1426. (6178.) Resignation of Executor or Administrator.

If any executor or administrator, having first settled his accounts, shall publish for six weeks, in some newspaper in this state in general circulation in the county wherein his letters were granted, a notice of his intention to apply to the court to resign his letters, and the court, on proof of such publication, believe that he should be permitted to resign, it shall so order. [Cf. L. '54, p. 273, § 36; L. '60, p. 185, § 110; L. '73, p. 274, § 110; Cd. '81, § 1425; 2 H. C., § 937.]

Resignation and discharge: See 1 Remington's Digest, p. 1202, § 25; State ex rel. Reser v. Superior Court, 13 Wash. 25.

§ 1427. (6179.) Letters to be Surrendered on Resignation.

Such person shall then surrender his letters, his power from that time shall cease, and he shall pay the expense of publication and of all the proceedings on such application. [L. '54, p. 273, § 37; Cd. '81, § 1426; 2 H. C., § 938.]

§ 1428. (6180.) Where One Resigns Others may Act.

If there be more than one executor or administrator of an estate, and the letters to part of them be revoked or surrendered, or a part die or in any way become disqualified, those who remain shall perform all the duties required by law. [L. '54, p. 273, § 38; Cd. '81, § 1427; 2 H. C., § 939.]

§ 1429. (6181.) Order of Appointment on Death or Resignation.

If the executor or administrator of an estate shall die, resign, or the letters be revoked before the settlement of the estate, letters of administration of the goods remaining unadministered shall be granted to those to whom administration would have been granted if the original letters had not been obtained, or the person obtaining them had renounced administration, and the administrator de bonis non shall perform the like duties and incur the like liabilities as the former executors or administrators. [Cf. L. '54, p. 273, § 39; L. '73, p. 274, § 113; Cd. '81, § 1428; 2 H. C., § 940.]

As to necessity for appointment of administrator de bonis non: See 1 Remington's Digest, p. 1203, § 29½; Griffin v. Warburton, 23 Wash. 231.

§ 1430. (6182.) Accounting upon Resignation or Revocation, etc.

If any executor or administrator resign, or his letters be revoked, or he die, he or his representatives shall account for, pay, and deliver to his successor, or to the surviving or remaining executor or administrator, all money and property of every kind, and all rights, credits, deeds, evidences of debt, and papers of every kind of the deceased, at such time and in such manner as the court shall order on final settlement with such executor or administrator, or his legal representatives. [L. '54, p. 273, § 40; Cd. '81, § 1429; 2 H. C., § 941.]

See supra, § 1379, revocation of letters.

Cited in 6 Wash. 292.

Where husband acts as executor under wife's will, but dies before completion of administration, and the executors of husband's own will take possession and administer upon all husband's property, including separate and community estate of deceased wife, such administration is merely irregular and not void, and ordinary rules relating to liability of executors de son tort do not apply to them: *In re Hill's Estate*, 6 Wash. 286.

In such case, although it is proper for the community estate to be administered, and where an administrator with the will annexed has been appointed for the wife's estate subsequent to the death of the husband, who was acting as her executor, and such administrator does not proceed to diligently administer upon the community, but

sits by for eighteen months and sees the same administered in the settlement of the husband's estate, such administrator of the wife's estate is estopped from setting up claim of right to such administration: *Id.*

Notes found in Oregon secured by mortgages on land in Washington, and where there has been a proper accounting to the Oregon probate court, will relieve an administrator of that court from any liability in the courts of Washington, in an action begun against him by an administrator appointed by the Washington probate court: *McCoy v. Ayres*, 2 W. T. 307.

An administrator is not estopped to contest the validity of a mortgage made by a former administrator: *Wallace v. Grant*, 27 Wash. 130.

§ 1431. (6183.) Action by Successor for Assets.

The succeeding administrator, or remaining executor or administrator, may proceed by law against any delinquent former executor or administrator, or his personal representatives, or the sureties of either, or against any other person possessed of any part of the estate. [Cf. L. '54, p. 273, § 41; Cd. '81, § 1430; L. '91, p. 384, § 20; 2 H. C., § 942.]

See notes to last section.

§ 1432. (6184.) Limitation of Actions Against Sureties.

All actions against sureties shall be commenced within six years after the revocation or surrender of letters of administration or death of the principal. [Cf. L. '54, p. 274, § 42; Cd. '81, § 1431; L. '91, p. 385, § 21; 2 H. C., § 933.]

See supra, § 161, limitation of actions against administrators for malfeasance, etc.

See supra, § 967, limitations in general.

See infra, § 1535, actions by and against administrators.

See infra, § 1574, administrator personally liable to creditors.

See infra, § 8336, release of sureties.

§ 1433. (6185.) Attachment for Failure to Settle.

If any executor or administrator fail to make either annual or final settlement as required by law, and do not show good cause for such failure, after having been cited for that purpose, the court shall order such executor or administrator to make such settlement, and may enforce obedience to such order by attachment and may revoke his letters. [L. '54, p. 274, § 43; Cd. '81, § 1432; 2 H. C., § 944.]

§ 1434. (6186.) Attachment of, When Letters Surrendered.

If any person who has surrendered his letters testamentary or of administration, or whose letters have been revoked, or the legal representatives of any deceased executor or administrator, shall fail to make final settlement as required by law, after being cited for that purpose by the court, it shall order such delinquent to make such settlement, and may enforce obedience to such order by attachment. [L. '54, p. 274, § 44; Cd. '81, § 1433; 2 H. C., § 945.]

§ 1435. (6187.) Costs upon Attachment.

In all cases where citations or attachments may be issued against any executor, administrator, or other person for failing to settle his accounts, such delinquent shall pay all costs incurred thereby, the collection of which costs may be enforced by attachment. [Cf. L. '54, p. 274, § 45; L. '73, p. 275, § 119; Cd. '81, § 1434; 2 H. C., § 946.]

§ 1436. (6188.) Partnership Property, Inventory of.

The executor or administrator of a deceased person who was a member of a copartnership shall include in the inventory of such person's estate, in a separate schedule, the whole of the property of such partnership; and the appraisers shall estimate the value thereof, and also the value of such person's individual interest in the partnership property, after the payment or satisfaction of all the debts and liabilities of the partnership. [L. '54, p. 274, § 46; L. '73, p. 275, § 120; Cd. '81, § 1435; 2 H. C., § 947.]

Cited in 2 Wash. 335; 5 Wash. 381; 12 Wash. 70; 27 Wash. 187; 30 Wash. 279; 31 Wash. 42.

Upon the death of a partner in whose name partnership real property is held, the legal title descends to his heirs, who take subject to the debts of the firm, and the interest of the surviving partner therein is merely an equitable one: *Hannegan v. Roth*, 12 Wash. 65.

There being no survivorship in partnership real property, the legal title of which was in the name of a deceased partner, the surviving partner cannot maintain an action to quiet title thereto until he has acquired the legal title: *Id.*

Duty of executor as to inventory of partnership property: See *In re Alfstad's Estate*, 27 Wash. 175.

§ 1437. (6189.) Administration of Partnership Estate.

After the inventory is taken, the partnership property shall be in the custody and control of the executor or administrator for the purposes of administration, unless the surviving partner shall within five days from the filing of the inventory, or such further time as the court may allow, apply for the administration thereof, and give the bond therefor hereinafter prescribed. [Cf. L. '54, p. 274, § 47; L. '73, p. 276, § 121; Cd. '81, § 1436; 2 H. C., § 948.]

See notes to §§ 1436, 1438.

§ 1438. (6190.) Surviving Partner Entitled to Administration.

If the surviving partner apply therefor, as provided in the last section, he is entitled to the administration of the partnership estate, if he have the qualifications and competency required for a general administrator. He is denominated an administrator of the partnership, and his powers and duties extend to the settlement of the partnership business generally, and the payment or transfer of the interest of the deceased in the partnership property remaining after the payment or satisfaction of the debts and liabilities

of the partnership, to the executor or general administrator, within six months from the date of his appointment, or such further time, if necessary, as the court may allow. In the exercise of his powers and the performance of his duties, the administrator of the partnership is subject to the same limitations and liabilities, and control and jurisdiction of the court, as a general administrator. [Cf. L. '54, p. 274, §§ 48-51; L. '63, p. 225, §§ 155-158; L. '73, p. 276, § 122; Cd. '81, § 1437; 2 H. C., § 949.]

Cited in 20 Wash. 219; 29 Wash. 392; 30 Wash. 278.

Administration of partnership estate, upon death of partner: See 2 Remington's Digest, pp. 2224, 2225, §§ 56-62; Hannegan v. Roth, 12 Wash. 65; Alfstad's Estate, 27 Wash. 175; State ex rel. Bogey v. Neal, 29 Wash. 391; Brigham Hopkins Co. v. Gross, 20 Wash. 218; Id., 30 Wash. 277.

In the absence of statutory provisions the surviving partner is liable and has exclusive control of partnership effects; suits must be brought by or against him for partnership demands or liabilities. Remedy cannot be had against the executor of the deceased partner unless partnership property is insufficient to satisfy the same: Barlow v. Coggan, 1 W. T. 257.

The partner may satisfy the debt, and reimburse himself so far as he is entitled to reimbursement from the estate of the deceased in his custody: Id.

The general rule requiring claims against estates of deceased persons before suit to be presented to the administrator of the

partnership has no application in this case: Id.

Presentment and demand on a note should be made to the surviving partnership maker, and not to executor of deceased partner: Id.

The statute of 1862 for the settlement of partnership estates was in aid of the common-law method of closing such estates, instead of exclusion thereof, and where no steps were taken to procure administration of the affairs of the partnership under the statute, the surviving partner had full power to settle its affairs: Dyer v. Morse, 10 Wash. 492.

Where, upon the death of a party, while the law of 1862 for the settlement of partnership estates was in force, no administration was had upon his estate, but the surviving partner settled the affairs of the firm, paying off its indebtedness, which amounted to more than the partnership assets, and in order to reimburse himself took possession of the partnership realty as his own, he acquired the same right thereto which he could have conveyed to another: Id.

§ 1439. (6191.) Bond of Administrator of Partnership.

The bond of the administrator of the partnership shall be in a sum not less than double the value of the partnership property, and shall be given in the same manner and be of the same effect as the bond of a general administrator. [Cf. L. '54, p. 274, § 48; L. '63, p. 225, § 155; L. '73, p. 276, § 123; Cd. '81, § 1438; 2 H. C., § 950.]

See supra, § 1395, bond of general administrator.

§ 1440. (6192.) General Administrator to Give Additional Bond, When.

In case the surviving partner is not appointed administrator of the partnership, the administration thereof devolves upon the executor or general administrator, but before entering upon the duties of such administration, he shall give an additional bond in double the value of the partnership property. [Cf. L. '63, p. 226, § 157; L. '73, p. 276, § 124; Cd. '81, § 1439; 2 H. C., § 951.]

§ 1441. (6193.) Surviving Partner to Furnish Exhibit.

Every surviving partner, on the demand of an executor or administrator of a deceased partner, shall exhibit and give information concerning the property of the partnership at the time of the death of the deceased partner, so that the same may be correctly inventoried and appraised; and in case the administration thereof shall devolve upon the executor or administrator, such survivor shall deliver or transfer to him, on demand, all the property

of the partnership, including all books, papers, and documents pertaining to the same, and shall afford him all reasonable information and facilities for the performance of the duties of his trust. [Cf. L. '63, p. 226, § 159; L. '73, p. 277, § 125; Cd. '81, § 1440; 2 H. C., § 952.]

§ 1442. (6194.) Surviving Partner Cited to Give Information.

Any surviving partner who shall refuse or neglect to comply with the requirements of the last section may be cited to appear before the court; and unless he show cause to the contrary, the court shall require him to comply with such section in the particular complained of. [Cf. L. '54, p. 275, § 53; L. '63, p. 227, § 160; L. '73, p. 227, § 126; Cd. '81, § 1441; 2 H. C., § 953.]

See supra, § 1281, citation.

§ 1443. (6195.) Who Disqualified—Revocation.

The following persons are not qualified to act as executors or administrators: Nonresidents of this state, minors, judicial officers other than justices of the peace, persons of unsound mind or who have been convicted of any felony or of a misdemeanor involving moral turpitude. And when any person to whom letters testamentary or of administration have been issued becomes disqualified to act because of leaving the state, becoming of unsound mind, or is convicted of any crime or misdemeanor involving moral turpitude, the court having jurisdiction shall revoke his or her letters as in this chapter provided. [L. '63, p. 227, § 164; L. '77, p. 227, § 127; Cd. '81, § 1442; 2 H. C., § 954.]

See supra, § 1372, to whom letters granted.

See supra, § 1378, marriage no disqualification.

See supra, § 1389, persons entitled to.

Provision regarding disqualification of married women omitted as repealed by § 1378, supra.

Cited in 33 Wash. 170, 171.

Foreign appointment and actions by foreign executors or administrators: See 1 Remington's Digest, p. 1229, §§ 170-173.

Property in this state vested in a non-resident administrator is liable to attachment and other process: Barlow v. Coggan, 1 W. T. 257.

A personal representative of deceased will not be recognized unless clothed with authority under our laws: Id.

An assignee of an administrator appointed in one state may bring an action in another without administration being first had in the latter state: Munson v. Exchange National Bank, 19 Wash. 125; Waldo v. Milroy, 19 Wash. 156.

The fact that an administrator is a non-resident of the state does not amount to such a fraud as to avoid the proceedings had: Meikle v. Cloquet, 44 Wash. 513.

§ 1444. (6196.) Settlement of Estates Without Administration.

In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that letters testamentary or of administration shall not be required, and where it also duly appears to the court, by the inventory filed, and other proof, that the estate is fully solvent, which fact may be established by an order of the court on the coming in of the inventory, it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will, and to file a true inventory of all the property of such estate in the manner required by existing laws. And after the probate of such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court, if the said last will and testament shall so provide: But provided, that in all such cases

the claims against such estates shall be paid within one year from the date of the first publication of notice to creditors to present their claims, unless such time be extended by the court, for good cause shown, for a reasonable time: Provided, however, in all such cases, if the party named in such will as executor shall decline to execute the trust, or shall die or be otherwise disabled from any cause from acting as such executor, then letters testamentary or of administration shall issue as in other cases: And provided further, if the party named in the will shall fail to execute the trust faithfully and to take care and promote the interests of all parties taking under the will, then, upon petition of a creditor of such estate, or of any of the heirs, or of any person on behalf of any minor heirs, it shall be the duty of the court of the county wherein such estate is situated to cite such person having the management of such estate to appear before such court, and if, upon hearing of such petition it shall appear that the trust in such will is not faithfully discharged, and that the parties interested, or any of them, have been or are about to be damaged by such actual doings of the executor, then letters testamentary or of administration shall be had and required in such cases, and all other matters and proceedings shall be had and required as are now required in the administration of estates, and in such cases the costs of the citation and hearing shall be charged against the party failing and neglecting to execute the trust as required in such will. [Cf. L. '68, p. 49, § 2; L. '69, p. 298 et seq.; Cd. '81, § 1443; 2 H. C., § 955; L. '97, p. 285, § 1.]

See *supra*, § 1404, bond dispensed with.

Cited in 3 Wash. 411; 5 Wash. 117; 11 Wash. 262; 16 Wash. 342; 19 Wash. 607; 21 Wash. 187, 188, 578; 26 Wash. 104; 29 Wash. 423; 48 Wash. 275.

Withdrawing estate from administration: See 1 Remington's Digest, p. 1197, § 3; *State ex rel. Cox v. Superior Court*, 21 Wash. 575; *Boyer v. Robinson*, 26 Wash. 117; *MacDonald's Estate, In re*, 29 Wash. 422; *State ex rel. Phinney v. Superior Court*, 21 Wash. 186; *Logging Co. v. Clowe*, 29 Wash. 721.

Jurisdiction of courts over management of estate: See 1 Remington's Digest, p. 1204, § 38; *Seattle v. McDonald*, 26 Wash. 98; *Moore v. Kirkman*, 19 Wash. 605; *In re McDonald's Estate*, 29 Wash. 422.

Where trustees of the property of an estate, instead of executors, have been appointed by a will, the probate court has no jurisdiction of questions involving their management of the estate, but the same are triable in equity: *Smith v. Smith*, 15 Wash. 239.

Under this section, where the testator provides by will that the trustees shall manage and settle the estate by the terms of the will without the intervention of court, the power of such trustees is derived from the will and their duty prescribed by it, and, so long as they faithfully comply with its provisions their acts cannot be called in question by any court: *Newport v. Newport*, 5 Wash. 114; see *Ralph v. Lomer*, 3 Wash. 401, 411.

In foreclosure of a mortgage executed by the executor of decedent's estate, an allegation in the complaint that the will authorized and directed said executor to administer upon said estate without the intervention, order or advice of any court, and to fully execute all its terms and provisions, sufficiently shows that no letters testamentary were required in the settlement of the estate: *Miller v. Borst*, 11 Wash. 260.

A complaint in foreclosure of a mortgage, executed by the executor of a decedent's estate, sufficiently alleges the power under the will to make the note and mortgage in controversy, when it appears from the complaint that it was the intention of the testator that the estate should be administered without the aid of any court, that the executor had performed all the terms and conditions of said will, that he had executed the note and mortgage, and that his action therein had been fully confirmed by the court; the necessary inference from such allegations being that the execution of the note and mortgage was within the powers conferred by the will: *Id.*

As to discretionary power of sale, see *Sharp v. Greene*, 22 Wash. 677.

The law presumes that the executor of a nonintervention will seasonably publish notice to creditors, as required by statute, and a complaint upon a claim is demurrable where the action was not commenced until five years after testator's

death, and there is no allegation that notice to creditors was not given, or any excuse shown for the delay: *Foley v. McDonnell*, 48 Wash. 272.

Sufficiency of consideration for sale by executors and trustees in a nonintervention will: See *Sprague v. Betz*, 44 Wash. 650.

§ 1445. (6197.) Inventory to be Filed Within Thirty Days.

All executors and administrators of estates that have not been fully settled and closed, and who shall not have filed an inventory of all the property as required by the existing laws, shall, within thirty days after the taking effect of this act, file a true inventory of all the property of any such estate, and in case it appears to the court by any such inventory or other proof that any such estates are insolvent, such estates shall be settled by the court as in cases of intestacy, and the court shall make an order requiring the executor or administrator to make a report of his acts to the court. [L. '97, p. 286, § 2.]

"This act": Of March 16, 1897.

Cited in 21 Wash. 188, 578.

This section is unconstitutional in so far as it impairs vested rights, under non-

intervention wills: *State ex rel. Phinney v. Superior Court*, 21 Wash. 186.

§ 1446. (6198.) Sale of Property.

Such executors, who have been heretofore acting under wills dispensing with letters testamentary or of administration, and those who may hereafter act under such wills, shall have power, after the filing of an inventory of the estate, if the said estate has been adjudged to be solvent according to the provisions of the last preceding section, to sell and convey the real and personal property of their testator, where the will authorizes them so to do, without an order of the court for that purpose, and without notice or confirmation of sale. [L. '97, p. 286, § 3.]

§ 1447. (6199.) Performance of Contracts.

Such executor, after the order referred to in section 1445 has been made, declaring the estate solvent, shall have the power to carry out and perform all the contracts and undertakings of his testator, which he might be required by law to execute, and it shall not be necessary to obtain an order of the court authorizing the same, or an order confirming the same. [L. '97, p. 286, § 4.]

§ 1448. (6199a.) Publication of Notice.

Upon publication of notice to creditors to present their claims to such executor, for a period of time and in the manner required of executors and of administrators holding letters testamentary and of administration under the laws of this state, said creditors shall be required to present their claims to the said executor within one year from the date of the first publication of said notice, and if they fail to do so their claim shall be barred. [L. '97, p. 287, § 5.]

Cited in 48 Wash. 275.

Under this section, creditors must present their claims to the executor of a nonintervention will within one year after publication of notice to creditors, as in other cases, or they will be barred: *Foley v. McDonnell*, 48 Wash. 272 (overruling earlier cases); *Strand v. Stewart*, 51 Wash.

685. And this section applies to wills executed prior to the passage of the act: *Strand v. Stewart*, supra.

An adjudication of solvency of an estate, in the case of a nonintervention will, need not precede the publication of notice to creditors, which is required immediately upon appointment: *Strand v. Stewart*, supra.

CHAPTER IX.

THE INVENTORY AND EFFECTS OF DECEASED PERSONS.

§ 1449. (6200.) Right of Possession of Estate.

Every executor or administrator shall, after having qualified, by giving bond as hereinbefore provided, have a right to the immediate possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the court, to the heirs or devisees, and shall keep in tenantable repair all houses, buildings, and fixtures thereon, which are under his control. [Cf. L. '54, p. 278, § 65; L. '60, p. 189, § 132; Cd. '81, § 1444; 2 H. C., § 956.]

See *supra*, Title X, Chaps. VI, and VII, descent and distribution.

See *supra*, § 1366 et seq., rights of heirs, devisees, etc.

See *infra*, § 1534, right to possession of estate.

See *infra*, § 1610 et seq., specific performance of contracts of decedents.

Cited in 1 Wash. 480; 2 Wash. 335; 4 Wash. 172, 500, 501; 7 Wash. 381, 650; 10 Wash. 599; 17 Wash. 676; 27 Wash. 188; 32 Wash. 487; 38 Wash. 264; 42 Wash. 351, 353.

JURISDICTION AND RIGHT OF POSSESSION.—Upon the appointment of an administrator the court obtains jurisdiction of the estate, and the administration is a proceeding in rem: *Furth v. U. S. Mortgage & Trust Co.*, 13 Wash. 73, 75; *Ryan v. Ferguson*, 3 Wash. 356; *Ackerson v. Orchard*, 7 Wash. 377; *Hyde v. Heller*, 10 Wash. 586; *Dooley v. Russell*, 10 Wash. 195.

Our code differs from that of Oregon in that the administrator or executor shall take possession of and hold the estate, both real and personal, "until the estate shall be settled or delivered over, by order of the probate court, to the heirs or devisees": *Webster v. Seattle Trust Co.*, 7 Wash. 642, 650.

Right of administrator to possession and use of real property: See 1 *Remington's Digest*, p. 1206, § 48; *Noble v. Whitten*, 38 Wash. 262; *Gibson v. Slater*, 42 Wash. 347.

An administrator takes charge of the entire estate of the decedent, whether it passes to the heirs by descent or otherwise: *Ward v. Moorey*, 1 W. T. 104; and under this section the administrator has the right to the immediate possession of all real estate, and when an administrator is appointed it is his duty to take possession of both personal and real property: *Hanford v. Davies*, 1 Wash. 476, 480.

A devisee of lands under a foreign will admitted to probate where the lands are situated cannot maintain ejectment therefor: *Dunn v. Peterson*, 4 Wash. 170.

Though heirs take title at once to real estate, on death of ancestor, yet such title is subject to right of administration and probate to judicially determine who the

heirs or devisees are: *Hanford v. Davies*, *supra*.

After filing of bond, an executor is qualified to act, whether letters testamentary have issued or not, and the year allowed by § 170 for commencement of action against the executor begins to run: See 1 *Remington's Digest*, p. 1225, § 149; *Bank of Montreal v. Buchanan*, 32 Wash. 480; *Gleason v. Hawkins*, 32 Wash. 464.

As a general rule, the intervention of the probate court and a distribution thereunder are essential to passing title to decedent's heirs, and an allegation that several persons plaintiff are heirs at law is not sufficient to establish the fact that they are jointly interested in the property to be recovered and entitled jointly to maintain an action therefor: *Balch v. Smith*, 4 Wash. 497; *Dunn v. Peterson*, *supra*; *Hanford v. Davies*, 1 Wash. 476.

If the complaint, in an action by an heir, sets up facts showing administration unnecessary, it will not be held insufficient because plaintiff is suing as heir, when there has been no distribution (*Balch v. Smith*, 4 Wash. 497; *Hill v. Young*, 7 Wash. 33, distinguished): *Tucker v. Mastick*, 9 Wash. 357.

Where there has been no administration on the wife's estate or upon the community, for eight years after death, her husband and an only child surviving, the presumption is as to the community real property that there is no necessity of administration, and that the child's right as heir of its mother in the community is complete: *Hill v. Young*, *supra*; and that the husband's power to dispose of community realty, although acquired under the act of 1869, ceased upon wife's death and the property became vested by moieties in the husband and child: *Id.*

Under this section the probate court had jurisdiction to grant letters of administration upon a decedent's estate, although

no personal property is within the territory, no creditors of the estate existed, and decedent's estate was being administered in a sister state; and there being no personal property, it was proper to order sale of the realty to pay expense of administration and taxes on the realty: *Hanford v. Davies*, supra.

Under the statutes of this state the legal title to land of a decedent vests in his executor for the purpose of passing title made under a contract by the decedent and the rights of heirs or devisees in the land are confined to the purchase money due on the contract: *Hyde v. Heller*, 10 Wash. 586.

The fact that a tender of the purchase price of land is made to an executor before he has qualified does not impose upon such executor the duty of executing a deed after his qualification, when the tender is not kept good, especially when the time of the execution of the deed is not made of the essence of the contract: *Id.* What was and what was not a sufficient tender to a vendor's executor: See *Id.*

On the decease of an intestate pre-emptor, whose title is yet inchoate, a salable possessory right passes to his administrator, subject to the trust to perfect title in favor of the heirs if the estate will enable him to do so and the interest of heirs so demand, with liability for neglect of duty, and he may dispose of the possessory right under orders of court: *Burch v. McDaniel*, 2 W. T. 58; he can

transfer no interest in the land, but may release the entry: *Id.*

But see *Towner v. Rodegeb*, 33 Wash. 153.

Under § 1341, supra, upon the death of either husband or wife the whole community estate, and not merely the decedent's interest therein, is subject to administration for the payment of community debts: *Ryan v. Ferguson*, 3 Wash. 356.

The property of the community is to be administered with the estate of that member who is first deceased, and the widow of a decedent cannot maintain her action for her half interest until after a decree of distribution in the probate proceedings: *Lawrence v. Bellingham Bay etc. Ry. Co.*, 4 Wash. 664; *Baleh v. Smith*, 4 Wash. 497; but see supra, §§ 1366 et seq.

Our courts cannot recognize the personal representatives of deceased persons unless clothed with authority derived from the laws of this territory: *Barlow v. Coggan*, 1 W. T. 257.

Property vested in a nonresident administrator is liable to attachment and other process: *Id.*

The legal representative of a decedent's estate has power to compromise law suits involving realty belonging thereto, when the legal title is in the adverse party, without submitting the matter to the probate court for authorization and approval: *Denny v. Parker*, 10 Wash. 218. See § 1539, infra.

§ 1450. (6201.) Inventory.

Every executor and administrator shall make and return, upon oath, into the court, within one month after his appointment, a true inventory of the real and personal estate of the deceased, which shall come to his possession or knowledge. [L. '60, p. 190, § 136; Cd. '81, § 1445; 2 H. C., § 957.]

See supra, § 1445, inventory in case of nonintervention will.

See infra, § 1453, inventory to include moneys.

See infra, § 1456, signing and verification.

See infra, § 1457, penalty for failure to return.

See infra, § 1458, additional inventory.

See infra, § 1464, suspension when estate less than \$1,000.

See infra, § 1489, claims to be presented with inventory.

Cited in 29 Wash. 540; 30 Wash. 567; 38 Wash. 265; 42 Wash. 353.

The failure of an administrator to include certain lands will not deprive him of authority to administer thereon, when

a supplemental statement has been filed describing and showing their value, although not filed as an additional inventory: *Ackerson v. Orchard*, 7 Wash. 377.

§ 1451. (6202.) Appraisement of Estates.

The estates and effects comprised in the inventory shall be appraised by three suitable disinterested persons, who shall be appointed by the court. If any part of the estate shall be in another county than that in which letters are issued, appraisers residing in such county may be appointed by the court having jurisdiction of the case, or, if most advisable, the same appraisers may act. Such appraisers shall receive as compensation for their services three dollars per day, to be paid out of the estate, and when they have to go

out of their county, mileage shall be allowed: Provided, that where it appears to the satisfaction of the court, from the return of the inventory or other proof, that the whole estate consists of personal property of less value than one hundred dollars, exclusive of moneys, drafts, checks, bonds, or other securities of fixed valuation, an appraisement may be dispensed with, in the discretion of the court. [Cf. L. '54, p. 276, § 57; Cd. '81, § 1446; L. '88, p. 186, § 1; 2 H. C., § 958.]

§ 1452. (6203.) Oath and Duties of Appraisers.

Before proceeding to the discharge of their duties, the appraisers shall take and subscribe an oath, before any officer authorized to administer oaths, to be attached to the inventory, that they will honestly and impartially appraise the property which shall be exhibited to them, according to the best of their knowledge and ability; they shall proceed to estimate and appraise the property, and set down each article separately, with the value thereof in dollars and cents, in figures, opposite the respective articles. The inventory shall contain all the estate of the deceased, real and personal, a statement of all debts, partnership and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to the deceased, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, and their dates, and the sum which, in the judgment of the appraisers, may be collectible on each debt, interest, or security. [L. '54, p. 276, § 58; Cd. '81, § 1447; 2 H. C., § 959.]

§ 1453. (6204.) Inventory to Include Moneys, etc.

The inventory shall also contain an account of all moneys belonging to the deceased, which shall have come to the possession or knowledge of the executor or administrator; and if none shall come to his possession or knowledge, the fact shall be so stated in the inventory. [L. '54, p. 277, § 59; Cd. '81, § 1448; 2 H. C., § 960.]

Cited in 29 Wash. 541.

§ 1454. (6205.) Executor or Administrator not Released by Appointment.

The naming of any person as executor in a will, or the appointment of any person as administrator, shall not operate as a discharge from any just claim which the testator or intestate had against the executor or administrator, but the claim shall be included in the inventory, and the executor and administrator shall be liable to the same extent as he would have been had he not been appointed executor or administrator. [Cf. L. '54, p. 277, § 60; L. '60, p. 63, § 5; Cd. '81, § 1449; 2 H. C., § 961.]

Cited in 17 Wash. 52.

§ 1455. (6206.) Bequest Invalid Against Creditor, When.

The discharge or bequest in a will of any debt or demand of the testator against any executor named in his will or against any other person, shall not be valid against the creditors of the deceased, but shall be construed as a specific bequest of such debt or demand, and the amount thereof shall be included in the inventory, and shall, if necessary, be applied in payment of his debts; if not necessary for that purpose, it shall be paid in the same man-

ner and proportions as other specific legacies. [L. '54, p. 277, § 61; Cd. '81, § 1450; 2 H. C., § 962.]

§ 1456. (6207.) Inventory to be Signed and Verified.

The inventory shall be signed by the appraisers, and be verified by the oath of the executor or administrator to the effect that the inventory contains a true statement of all of the estate of the deceased which has come to his possession or knowledge, and particularly of all moneys belonging to the deceased, and of all just claims of the deceased against the executor or administrator. [L. '54, p. 277, § 62; L. '73, p. 280, § 136; Cd. '81, § 1451; 2 H. C., § 963.]

§ 1457. (6208.) Penalty for Failure to Return Inventory.

If any executor or administrator shall neglect or refuse to return the inventory within the period prescribed, or within such further time, not exceeding three months, as the court shall allow, the court shall revoke the letters testamentary or of administration; and the executor or administrator shall be liable on his bond to any party interested for the injury sustained by the estate through his neglect. [L. '54, p. 277, § 63; L. '73, p. 280, § 137; Cd. '81, § 1452; 2 H. C., § 964.]

See supra, § 1450, inventory.

Cited in 30 Wash. 568.

This section in directory and not mandatory: *Clancy v. McElroy*, 30 Wash. 567.

§ 1458. (6209.) Additional Inventory, When.

Whenever property not mentioned in any inventory shall come to the knowledge and possession of the executor or administrator, he shall cause the same to be appraised in the manner prescribed in this chapter, and an additional inventory to be returned, subscribed and sworn to as is provided in this chapter, as soon as practicable after the discovery thereof, and the making of such inventory may be enforced, after notice, by attachment to which may be added the revocation of the letters. [Cf. L. '54, p. 277, § 64; L. '73, p. 281, § 138; Cd. '81, § 1453; 2 H. C., § 965.]

See notes to § 1450, supra, inventory.

Cited in 29 Wash. 541.

Supplemental inventory: See 1 Remington's Digest, p. 1204, § 33; *Ackerson v. Orchard*, 7 Wash. 377.

§ 1459. (6210.) Personal Estate, How Applied.

The personal estate of the deceased which shall come into the hands of the executor or administrator shall be first chargeable with the payment of the debts and expenses; and if the goods, chattels, rights, and credits in the hands of the executor or administrator shall not be sufficient to pay the debts of the deceased, the expenses of the administration, and the allowance to the family of the deceased, the whole, or so much as may be necessary, of the real estate may be sold for that purpose by the executor or administrator, in the manner prescribed in this chapter. [L. '54, p. 278, § 66; Cd. '81, § 1454; 2 H. C., § 966.]

§ 1460. (6211.) Penalty for Embezzlement.

If any person, before the granting of letters testamentary or administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects

of any deceased person, he shall stand chargeable, and be liable to the action of the executor or administrator of the estate, in double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate. [L. '54, p. 278, § 67; Cd. '81, § 1455; 2 H. C., § 967.]

§ 1461. (6212.) Citation to Recover Property Unlawfully Withheld.

If the executor, administrator, heir, legatee, creditor, or other person interested in the estate of any deceased person, shall complain to the court, on oath, that any person is suspected of having concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the deceased, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings which contain evidence of or tend to disclose the right, title, interest, or claim of the deceased to any real or personal estate, or any claim, demand, or last will of the deceased, the said court may cite such person to appear, and may examine him on oath upon the matter of such complaint. If such person be not in the county where letters have been granted, he may be cited and examined, either before the court for the county where he may be found, or before the court issuing the order or citation; but in the latter case, if he appear and be found innocent, his necessary expenses shall be allowed him out of the estate. [Cf. L. '54, p. 278, § 68; Cd. '81, § 1456; L. '91, p. 385, § 22; 2 H. C., § 968.]

See *supra*, § 1281, citation.

See *infra*, § 1463, and notes, citation in certain cases.

A suit in equity may be maintained against an unauthorized person collecting debts owing to an estate without authority, if it be shown that the debtor is insolvent: *McCoy v. Ayers*, 2 W. T. 307.

If an unauthorized person collects debts owing to an estate, an action at law cannot be maintained against him for the recovery of such money, for the reason that the original debtor is still liable to the estate. The rule would be otherwise

in the case of specific personal property in the hands of a person unauthorized to receive it, if such property is capable of identification: *Id.*

In an action by an administrator against the son of deceased for misappropriation of decedent's property, the exclusion of a brother of defendant from testifying under § 1211, *supra*, was erroneous, because such person was not interested adversely to the estate: *Id.*

§ 1462. (6213.) Penalty for Failure to Submit to Examination.

If the person so cited refuse to appear and submit to such examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he shall submit to the order of the court; and all such interrogatories and answers shall be in writing, and shall be signed by the party examined, and filed in the court. [L. '54, p. 278, § 69; Cd. '81, § 1457; 2 H. C., § 969.]

Procedure as to interrogatories: See 1 Remington's Digest, p. 1205, § 39; *Main v. Hadfield*, 41 Wash. 504.

§ 1463. (6214.) Citation to Person Intrusted with Property.

The court, upon the complaint on oath of any executor or administrator, may cite any person who shall have been intrusted with any part of the estate of the deceased person to appear before the said court, and may require such person to give a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other papers belonging to the estate, which shall have come to his possession in trust for such executor or administrator, and

of his proceeding thereon; and if the person so cited shall refuse to appear and answer such account, the court may proceed against him as provided in the preceding section. [L. '54, p. 279, § 70; Cd. '81, § 1453; 2 H. C., § 970.]

§ 1464. (6215.) Proceedings When Estate does not Exceed One Thousand Dollars.

If, by the return of the inventory of the estate of any intestate who died leaving a widow or minor children, it shall appear that the value of the estate does not exceed one thousand dollars, the court shall, by decree for that purpose, assign for the use and support of the widow and minor children of the [int]estate, or for the support of the minor child or children, if there be no widow, the whole estate, after the payment of the funeral expenses and expenses of administration, and there shall be no further proceedings in the administration, unless further estate be discovered. [Cf. L. '68, p. 49, § 1; L. '73, p. 283, § 145; Cd. '81, § 1459; L. '88, p. 186, § 2; L. '91, p. 385, § 23; 2 H. C., § 971.]

See supra, § 1450, inventory.

See infra, § 1465 et seq., exempt property.

Cited in 30 Wash. 42, 55; 40 Wash. 671.

CHAPTER X.

PROVISION FOR THE SUPPORT OF THE FAMILY.

§ 1465. (6219.) Probate Homestead and Widow's Allowance.

When a person shall die, leaving a widow, or minor child or children, the widow, child or children, shall be entitled to remain in the possession of the homestead, and of all the wearing apparel of the family, and of all the household furniture of the deceased; and if the head of the family in his lifetime had not complied with the provisions of the law relative to the acquisition of a homestead, the widow, or the child or children, may comply with such provisions, and shall be entitled on such compliance to a homestead as now provided by law for the head of a family, and the same shall be set aside for the use of the widow, child or children, and shall be exempt from all claims for the payment of any debt, whether individual or community. Said homestead shall be for the use and support of said widow, child or children, and shall not be assets in the hands of any administrator or executor for the debts of the deceased, whether individual or community. [Cf. L. '54, p. 279, § 71; L. '73, p. 283, § 146; L. '77, p. 209, § 3; Cd. '81, § 1460; L. '83, p. 44, § 1; L. '86, p. 170, § 1; L. '91, p. 386, § 24; 2 H. C., § 972.]

See notes to next section.

See supra, § 445, judgment liens.

See supra, § 528 et seq., exemptions.

See supra, § 561, tenure by which homestead held.

See supra, § 1464, when estate less than \$1,000, suspension of probate.

Cited in 4 Wash. 232; 7 Wash. 292; 17 Wash. 677; 20 Wash. 576; 24 Wash. 174; 30 Wash. 39, 55; 34 Wash. 90.

Allowances to surviving wife, husband or children: See 1 Remington's Digest, p. 1209; §§ 58-64; Murphy's Estate, 30 Wash. 0; Griesemer v. Boyer, 13 Wash. 171; Gor-

kow's Estate, In re, 20 Wash. 563; Drasdo's Estate, In re, 36 Wash. 478; Stewin v. Thrift, 30 Wash. 36.

As to possession of homestead: See Austin v. Clifford, 24 Wash. 172.

Where person claiming to be a widow of a decedent, which claim is resisted by

daughter of deceased on the ground of no marriage, and where the court decides in favor of the widow, from which an appeal was taken to review and determine such question, the superior court has no jurisdiction to make an allowance for maintenance pending such appeal: *State v. Lichtenberg*, 4 Wash. 231.

Under this section the obtaining of a general judgment lien does not cut off subsequent selection of a homestead at any time before sale: *McMillan v. Mau*, 1 Wash. 26. See *Philbrick v. Andrews*, 8 Wash. 7.

§ 1466. (6220.) Exempt Property to be Set Apart.

In case of the appointment of an executor or administrator upon the death of the husband, as mentioned in the last preceding section, the court shall, without cost to the widow, minor child or children, set apart, for the use of such widow, minor child or children, all the property of the estate by law exempt from execution; if the amount thus exempt be insufficient for the support of the widow and minor child or children the court shall make such further reasonable allowance out of the estate as may be necessary for the maintenance of the family according to their circumstances, during the progress of the settlement of the estate. [Cf. L. '54, p. 279, §§ 72, 73; Cd. '81, § 1461; L. '86, p. 171, § 2; L. '91, p. 386, § 25; 2 H. C., § 973.]

See supra, § 528 et seq., property exempt from execution.

Cited in 13 Wash. 172; 20 Wash. 572; 30 Wash. 11, 55.

The fact that the widow had ample means of her own for maintenance is no ground for denying a further allowance, the exemption being insufficient: *Griesemer v. Boyer*, 13 Wash. 171; and the removal from the state on the death of the husband cannot deprive the widow and children of the right of further allowance for maintenance pending settlement of the estate; *Id.*

Under this section, providing that in case the property of a decedent exempt from execution, which has been set apart for the use of the widow and minor children, prove insufficient for their support, "the court shall make such further reasonable allowance out of the estate as may be necessary for the maintenance of the family according to their circumstances, during the progress of the settlement of the es-

tate," the widow and children are entitled to such allowance, although the husband may have made provision for them otherwise by means of life insurance policies payable to the widow: *Griesemer v. Boyer*, 13 Wash. 171.

Prior ex parte appraisement of estate and order setting same aside to the widow as her homestead are not res adjudicata of the value thereof or of the question of exemption of the same from the debts of the estate: See *In re Lloyd's Estate*, 34 Wash. 84.

An allowance to a widow for support pending administration cannot be granted thirteen years after the death of the testator, after ample allowances in another state under proceedings which were not closed up by final distribution owing to the neglect of the widow: *State ex rel. Speckart v. Superior Court*, 48 Wash. 141.

§ 1467. (6221.) Family Allowance has Preference.

Any allowance made by the court in accordance with the provisions of the preceding section shall be paid by the executor or administrator in preference to all other charges, except funeral charges and expenses of administration. [L. '54, p. 279, § 74; Cd. '81, § 1462; 2 H. C., § 974.]

Cited in 18 Wash. 107.

Such part of physician's charges and funeral expenses as are incurred by the surviving spouse for the benefit of minor

children living in the family are properly allowable as a part of the family allowance: *Murphy's Estate, In re*, 30 Wash. 9.

§ 1468. (6222.) Distribution of Property Set Apart.

When property shall have been set apart for the use of the family, in accordance with the provisions of this chapter, if the deceased shall have left a widow and no minor children, such property shall be the property of the widow; if he shall have left also a minor child or children, one-half to the

widow, and the remainder to such child, or in equal shares to such children, if there are more than one; if there be no widow, then the whole shall belong to the minor child or children. [L. '54, p. 279, § 75; Cd. '81, § 1463; 2 H. C., § 975.]

See supra, §§ 1465, 1466, probate and exemption.

Cited in 24 Wash. 174; 30 Wash. 40; 34 Wash. 90.

§ 1469. (6223.) When No Widow or Children, Estate to be Administered.

If intestate leave no widow or minor children, all his estate shall be assets in the hands of the administrator, after payment of funeral expenses and expenses of administration, for the payment of the debts of the deceased, or distribution according to law. [Cf. L. '54, p. 280, § 77; L. '73, p. 284, § 151; Cd. '81, § 1464; 2 H. C., § 976.]

CHAPTER XI.

CLAIMS AGAINST THE ESTATE.

§ 1470. (6226.) Notice to Creditors.

Every executor or administrator shall, immediately after his appointment, cause to be published in some newspaper printed in the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the deceased, requiring all persons having claims against the deceased to present them, with the necessary vouchers, within one year after the date of such notice, to such executor or administrator, at the place of his residence or transaction of business, to be specified in the notice. Such notice shall be published as often as the court shall deem necessary, but not less than once in a week for four successive weeks. [L. '54, p. 280, § 78; L. '60, p. 195, § 157; Cd. '81, § 1465; 2 H. C., § 977.]

See supra, § 1448, notice in case of nonintervention will.

See infra, § 1490, additional notice in case of resignation.

See infra, § 1550, exhibit of claims.

Cited in 1 Wash. 181; 2 Wash. 335; 18 Wash. 606; 19 Wash. 608; 21 Wash. 614; 32 Wash. 486; 51 Wash. 688; 52 Wash. 176.

A notice to creditors is not objectionable in that the administrator's signature was

affixed thereto by his attorneys: Meikle v. Cloquet, 44 Wash. 513.

Upon the probate of a foreign will, the absence of debts can only be established by notice to creditors: State ex rel. Mann v. Superior Court, 52 Wash. 149.

§ 1471. (6227.) Copy of Notice to be Filed.

After the notice shall have been published, a copy thereof, together with the affidavit attached thereto, of the publisher or printer of the paper in which the same was published, shall be filed by the executor or administrator in court. [L. '54, p. 281, § 79; Cd. '81, § 1466; 2 H. C., § 978.]

§ 1472. (6228.) Claims Barred in One Year.

If a claim be not presented within one year after the first publication of the notice, it shall be barred. [L. '54, p. 281, § 80; L. '61, p. 63, § 6; Cd. '81, § 1467; 2 H. C., § 979.]

Cited in 1 Wash. 181; 18 Wash. 606; 19 Wash. 608; 21 Wash. 614; 32 Wash. 486.

Presentation of claims: See 1 Remington's Digest, p. 1211, §§ 72-77; McFarland

v. Fairlamb, 18 Wash. 601; Strong v. Eldridge, 8 Wash. 895; Megrath v. Gilmore, 15 Wash. 558; Barto v. Stewart, 21 Wash. 605; McDonald v. Frater, 29 Wash. 423;

Gleason v. Hawkins, 32 Wash. 464; *Griffin v. Warburton*, 23 Wash. 231.

The failure to present a claim to the trustees of a testator's estate within one year after their appointment and qualification under the will is no bar to an action on the claim when notice to present claims has never been published by the trustees: *Donnerberg v. Oppenheimer*, 15 Wash. 290.

A claim secured by mortgage not presented within the year will be barred, only so far as relates to the deficiency remaining after exhausting the mortgaged property: *Scammon v. Ward*, 1 Wash. 179; *Redd v. Miller*, 1 Wash. 426.

An action to foreclose a laborer's lien on saw-logs cannot be maintained against the personal representatives of a decedent's estate unless the claim shall have been presented to the executor or admin-

istrator as required by this section: *Casey v. Ault*, 4 Wash. 167. A lien of this character does not come within the provisions of §§ 1528, 1529, *infra*: *Id.*; distinguishing *Scammon v. Ward*, 1 Wash. 179. See notes to § 1528, *infra*, redemption of mortgaged property of decedents.

Fraud in preventing a creditor from presenting his claim against an estate within the proper time cannot be predicated upon the fact that the attorney of the administrator declined, upon request by mail, to look after the collection of the debt because employed by the administrator, where such answer was promptly mailed: *Meikle v. Cloquet*, 44 Wash. 513.

It cannot be claimed that an administrator fraudulently misled a creditor as to the time for presenting his claim, where he gave the proper notices and personally notified the creditor of the necessity of presenting the claim: *Id.*

§ 1473. (6229.) Claims to be Verified.

Every claim presented to the administrator shall be supported by the affidavit of the claimant that the amount is justly due, that no payments have been made thereon, and that there are no offsets to the same to the knowledge of the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers to be produced in support of the claim. [Cf. *Cd.* '81, § 1468; *L.* '83, p. 29, § 1; 2 H. C., § 980.]

Laws of 1883 omitted as unconstitutional.

Cited in 9 Wash. 517; 15 Wash. 207; 18 Wash. 606; 19 Wash. 112; 21 Wash. 614; 32 Wash. 3, 99.

Statement and verification of claim: See 1 *Remington's Digest*, p. 1213, § 81; *McFarland v. Fairlamb*, 18 Wash. 601; *First Nat. Bank of Olympia v. Root*, 19 Wash. 111; *Ash v. Clarke*, 32 Wash. 390.

A verification that the amount is justly due, etc., is insufficient: *Neis v. Farquharson*, 9 Wash. 508, 517.

Verification held sufficient in *Pocin v. Furth*, 15 Wash. 201, 207.

Where it has been stipulated between parties to an action that prior to its commencement plaintiff had duly presented the note in issue to defendants and demanded payment of them, as the personal representatives of certain dece-

dents who had guaranteed its payment, no question can be raised on the trial as to the want of an affidavit of the justness of the claim: *Donnerberg v. Oppenheimer*, 15 Wash. 290.

Where services are performed for another under a contract for compensation to be made by will or otherwise upon the death of the employer, who dies without making provision therefor, an action on quantum meruit lies against the estate: *Pelton v. Smith*, 50 Wash. 459.

In an action against an estate upon a quantum meruit for services rendered under a contract whereby the employer was to make provision therefor on his death, he having failed to do so, interest is recoverable only from the time of his death, and not from the time the employment ceased: *Id.*

§ 1474. (6230.) Allowance and Rejection of Claims.

When a claim, accompanied by the affidavit required in the preceding section, has been presented to the executor or administrator, he shall indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it shall be presented to the judge of the court, who shall in the same manner indorse on it his allowance or rejection. If the executor or administrator reject the claim, he shall notify the claimant forthwith of

said rejection. [Cf. L. '54, p. 281, § 82; L. '73, p. 285, § 156; Cd. '81, § 1469; 2 H. C., § 981.]

See *infra*, § 1479, and notes, no action until claim presented.

See *infra*, § 1481, claim to be presented although action pending.

See *infra*, § 1487, allowance of administrator's claims.

Allowance or disallowance — Disputed claims: See 1 Remington's Digest, pp. 1214, 1215, §§ 85-91; *In re Alfstad's Estate*, 27 Wash. 175; *Nash v. Wakefield*, 30 Wash. 851; *Winston v. Crowe*, 28 Wash. 65; *Wallace v. Grant*, 27 Wash. 130; *Reese v. Murnan*, 5 Wash. 373; *In re Sullivan's Estate*, 36 Wash. 217.

§ 1475. (6231.) Claims to be Filed.

Every claim which has been allowed by the executor or administrator and the said judge shall be filed in the court and be ranked among the acknowledged debts of the estate, to be paid in the course of the administration. [L. '54, p. 281, § 83; Cd. '81, § 1470; 2 H. C., § 982.]

Cited in 21 Wash. 618.

If a claim is rejected by the judge in probate no appeal lies from the order of rejection, the claimant's remedy being by suit in the proper court against executor or administrator: *Wilkins v. Wilkins*, 1 Wash. 87; and if the claim is held by the administrator and disallowed, his only remedy is a resignation of the trust and to bring suit as another creditor: *Id.*

The original note and rejected statement of claim are admissible in evidence: *First Nat. Bank of Olympia v. Root*, 19 Wash. 111.

A proceeding to recover specific real or personal property belonging to an estate must be tried by a jury: *Winston v. Crowe*, 28 Wash. 65; *Filley v. Murphy*, 30 Wash. 1.

§ 1476. (6232.) Claim of Judge Referred to Another.

Any judge of a court may present a claim against the estate of any decedent for allowance, to the executor or administrator; and if the executor or administrator allows such claim, he shall, in writing, designate some judge of the court of an adjoining county, and the said judge shall have the same power to allow or reject it as he would have, had letters issued in his court; and the claimant shall have, in the event of his claim being rejected, all the rights incident to any other creditor against the estate. [L. '60, p. 196, § 163; Cd. '81, § 1471; 2 H. C., § 983.]

§ 1477. (6233.) Claim Barred, When.

When a claim is rejected by either the executor, administrator, or the court, the holder must bring suit in the proper court against the executor or administrator within three months after its rejection, otherwise the claim shall be forever barred. [Cf. L. '54, p. 281, § 84; L. '69, p. 166, § 665; L. '73, p. 285, § 159; Cd. '81, § 1472; 2 H. C., § 984.]

See *supra*, § 164, same subject.

See *infra*, § 1480, suspension of statute.

Cited in 1 Wash. 88; 8 Wash. 599; 28 Wash. 70.

§ 1478. (6234.) No Claim to be Allowed if Barred by Statute.

No claim shall be allowed by the executor, administrator, or court which is barred by the statute of limitations. [L. '54, p. 281, § 85; Cd. '81, § 1473; 2 H. C., § 985.]

Effect of presentation or failure to present: See 1 Remington's Digest, p. 1213, §§ 82-84; *Frew v. Clark*, 34 Wash. 561; *Bank of Montreal v. Buchanan*, 32 Wash. 480.

§ 1479. (6235.) No Action on Unpresented Claim.

No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator. [L. '54, p. 281, § 86; Cd. '81, § 1474; 2 H. C., § 986.]

See supra, § 1472, and notes.

See supra, § 1474, allowance or rejection of claims.

See infra, § 1483, effect of judgment.

Cited in 8 Wash. 599; 15 Wash. 560; 18 Wash. 606; 21 Wash. 614; 48 Wash. 274.

Necessity for presentation: See 1 Remington's Digest, p. 1211, §§ 72-76; McFarland v. Fairlamb, 18 Wash. 601; Barto v. Stewart, 21 Wash. 605; Griffin v. Warburton, 23 Wash. 231; In re Macdonald's Estate, 29 Wash. 422; Foley v. McDonnell, 48 Wash. 272.

The provisions of this section have no application to claims against a partnership estate: Barlow v. Coggan, 1 W. T. 257. They are applicable in case of foreclosure of laborer's lien on saw-logs: Casey v. Ault, 4 Wash. 167. No action can be maintained against the representative of a deceased person until the claim has been first presented and rejected: Strong v. Eldridge, 8 Wash. 595, 599; but the rule does not apply where no executor or administrator is in existence: Id.

Where, pending an appeal from a judgment, the appellant dies and his execu-

tors are substituted by stipulation, they cannot, on a retrial of the cause after reversal, demand a nonsuit on the ground that the claim in action had never been presented to them as executors: Megrath v. Gilmore, 15 Wash. 558; Strong v. Eldredge, supra.

Failure to present a claim to the executors of one joint debtor will not release the other joint debtor, in cases where the law excuses, or does not require, presentment to the executors: Megrath v. Gilmore, supra.

Where one of the makers of a promissory note, a partner, dies, before maturity of the note, presentment and demand should be made of the surviving maker, and not of the executor of the deceased partner. This section has no application in such a case: Barlow v. Coggan, 1 Wash. 257.

§ 1480. (6236.) Vacancy in Administration not Included.

The time during which there shall be a vacancy in the administration shall not be included in any limitations herein prescribed. [L. '54, p. 281, § 87; Cd. '81, § 1475; 2 H. C., § 987.]

Time not included, when: See notes to §§ 1472, 1477.

§ 1481. (6237.) Claim to be Presented Though Action Pending at Death of Decedent.

If any action be pending against the testator or intestate at the time of his death, the plaintiff shall, in like manner, present his claim to the executor or administrator for allowance or rejection, authenticated as in other cases; and no recovery shall be had in the action, unless proof be made of the presentment. [L. '54, p. 281, § 88; Cd. '81, § 1476; 2 H. C., § 988.]

See notes to § 1479, supra.

See infra, § 1484, no execution to issue.

Cited in 8 Wash. 599; 9 Wash. 517; 15 Wash. 560.

§ 1482. (6238.) Costs Disallowed on Failure to Recover Full Amount.

Whenever any claim shall have been presented to an executor or administrator and the court, and a part thereof shall be allowed, the amount of such allowance shall be stated in the indorsement. If the creditor shall refuse to accept the amount so allowed in satisfaction of his claim, he shall recover no costs in any action he may bring against the executor or administrator, unless he shall recover a greater amount than that offered to be allowed, exclusive of interest and costs. [L. '54, p. 282, § 89; Cd. '81, § 1477; 2 H. C., § 989.]

§ 1483. (6239.) Effect of Judgment.

The effect of any judgment rendered against any executor or administrator shall be only to establish the claim in the same manner as if it had been allowed by the executor or administrator and the court; and the judgment shall be, that the executor or administrator pay, in due course of administration, the amount ascertained to be due, but no execution shall issue upon such judgment, nor shall it create a lien upon the property of the estate, or give the judgment creditor any priority of payment. [L. '54, p. 282, § 90; Cd. '81, § 1478; 2 H. C., § 990.]

Cited in 15 Wash. 207; 16 Wash. 22; 29 Wash. 425.

Effect of verdict and judgment is determined by this section, and their form is of the least importance: *Poncin v. Furth*, 15 Wash. 201, 207.

A claimant must exhaust his remedy against the personal representatives be-

fore he has a right to proceed against the heirs or devisees: *Prefontaine v. McMicken*, 16 Wash. 16.

Enforcement of judgment: See 1 *Remington's Digest*, p. 1226, § 155; *Collins v. Denny Clay Co.*, 41 Wash. 136.

§ 1484. (6240.) No Execution After Death—Proceedings.

When any judgment has been rendered against the testator or intestate in his lifetime, no execution shall issue thereon after his death, but it shall be presented to the executor or administrator as any other claim, but need not be supported by the affidavit of the claimant, and if justly due and unsatisfied, shall be paid in due course of administration: Provided, however, that if it be a lien upon any property of the deceased, the same may be sold for the satisfaction thereof, and the officer making the sale shall account to the executor or administrator for any surplus in his hands. [L. '54, p. 282, § 91; Cd. '81, § 1479; 2 H. C., § 991.]

Cited in 2 Wash. 335.

§ 1485. (6241.) Arbitration of Claims, When.

If the executor or administrator doubt the correctness of any claim presented to him, he may enter into an agreement in writing with the claimant to refer the matter in controversy to some disinterested person or persons, to be approved by the court. Upon filing the agreement in the court, the court shall enter an order referring the matter in controversy to the persons so selected. [Cf. L. '54, p. 282; L. '60, p. 197, § 172; Cd. '81, § 1480; 2 H. C., § 992.]

See *supra*, § 420, arbitration in general.

§ 1486. (6242.) Referees—Proceedings upon Reference.

The referee or referees, having been sworn, shall proceed to hear and determine the case and make return thereof; and their award, if not excepted to, shall be entered as the decision of the court. If exceptions in writing are filed, the court shall proceed to determine the case in like manner as other claims are determined. The compensation of referees shall be the same as allowed to referees in other causes. [Cf. L. '54, p. 282, § 93; L. '60, p. 197, § 173; Cd. '81, § 1481; L. '91, p. 386, § 26; H. C., § 993.]

§ 1487. (6243.) Executor or Administrator's Claims Presented to Court.

If the executor or administrator is himself a creditor of the testator or intestate, his claim, duly authenticated by affidavit, shall be presented for

allowance or rejection to the judge of the court, and its allowance by the judge shall be sufficient evidence of its correctness. [Cf. L. '54, p. 283, § 94; Cd. '81, § 1482; L. '91, p. 386, § 27; 2 H. C., § 994.]

See *supra*, § 1474, allowance of claims.

A court exercising probate jurisdiction has no power to direct a distribution of a decedent's estate to the heirs, charged with a lien in favor of the administrator on account of money expended by him for the benefit of the estate: *Hustan v. Becker*, 15 Wash. 586.

§ 1488. (6244.) Failure to Give Notice to Creditors, Effect of.

If the executor or administrator shall neglect, for two months after his appointment, to give notice to creditors as prescribed by section 1470, it shall be the duty of the court to revoke his letters. [Cf. L. '54, p. 283, § 95; L. '60, p. 197, § 174; Cd. '81, § 1483; 2 H. C., § 995.]

§ 1489. (6245.) Statements Required of Executors and Administrators.

At the same time at which the executor or administrator is required to return his inventory, he shall also return a statement of all claims against the estate which shall have been presented to him, when required by the court, and from time to time thereafter shall present a statement of claims subsequently presented to him; and in all such statements he shall designate the names of creditors, the nature of each claim, when it did or will become due, and whether it was allowed or rejected by him. [L. '54, p. 283, § 96; Cd. '81, § 1484; 2 H. C., § 996.]

See *supra*, § 1450, inventory.

Cited in 21 Wash. 615.

§ 1490. (6246.) Notice on Change of Executor or Administrator.

In case of resignation or removal for any cause of any executor or administrator, and the appointment of another or others after notice has been given by publication as required by law, by such executor or administrator first appointed, to persons to present their claims against the estate, it shall be the duty of the judge of the court to cause notice of such resignation or removal and such new appointment to be published two successive weeks in the same newspaper in which the original notice was published, if the publication of such paper is at the time continued, and if not, then in some other newspaper published in the county, or if there be no newspaper published in such county, then in a newspaper published in the state and of general circulation in the county, and the estate shall be closed up and settled within the year from the date of said original notice, unless further time be granted by the court as provided by law. [Cf. L. '67, p. 106, § 3; L. '73, p. 288, § 172; Cd. '81, § 1485; L. '91, p. 387, § 28; 2 H. C., § 997.]

See *supra*, § 1470, notice to creditors.

CHAPTER XII.

SALES BY EXECUTORS AND ADMINISTRATORS.

§ 1491. (6250.) Sales or Mortgages to be Made Under Order of Court.

No sale or mortgage of any property shall be valid unless made under order of the court, unless otherwise provided by law. [Cf. L. '54, p. 284, § 97; Cd. '81, § 1486; L. '83, p. 29, § 1; 2 H. C., § 998; L. '95, p. 394, § 1.]

See *infra*, § 1520, sales under power given in will.

Sales and conveyances under order of court: See 1 Remington's Digest, pp. 1218-1223, §§ 106-139.

§ 1492. (6251.) Application for Order of Sale.

All applications for orders of sale shall be by petition, in writing, in which shall be set forth the facts, showing the sale to be necessary, and upon the hearing any person interested in the estate may file his written objections, which shall be heard and determined. [L. '54, p. 284, § 98; Cd. '81, § 1487; 2 H. C., § 999.]

§ 1493. (6252.) Sale of Perishable Property, etc.

Within twenty days after the filing of the inventory, the executor or administrator shall apply for an order to sell the perishable property of the estate, and so much other property as may be necessary to be sold to pay the allowance made to the family of the deceased; and the order of sale may be made without notice of the application, but the executor or administrator shall be responsible for the value of the property unless the sale be reported to and approved by the court. [Cf. L. '54, p. 284, § 99; Cd. '81, § 1488; L. '91, p. 387, § 29; 2 H. C. § 1000.]

A sale of personal property made by an executor, without authority of the court, may be ratified and rendered valid by the court if deemed to the advantage of the estate, and anyone interested in the estate may ratify it to the extent of his interest: *Brewster v. Baxter*, 2 W. T. 135.

§ 1494. (6253.) Application to Sell to Pay Expenses.

If the claims against the estate have been allowed, or a sale of property shall be necessary for the payment of the expenses of the administration, he may also apply for an order to sell so much of the personal estate as shall be necessary. [Cf. L. '54, p. 284, § 99; L. '60, p. 199, § 179; Cd. '81, § 1489; L. '91, p. 387, § 30; 2 H. C., § 1001.]

§ 1495. (6254.) Order of Sale, Contents of.

If it appear to the court that a sale is necessary, it shall so order. In making such sale, the court shall order such articles as are not necessary for the support and subsistence of the family of the deceased, or not specially bequeathed, to be first sold. [L. '54, p. 285, § 100; Cd. '81, § 1490; 2 H. C., § 1002.]

§ 1496. (6255.) Sales of Personalty, How Made.

Sales of personal property shall be made at public auction, and after notice given for at least two weeks, which notice shall be given by notices posted in ten public places in the county, or by publication in a newspaper, if

the judge shall so order, in which shall be stated the time and place of sale. [Cf. L. '54, p. 285, § 101; L. '73, p. 289, § 178; Cd. '81, § 1491; 2 H. C., § 1003.]

§ 1497. (6256.) Private Sales of Personalty.

If it be made to appear to the satisfaction of the court that it will be for the interest of the estate to allow the executor or administrator to sell some or the whole of the personal estate at private sale, the court may so order. [Cf. L. '54, p. 285, § 102; L. '60 p. 199, § 182; Cd. '81, § 1492; L. '83, p. 29, § 1; 2 H. C., § 1004.]

The amendment of 1883 is void for defective title.

§ 1498. (6257.) Real Property may be Sold or Mortgaged, When.

When the personal estate in the hands of the executor or administrator shall be insufficient to pay the allowance to the family and all the debts and charges of the administration, the executor or administrator may sell or mortgage the real estate for that purpose, upon the order of the court. To obtain such order he shall present a petition to the court setting forth the amount of the personal estate that has come to his hands, and how much, if any, remains undisposed of, a list and the amounts of the debts outstanding against the deceased, as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seised, the condition and value of the respective lots and portions, the names and ages of the devisees, if any, and of the heirs of the deceased, which petition shall be verified by the oath of the party presenting the same. [Cf. L. '54, p. 285, § 103; Cd. '81, § 1493; 2 H. C., § 1005.]

See *supra*, § 1397, additional bond.

See *infra*, § 1515, confirmation of sales.

See notes to next section.

See *infra*, § 1683 et seq., private sales of real property.

Cited in 10 Wash. 168, 196; 16 Wash. 23; 27 Wash. 133.

In an action to recover realty from the heirs of decedent, it is error to set aside a verdict in favor of plaintiff, when the evidence shows that the land had been ordered sold to pay debts; that with consent of plaintiff, who held a mortgage thereon, and of the defendant, the order provided for the payment of the debt out of the proceeds; that the lands were sold to plaintiff for a sum slightly in excess of his lien, he paying the excess in money; that a petition for resale on account of inadequacy of price was denied by the court; that the sale was duly confirmed, the defendants being represented in the confirmation proceedings; and that in accordance with the order of the court a deed had been duly executed by the administrator to the plaintiff: *Dooley v. Russell*, 10 Wash. 195.

Facts of a particular case held sufficient to authorize a writ of prohibition to prevent the lower court setting aside a sale of property of an estate: *State v. Superior Court*, 10 Wash. 168.

The showing that there is not a sufficiency of personal property to pay the debts is a jurisdictional step, without which the sale of realty is void: See 1 *Remington's Digest*, pp. 1218, 1219, §§ 110-118; *Wallace v. Grant*, 27 Wash. 130; *McKenna v. Cosgrove*, 41 Wash. 332; *Prefontaine v. McMicken*, 16 Wash. 16.

An order of sale of real estate, held under a nonintervention will, held void where estate had been fully settled, and the trust reposed in the executrix concluded: *English-McCaffery Logging Co. v. Clowe*, 29 Wash. 721.

A petition for an administrator's sale of real estate to pay debts sufficiently shows jurisdiction to make the sale, where it appears that the personal property, consisting of stock, was lost without fault of the administrator, the money having been expended in an effort to save the stock, that no personal property remains in his hands, and that there is no way to pay the debts except by sale of the real estate: *Magee v. Big Bend Land Co.*, 51 Wash. 406.

§ 1499. (6258.) Order to Show Cause Why Realty Should not be Sold or Mortgaged.

If it should appear from such petition that there is not sufficient personal estate in the hands of the executor or administrator to pay the allowance to the family, the debts outstanding against the deceased and the expenses of administration, and that it is necessary to sell or mortgage the whole or some portion of the real estate to provide funds for the payment of such debts, the court shall thereupon make an order directing all persons interested to appear at a time and place specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order shall not be granted to the executor or administrator to sell or mortgage the real estate of the deceased, or so much thereof as shall be necessary to pay such allowances, charges and debts. [Cf. L. '54, p. 285, § 104; Cd. '81, § 1494; 2 H. C., § 1006; L. '95, p. 385, § 3.]

Cited in 13 Wash. 74; 34 Wash. 310.

In the order for interested persons to show cause, the names, though known, need not be given, but it is sufficient, if directed, in the language of this section, to "all parties interested": *Furth v. United States Mortgage & Trust Co.*, 13 Wash. 73.

A sale under an order which gives such an indefinite description of the land that the same cannot be located, validating statutes cannot cure the defect: *Hazleton v. Bogardus*, 8 Wash. 102; see *Ackerson v. Orchard*, 7 Wash. 377.

Irregularities in probate proceedings for order of sale, though defective in contents, will not oust the court of jurisdiction to order the sale: *Id.*; see *Hazleton v. Bogardus*, *supra*.

Lands of decedent may be sold to pay expense of administration and for allowance for support of family, although the petition for such sale may state that decedent left no debts: *Ackerson v. Orchard*, *supra*.

The sole heir to lands who was also administrator of decedent's estate, contracted for the sale of the land, subsequently delivered an administrator's deed therefor to the vendee without authority of the probate court, the vendee paying a portion of the consideration and agreeing that in case of his failure to make the deferred payments when due, to forfeit all payments theretofore made and to be retained by the vendor. The deferred payments were never made and the vendor or administrator mortgaged the land to a third person. Held, that an equitable title passed to the vendee, subject to a lien in favor of the vendor for the amount remaining unpaid, and that the mortgagee, being sub-

rogated to the rights of the vendor, is entitled to the amount of such deferred payment, with interest, as a condition to setting aside his mortgage: *Wilson v. Morrill*, 5 Wash. 654.

Where an administratrix has sold timber upon lands of her intestate for a fair price to parties purchasing in good faith, and, after having received from them almost the whole purchase price and refused to receive the balance, the amount received having been appropriated to the use and benefit of herself and the estate, and accounted for in her report to the court, she cannot come into a court of equity and rescind her sale and deprive the purchasers of the benefits thereof simply on the ground that she was not authorized by the court to make the sale as required by statute: *Davis v. Ford*, 15 Wash. 107.

Even if an unauthorized sale of timber by an administratrix was merely a license to cut and remove the timber, she is estopped from taking advantage of its invalidity, when the licensee has acted in good faith and paid her a valuable consideration therefor: *Id.*

Where defendants have been improperly restrained from performing certain acts under a contract, which was to be terminated at a certain time, the court may properly, in refusing to continue the injunction, grant defendants such further time after the period for which their contract rights had been given as would be equivalent to what they had lost by the interference of the plaintiff in securing a restraining order: *Id.*

Facts held not sufficient to show inadequacy of price: *Sharp v. Greene*, 22 Wash. 677.

§ 1500. (6259.) Service of Order to Show Cause.

A copy of such order to show cause shall be personally served on all persons interested in the estate at least ten days before the time appointed for the hearing of the petition, or shall be published, at least four successive weeks in such newspaper as the court shall order: Provided, however, that if all per-

sons interested in the estate shall signify in writing their assent to such sale or the making of such mortgage, the notice may be dispensed with. [Cf. L. '54, p. 285, § 105; Cd. '81, § 1495; 2 H. C., § 1007; L. '95, p. 395, § 4.]

Cited in 13 Wash. 75; 34 Wash. 310.

Failure to direct in the order of sale the newspaper in which publication shall be made is cured by an order confirming the sale: *Furth v. United States Mtg. & Trust Co.*, 13 Wash. 73; affirming *Ryan v. Fer-*

guson, 3 Wash. 356; *Ackerson v. Orchard*, 7 Wash. 377; *Hyde v. Heller*, 10 Wash. 586.

A complaint, to enjoin a sale, held sufficient where it is alleged that the order was obtained through fraud and without notice: See 1 *Remington's Digest*, p. 1221, § 125; *Demaris v. Barker*, 33 Wash. 200.

§ 1501. (6260.) Hearing of Application.

The court, at the time and place appointed in such order, or at such other time to which the hearing may be adjourned, upon proof of due service or publication of a copy of the order, or upon filing the consent in writing to such sale or to the making of such mortgage of all parties interested, shall proceed to the hearing of such petition, and if such consent be not filed, shall hear and examine the allegations and proofs of the petitioner and of all persons interested in the estate who may oppose the application. [Cf. L. '54, p. 286, § 106; Cd. '81, § 1496; 2 H. C., § 1008; L. '95, p. 396, § 5.]

An order denying application for sale, held final and appealable, and subject to vacation only by the statutory steps: See

1 *Remington's Digest*, p. 1221, § 126; *In re Barker's Estate*, 33 Wash. 79.

§ 1502. (6261.) Service on Guardian—Appointment of.

If any of the devisees or heirs of the deceased are minors, and have a general guardian in the county, the copy of the order shall be served on the guardian. If they have no such guardian, the court shall, before proceeding to act on the petition, appoint some disinterested person their guardian for the sole purpose of appearing for them, and taking care of their interests in the proceedings. [L. '54, p. 286, § 107; Cd. '81, § 1497; 2 H. C., § 1009.]

See *supra*, § 187, appointment of guardian ad litem.

Cited in 34 Wash. 310.

Sale held void for noncompliance with this section: *Ball v. Clothier*, 34 Wash. 299.

§ 1503. (6262.) Examination of Witnesses.

The executor or administrator may be examined under oath, and witnesses may be examined by either party, and process may be issued to compel their attendance and testimony, by the court, in the same manner and with like effect as in other cases. [L. '54, p. 286, § 108; Cd. '81, § 1498; 2 H. C., § 1010.]

§ 1504. (6263.) Court may Order Part or All of Estate Sold.

If it shall appear to the court that it is necessary to sell a part of the real estate, and that by a sale of such part the residue of the estate or some specific part or piece thereof would be greatly injured, the court may authorize the sale of the whole estate, or of such part thereof as may be adjudged necessary, and most to the interest of all concerned. [L. '54, p. 286, § 109; Cd. '81, § 1499; 2 H. C., § 1011.]

As to order of sale under this section: See 1 *Remington's Digest*, p. 1220, § 122; *In re Bryant's Estate*, 38 Wash. 337.

§ 1505. (6264.) Order to Sell or Mortgage, When Granted.

If the court shall be satisfied, after a full hearing upon the petition, and on examination of the proofs and allegations of the parties interested, that it is necessary, in order to raise funds for the payment of the allowance to the family and all valid claims against the estate, and charges of administration, to sell or mortgage the whole or some portion of the real estate, the court shall then proceed to determine which method of raising such funds will be most beneficial to the estate and those interested therein, and shall thereupon make an order authorizing the executor or administrator to sell the whole or so much and such parts of the real estate described in the petition as the court shall adjudge necessary or beneficial, or authorizing the executor or administrator to mortgage the whole or so much and such parts of the real estate described in said petition as the court shall adjudge necessary or beneficial, according as the court shall determine one or the other methods most beneficial to the estate and those interested therein: Provided, that if the executor or administrator shall, in his petition, represent to the court that one or the other of such methods of providing such funds will be most beneficial to the estate, and all parties interested in the estate shall join in such petition, then the court, if it grants such petition, shall order that such funds be raised in the manner petitioned for. [Cf. L. '54, p. 286, § 110; Cd. '81, § 1500; 2 H. C., § 1012; L. '95, p. 396, § 6.]

§ 1506. (6265.) What Order must Contain.

The order shall specify the lands to be sold or mortgaged and the terms of the sale or mortgage. If a sale be ordered it may be either for cash or on credit, not exceeding six months, as the court may direct. If a sale has been ordered and it appears that any part of the real estate has been devised and not charged in such devise with the payment of debts, the court shall order that part descended to heirs to be sold before that part devised. If a mortgage be ordered the court shall order the amount to be borrowed, which may be greater or less than the amount prayed for in the petition, and shall prescribe the maximum rate of interest which shall be paid, and the period for which the mortgage shall run, and may require that the interest and part or the whole of the mortgage debt be paid from any part of the estate, and may direct that any buildings on the lands to be mortgaged shall be insured for the further security of the mortgagee, the premiums to be paid from any funds in the hands of the executor or administrator. If a mortgage be ordered the executor or administrator shall at once proceed to negotiate a loan for the amount and upon the terms and upon the security ordered by the court, and upon securing said loan and upon the receipt of the money borrowed, shall execute and deliver to the lender of said money a mortgage of the premises described in the order of the court directing such mortgage, in accordance with said order, setting forth in the mortgage that it is executed by order of the court, and giving the date of such order. Before the delivery of such mortgage the same shall be presented to a judge of the court making the order for his approval, and if he shall approve the same his approval shall be indorsed upon said mortgage. No notice of such presentation need be given. Every mortgage so made and approved shall be effectual to mortgage and hypothecate all the right, title and interest which the decedent had

in the premises described therein at the time of his death or acquired by his estate subsequent to his death. Jurisdiction of the court to administer such estate shall be sufficient to clothe such court with jurisdiction to make an order to mortgage the real property thereof, and such jurisdiction shall inure to the benefit of the mortgagee, his heirs and assigns. No irregularity in the proceedings shall impair or invalidate any mortgage given pursuant to such order and so approved, and the mortgage, his heirs and assigns, shall have the same rights and remedies by virtue of such mortgage as if it had been duly executed and delivered by the decedent in his lifetime. Whenever any such mortgage shall be foreclosed and the mortgaged property sold under such foreclosure proceedings, and the proceeds of the sale of such lands shall not be sufficient to pay the costs of such foreclosure proceedings and sale and the amount due upon said mortgage, then the amount of the deficiency shall be stated by the sheriff in his return of said sale, and the same shall stand as an allowed claim against the estate. [Cf. L. '54, p. 286, § 11; Cd. '81, § 1501; 2 H. C., § 1013; L. '95, p. 397, § 7.]

See *infra*, § 1693, validity of sales.

Presumption in aid of jurisdiction of the court to order sale: See 1 Remington's Digest, p. 1219, § 118; McKenna v. Cosgrove, 41 Wash. 332.

§ 1507. (6266.) Interested Persons may Apply for Order, When.

If the executor or administrator shall neglect to apply for an order to sell or mortgage the real property of the estate, whenever it may be necessary, any person interested in the estate may make application therefor in the same manner as an executor or administrator, but notice thereof shall be given to the executor or administrator before the hearing. [Cf. L. '54, p. 287, § 112; Cd. '81, § 1502; 2 H. C., § 1014; L. '95, p. 398, § 8.]

Cited in 16 Wash. 23.

§ 1508. (6267.) Order Delivered to Executor or Administrator.

Upon the making of such order the clerk of the court shall deliver the same to the executor or administrator, who shall thereupon be authorized to sell or mortgage the real estate as directed. [Cf. L. '54, p. 287, § 113; Cd. '81, § 1503; 2 H. C., § 1015; L. '95, p. 398, § 9.]

§ 1509. (6268.) Notice of Sale, What to Contain.

When a sale is ordered, notice of the time and place of sale shall be posted in three of the most public places in the county where the land is situated, at least twenty days before the day of sale, and shall be published in some newspaper of said county, if any there be, and if not, in some newspaper of this state in general circulation in said county, for three successive weeks next before such sale, in which notice the lands and tenements shall be described with proper certainty. [Cf. L. '54, p. 287, § 114; Cd. '81, § 1504; L. '88, p. 187, § 1; 2 H. C., § 1016.]

A sale of community property in probate proceedings for the purpose of paying off a mortgage debt thereon, being a proceeding in rem, personal notice thereof to the widow is unnecessary: Ryan v. Ferguson, 3 Wash. 356.

§ 1510. (6269.) Sale of Real Estate, Where, When and How Made.

Such sale shall be in the county where the lands are situated, at public auction, between the hours of ten o'clock in the morning and the setting of the

sun the same day; but if the executor or administrator shall deem it for the interest of all concerned that the sale should be postponed, he may adjourn it for any time not exceeding fourteen days. [L. '54, p. 287, § 115; Cd. '81, § 1505; 2 H. C., § 1017.]

§ 1511. (6270.) Notice of Adjournment, How Given.

In case of such adjournment, notice thereof shall be given by a public proclamation at the time and place first appointed for the sale; and if the adjournment shall be for more than one day, further notice shall be given by posting or publishing as the time and circumstances may admit. [L. '54, p. 287, § 116; Cd. '81, § 1506; 2 H. C., § 1018.]

§ 1512. (6271.) Sale on Credit, Security Taken.

The executor or administrator shall, when the sale is on credit, take the note or notes of the purchaser for the purchase money, with surety, and mortgage on the property to secure their payment. [L. '54, p. 287, § 117; Cd. '81, § 1507; 2 H. C., § 1019.]

§ 1513. (6272.) Resale, When will be Ordered.

The executor or administrator making any sale of real estate shall, within ten days thereafter, make a return of his proceedings to the court, which shall examine the same, and if the court shall be of opinion that the proceedings were unfair, or that the sum bidden is disproportionate to the value, and that a sum exceeding such bid at least ten per cent, exclusive of expenses of a new sale, may be obtained, the order of sale shall be vacated [and] another sale shall be ordered. On a resale, notice shall be given, and the sale shall be conducted in all respects as if no previous sale had been made. [Cf. L. '54, p. 287, § 118; Cd. '81, § 1508; L. '91, p. 387, § 31; 2 H. C., § 1020.]

Sale: See 1 Remington's Digest, pp. 1221-1223, §§ 127-139. and discretion, is not ground for setting aside a sale by an executor: *Sharp v. Greene*, 22 Wash. 677.

Mere inadequacy of price, unless so gross as to indicate fraud or want of judgment

§ 1514. (6273.) Objections to Confirmation.

When the return of the sale is made, any person interested in the estate may file written objections to the confirmation of the sale, and may be heard and produce witnesses in support of his objections. [L. '54, p. 287, § 119; Cd. '81, § 1509; 2 H. C., § 1021.]

Objections to the confirmation of sale of a decedent's real estate can be made only by parties interested in the estate: *Terry v. Clothier*, 1 Wash. 475.

§ 1515. (6274.) Confirmation of Sale.

If it appear to the court that the sale was legally made and fairly conducted, and that the sum bidden was not disproportionate to the value of the property sold, or if disproportionate, that a greater sum, as above specified, cannot be obtained, the court shall make an order confirming the sale and directing conveyances to be executed; and such sale, from that time, shall be confirmed and valid. [L. '54, p. 287, § 120; Cd. '81, § 1510; 2 H. C., § 1022.]

See supra, § 591, confirmation of execution sales.

See note to § 1499, order to show cause for sale.

See infra, § 1649, guardian's sales.

See infra, § 1693 et seq., validity of sales.

Cited in 3 Wash. 368.

Failure to direct in the order of sale the newspaper in which publication shall be made is cured by an order confirming the sale: *Furth v. United States Mtg. & Trust Co.*, 13 Wash. 73.

Under a sale of the community property to satisfy a mortgage, duly confirmed, the deed executed thereunder purporting merely to convey "all the right, title, interest and estate of deceased at the time of his death," an equitable title to the entire tract is conferred upon the purchaser, sufficient to constitute a defense in an action of ejectment: *Ryan v. Ferguson*, 3 Wash. 356; *Sadler v. Niesz*, 5 Wash. 193.

A sale, free from fraud and valid on the face of the record, cannot be attacked collaterally for irregularities as against a bona fide purchaser: *McKenna v. Cosgrove*, 41 Wash. 332.

Where, pending confirmation of an inadequate bid at an executor's sale, an upset bid was made, misleading the executor to think that the sale would not be confirmed, withdrawal of the upset bid and confirmation of the sale without notice to the executor, at a time when higher bids were available, constitutes an irregularity warranting vacation of the order of confirmation: *In re Holburte's Estate*, 48 Wash. 378.

§ 1516. (6275.) Conveyance.

Such conveyances shall thereupon be executed to the purchaser by the executor or administrator. They shall refer to the original order authorizing a sale, and the order confirming the sale and directing the conveyance; and they shall be deemed to convey all the estate, rights, and interest of the testator or intestate at the time of his death. [L. '54, p. 288, § 121; Cd. '81, § 1511; 2 H. C., § 1023.]

Cited in 10 Wash. 599.

The rule of caveat emptor applies to administrator's sales: See 1 Remington's Digest, p. 1223, § 138; *Wallace v. Grant*, 27

Wash. 130; *Towner v. Rodegeb*, 33 Wash. 153; *Bjmerland v. Eley*, 15 Wash. 101; *Matson v. Johnson*, 48 Wash. 256.

§ 1517. (6276.) Order of Confirmation to Show Notice of Sale.

Before any order is entered confirming the sale, it shall be proven to the satisfaction of the court that notice of the sale was given as herein prescribed, and the order of confirmation shall state that such proof was made. [L. '54, p. 288, § 122; Cd. '81, § 1512; 2 H. C., § 1024.]

Order of confirmation: See note to § 1515, supra.

§ 1518. (6277.) Sale to Pay Legacy.

When a testator shall have given any legacy by will that is effectual to charge real estate, and his goods, chattels, rights and credits shall be insufficient to pay such legacy, together with the debts and charges of administration, the executor or administrator, with the will annexed, may obtain an order to sell or mortgage his real estate for that purpose in the same manner and upon the same terms and conditions as prescribed in this chapter in case of a sale or mortgage for the payment of the debts. [Cf. L. '54, p. 288, § 123; Cd. '81, § 1513; 2 H. C., § 1025; L. '95, p. 398, § 10.]

§ 1519. (6278.) Debts and Expenses Paid According to Terms of Will.

If the testator shall make provision by his will or designate the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they shall be paid according to the provision of the will, and out of the estate thus appropriated, so far as the same may be sufficient. [L. '54, p. 288, § 124; Cd. '81, § 1514; 2 H. C., § 1026.]

§ 1520. (6279.) Sale Without Order of Court.

When such provision has been made, or any property directed to be sold, the executor [or] administrator with the will annexed may proceed to sell

without the order of the court; but he shall be bound as an administrator to give notice of the sale, and to proceed in making the sale in all respects as if he were under the order of the court, unless there are special directions given in the will, in which case he shall be governed by such directions; but in no [all] cases he shall make return of the sale to the court, which shall vacate such sale unless the same shall appear in all respects to be made according to law, in like manner as upon sales made by administrator. [Cf. L. '54, p. 288, § 125; Cd. '81, § 1515; L. '91, p. 388, § 32; 2 H. C., § 1027.]

See *supra*, § 1491, no sale without order of court.

See *infra*, § 1683 et seq., private sales of real property.

§ 1521. (6280.) Debts and Expenses When Provisions of Will Insufficient.

If the provision made by the will or the estate appropriated be not sufficient to pay the debts and expenses of administration and family expenses, such part of the estate as shall not have been disposed of by the will, if any, shall be appropriated for that purpose, according to the provisions of this chapter. [L. '54, p. 288, § 126; Cd. '81, § 1516; 2 H. C., § 1028.]

§ 1522. (6281.) Estate Given by Will Subject to Debts and Expenses.

The estate, real and personal, given by the will to any legatees or devisees, shall be held liable for the payment of the debts, the expenses of administration and of the family, in proportion to the value or amount of the several devises or legacies, if there shall not be other sufficient estate, except that specific devises or legacies may be exempted, if it appear to the court necessary to carry into effect the intention of the testator. [Cf. L. '54, p. 288, § 127; L. '73, p. 249, § 204; Cd. '81, § 1517; 2 H. C., § 1029.]

§ 1523. (6282.) All Devisees and Legatees to Contribute.

When the estate given by any will has been sold for the payment of debts and expenses, all the devisees and legatees shall be liable to contribute according to their respective interests, to any devisee or legatee from whom the estate devised to him may be taken for the payment of the debts or expenses; and the court, when distribution is made, shall, by decree for that purpose, settle the amount of the several liabilities, and decree how much each person shall contribute. [L. '54, p. 289, § 128; Cd. '81, § 1518; 2 H. C., § 1030.]

See *infra*, § 1576, payment of legacies and distribution.

§ 1524. (6283.) Contract Interest of Deceased in Land may be Sold.

If the deceased person at the time of his death was possessed of a contract for the purchase of lands, his interest in such lands under such contract may be sold on the application of his executor or administrator, in the same manner as if he had died seised of such lands; and the same proceedings may be had for that purpose as are prescribed in this chapter, in respect to lands of which he died seised, except as hereinafter provided. [L. '54, p. 289, § 129; Cd. '81, § 1519; 2 H. C., § 1031.]

§ 1525. (6284.) Sale Subject to Unmatured Debts—Confirmation—Bond.

Such sale shall be made subject to all payments that may thereafter become due on such contract; and if there be any such payments thereafter to become due, such sale shall not be confirmed by the court until the purchaser

shall have executed a bond to the executor or administrator for his benefit and indemnity, and for the benefit and indemnity of the persons entitled to the interest of the deceased in lands so contracted for, in double the whole amount of the payments thereafter to become due on such contract, with such sureties as the court shall approve. [L. '54, p. 289, § 130; Cd. '81, § 1520; 2 H. C., § 1032.]

§ 1526. (6285.) Conditions of Bond.

Such bond shall be conditioned that the purchaser will make all payments for such land as shall become due after the date of such sale, and will fully indemnify the executor or administrator and the person so entitled against all demands, costs, and charges and expenses, by reason of any covenant or agreement contained in such contract; but if there be no payments thereafter to become due on such contract, no bond shall be required of the purchaser. [L. '54, p. 289, § 131; Cd. '81, § 1521; 2 H. C., § 1033.]

§ 1527. (6286.) Assignment of Contract, Effect of.

Upon the confirmation of such sale, the executor or administrator shall execute to the purchaser an assignment of the contract, which assignment shall vest in the purchaser, his heirs and assigns, all the right, title, and interest of the persons entitled to the interest of the deceased in the land sold at the time of the sale; and such purchaser shall have the same rights and remedies against the vendor of such lands as the deceased would have had if living. [L. '54, p. 289, § 132; Cd. '81, § 1522; 2 H. C., § 1034.]

§ 1528. (6287.) Redemption of Mortgaged Property.

If any person die, having mortgaged any real or personal estate, and shall not have devised the same, or provided for the redemption thereof by will, the court, upon the application of any person interested, may order the executor or administrator to redeem the estate out of the personal assets, if it should appear to the satisfaction of the court that such redemption would be beneficial to the estate, and not injurious to creditors. [L. '54, p. 289, § 133; Cd. '81, § 1523; 2 H. C., § 1035.]

See *supra*, § 1116, and notes, foreclosure of real estate mortgages.

See *supra*, § 1472, and notes, limitation on claims.

Cited in 1 Wash. 181, 183; 3 Wash. 364, 366; 4 Wash. 168; 8 Wash. 323, 324, 327; 10 Wash. 196.

A mortgagee, after the death of the mortgagor, has a right to foreclose the mortgage and sell the mortgaged property for the payment of his debt, and the sale will convey a good title: *Hyde v. Heller*, 10 Wash. 586, 600.

The provision of this section, that if the decedent "has not devised the same," merely limits the sale in case of a specific devise, and has no application to cases where the property has been devised to a residuary legatee: *In re Clements*, 8 Wash. 323.

Presentation of claims secured by mortgage: See 1 Remington's Digest, p. 1212, § 77; *Gleason v. Hawkins*, 32 Wash. 464.

Failure to present a claim against an estate, secured by mortgage, within the

time provided by § 1472 will not bar the mortgagee's right under the mortgage, but will operate to defeat any deficiency against the estate which may remain after exhausting the mortgaged property: *Scammon v. Ward*, 1 Wash. 179; see *Reed v. Miller*, 1 Wash. 426; *Casey v. Ault*, 4 Wash. 167; but if the mortgagee applies under this section to compel the redemption of land from his mortgage lien, or to have the lands sold under the provisions of the next section, he must apply within the year allowed for presentment of claims: *Scammon v. Ward*, *supra*.

Under this and the next section, if redemption is not deemed expedient, community property mortgaged by decedent and wife may be sold for the purpose of paying off the mortgage: *Ryan v. Ferguson*, 3 Wash. 356.

The rights of a mortgagee under a mortgage making special provisions for foreclosure and a receiver are not affected by the death of the mortgagor, but may be enforced against the executor: *German S. & L. Soc. v. Cannon*, 65 Fed. 542.

As property mortgaged by husband and wife, in the absence of claim that it was separate property, will be presumed to have been community, and as under the decisions of Washington, on the death of a married woman administration of her separate property is distinct from that of the

community, it will not be presumed that her administrator has acquired lawful authority over the property thus mortgaged and presumed as community property, or that a court administering her estate under her will has drawn such property into its custody: *Id.*

In ordering a sale of decedent's estate under § 1529 to pay the mortgage debt, it is error to allow attorneys' fees upon a foreclosure of the mortgage: *In re Clements*, 8 Wash. 323.

§ 1529. (6288.) Sale of Other Property in Lieu of that Mortgaged.

If it shall be made to appear to the satisfaction of the court that it will be to the interest of the estate of any deceased person to sell other personal estate or to sell or mortgage other real estate of the decedent than that mortgaged by him, to redeem the real estate so mortgaged, the court may order the sale of any personal estate, or the sale or mortgaging of any real estate of the decedent which it may deem expedient to be sold or mortgaged for such purpose, which sale or mortgaging shall be conducted in all respects as other sales or mortgages of like property ordered by the court. [Cf. L. '88, p. 185, § 1; 2 H. C., § 1036; L. '95, p. 399, § 11.]

See *infra*, § 1569, extent of mortgage preference.

See notes to last section.

Cited in 8 Wash. 323; 10 Wash. 196.

§ 1530. (6289.) Where Redemption not Expedient—Procedure.

If such redemption be not deemed expedient, the court shall order such property to be sold at public sale, which sale shall be with the same notice, and conducted in the same manner, as required in other cases of real estate provided for in this chapter, and the executor or administrator shall thereupon execute a conveyance thereof to the purchaser, which conveyance shall be effectual to convey to the purchaser all the right, title, and interest which the deceased would have had in the property had not the same been mortgaged by him, and the purchase money, after paying the expenses of the sale, shall first be applied to the payment and discharge of such mortgage, and the residue in due course of administration. If said sale of the mortgaged premises shall be insufficient to secure the mortgage debt, the mortgagee shall file a claim for balance, authenticated as other claims, and payable in due course of administration. [Cf. L. '54, p. 290, § 134; L. '73, p. 296; § 211; Cd. '81, § 1524; 2 H. C., § 1037.]

See notes to § 1528, redemption of mortgaged property.

Cited in 1 Wash. 181, 183; 3 Wash. 364, 366, 369; 4 Wash. 168.

§ 1531. (6290.) Liability for Neglect, etc., in Sales or Mortgages.

If there should be any neglect or misconduct in the proceedings of the executor or administrator in relation to any sale or mortgage by which any person interested in the estate shall suffer damages, the party injured may recover the same in a suit upon the bond of the executor or administrator, as the case may appear. [Cf. L. '54, p. 290, § 135; Cd. '81, § 1525; 2 H. C., § 1038; L. '95, p. 399, § 12.]

§ 1532. (6291.) Liability for Fraudulent Sale of Realty.

Any executor or administrator who shall fraudulently sell or mortgage any real estate of his testator or intestate, contrary to the provisions of this chapter, shall be liable in double the value of the land sold or mortgaged, as damages, to be recovered in an action by the person or persons having an estate of inheritance therein. [Cf. L. '54, p. 290, § 136; Cd. '81, § 1526; 2 H. C., § 1039; L. '95, p. 399, § 13.]

An administrator is not estopped from pleading the illegality of a former mortgage executed without authority by a former administrator: See *Wallace v. Grant*, 27 Wash. 130.

§ 1533. (6292.) Sale Under Will—Void Unless Confirmed.

When property is directed by will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without the order of the court, and either at public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case, no title passes unless the sale is confirmed by the court. [Cd. '81, § 1527; 2 H. C., § 1040.]

See supra, § 1444, under nonintervention will.

See supra, § 1515, confirmation of sale.

See supra, § 1520, sale without order of court.

See infra, § 1683 et seq., private sales of real property.

CHAPTER XIII.

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS.

§ 1534. (6296.) Executor or Administrator to Take and Manage Estate.

The executor or administrator shall take into his possession all the estate of the deceased, real and personal, and collect all debts due to the deceased. [L. '54, p. 291, § 141; Cd. '81, § 1528; 2 H. C., § 1041.]

See supra, § 1449, and notes, right to possession of estate.

Cited in 2 Wash. 335; 4 Wash. 173, 501; 10 Wash. 599; 38 Wash. 265; 42 Wash. 351, 353.

Whether persons appointed in a will are executors or trustees depends upon the gen-

eral scope of the powers conferred upon them, irrespective of the terms used: See 1 Remington's Digest, p. 1199, § 7; *Smith v. Smith*, 15 Wash. 239; *State ex rel. Phinney v. Superior Court*, 21 Wash. 186.

§ 1535. (6297.) Actions by and Against Administrators.

Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates. [Cf. L. '54, p. 291, § 142; L. '60, p. 206, § 222; Cd. '81, § 1529; 2 H. C., § 1042.]

See supra, § 180, parties.

See supra, § 193, actions not to abate when.

See supra, § 967 et seq., actions by and against executors, etc.

See supra, §§ 1531, 1532, liability for neglect of duty and fraudulent sales of property.

See infra, § 1543, when administrator chargeable.

See infra, § 1574, personal liability when.

Cited in 10 Wash. 594; 15 Wash. 294; 42 Wash. 351, 353.

Rights of actions by or against administrators: See 1 Remington's Digest, pp. 1223-1225, §§ 141-150; Gibson v. Slater, 42 Wash. 347; Smith v. Northern Pac. R. Co., 22 Wash. 500; In re Belt's Estate, 29 Wash. 535; Collins v. Denny Clay Co., 41 Wash. 136; Fishburne v. Merchants' Bank of Pt. Townsend, 42 Wash. 473; Strong v. Eldridge, 8 Wash. 595; Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76.

In order to bring a suit upon an administrator's bond, it is not necessary that application be first made to court and leave obtained, as the administrator is not a public officer within the purview of § 771, supra: Bartells v. Gove, 4 Wash. 632.

Pleading: See 1 Remington's Digest, p. 1225, § 151; Miller v. Borst, 11 Wash. 260; Megrath v. Gilmore, 15 Wash. 558; Waldo v. Milroy, 19 Wash. 156; Stein v. Waddell, 37 Wash. 634; Boyer v. Robinson, 26 Wash. 117.

§ 1536. (6298.) Action by Administrator for Waste, Trespass, etc.

Executors and administrators may maintain actions against any person who shall have wasted, destroyed, taken, carried away, or converted to his own use the goods of their testator or intestate in his lifetime; also may maintain actions for trespass committed on the estate of the deceased during his lifetime. [L. '54, p. 291, § 143; Cd. '81, § 1530; 2 H. C., § 1043.]

See supra, § 159, limitation of actions.

See supra, § 937 et seq., waste and trespass.

§ 1537. (6299.) Action Against Administrator for Waste, Trespass, etc.

Any person, or his personal representatives, shall have an action against the executor or administrator of any estate or intestate who in his lifetime shall have wasted, destroyed, taken, or carried away, or converted to his own use, the goods and chattels of any such person, or committed any trespass on the real estate of such person. [L. '54, p. 291, § 144; Cd. '81, § 1531; 2 H. C., § 1044.]

Cited in 4 Wash. 173, 502.

§ 1538. (6300.) Action by Administrator on Predecessor's Bond.

Any administrator may in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor or of any former administrator of the same estate. [L. '54, p. 291, § 145; Cd. '81, § 1532; 2 H. C., § 1045.]

§ 1539. (6301.) Debts may be Compromised.

Whenever a debtor of a deceased person shall be unable to pay all his debts, the executor or administrator may, with the approbation of the court, compound with him and give him a discharge upon receiving a fair and just dividend of his effects. [L. '54, p. 291, § 146; Cd. '81, § 1533; 2 H. C., § 1046.]

See note to § 1449, supra, right of possession of estate.

See supra, § 1485, administrator may arbitrate.

An administrator cannot cancel his own rights of the estate: Eastman v. Landon, 17 mortgage due to the estate, in fraud of the Wash. 48.

§ 1540. (6302.) Action to Recover Property Fraudulently Conveyed by Decedent.

When there shall be a deficiency of assets in the hands of an executor or administrator, and when the deceased shall in his lifetime have conveyed any real estate, or any right or interest therein, with intent to defraud his creditors or to avoid any right, duty, or debt of any person, or shall have so conveyed such estate, which deeds or conveyances by law are void as against creditors, the executor or administrator may, and it shall be his duty to, com-

mence and prosecute to final judgment any proper action for the recovery of the same, and may recover for the benefit of the creditors all such real estate so fraudulently conveyed, and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights and credits which may have been so fraudulently conveyed by the deceased in his lifetime, whatever may have been the manner of such fraudulent conveyance. [L. '54, p. 291, § 147; Cd. '81, § 1534; 2 H. C., § 1047.]

See *supra*, § 159, limitations.

§ 1541. (6303.) Such Action Brought, When.

No executor or administrator shall be bound to sue for such estate as mentioned in the preceding section for the benefit of the creditors, unless on application of the creditors of the deceased; and the creditors making such application shall pay such part of the costs and expenses, or give such security to the executor or administrator thereof, as the court shall direct. [Cf. L. '54, p. 292, § 148; L. '73, p. 298, § 221; Cd. '81, § 1535; 2 H. C., § 1048.]

§ 1542. (6304.) Real Estate so Regained, How Disposed of.

The real estate so recovered shall be sold for the payment of debts in the same manner as if the deceased had died seised thereof, upon obtaining an order therefor from the court, and the proceeds of all goods, chattels, rights, and credits so recovered shall be appropriated in payment of debts of the deceased, in the same manner as other property in the hands of the executor or administrator. [L. '54, p. 292, § 149; Cd. '81, § 1536; 2 H. C., § 1049.]

CHAPTER XIV.

ACCOUNTS OF EXECUTORS AND ADMINISTRATORS AND PAYMENT OF DEBTS.

§ 1543. (6308.) Administrator's Promise to Pay Debts Valid, When.

No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing, and signed by such executor or administrator, or by some other person by him thereunto specially authorized. [L. '54, p. 295, § 160; Cd. '81, § 1537; 2 H. C., § 1050.]

See *infra*, § 5288 et seq., statute of frauds.

§ 1544. (6309.) Administrator Chargeable with Whole Estate.

Every executor or administrator shall be chargeable in his accounts with the whole estate of the deceased which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with the interest, profit, and income of the estate. [Cf. L. '54, p. 295, § 161; L. '60, p. 210, § 241; Cd. '81, § 1538; 2 H. C., § 1051.]

See *infra*, § 1562, settlement of accounts.

Cited in 17 Wash. 677; 38 Wash. 265.

An executor is bound to account to the cestui que trust only for moneys held by the decedent as trustee: See 1 Remington's

Digest, p. 1203, § 31; Smith v. Smith, 15 Wash. 239; In re Belt's Estate, 29 Wash. 535; Collins v. Denny Clay Co., 41 Wash. 136.

§ 1545. (6310.) Administrator not to Profit or Suffer Loss.

He shall not make profit by the increase nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He shall account for the excess when he shall have sold any part of the estate for more than the appraisement; and if any has been sold for less than the appraisement, he shall not be responsible for the loss if the sale has been unjustly made. [Cf. L. '54, p. 295, § 162; L. '60, p. 210, § 242; Cd. '81, § 1539; 2 H. C., § 1052.]

Cited in 15 Wash. 617.

An executor, who in good faith deposits funds of the estate in a bank at the time solvent and of good repute, is not liable for depreciation of the trust funds resulting from the subsequent failure of the bank, if the deposit is made to the credit of the

estate, and not in the executor's individual name: *In re Kohlers' Estate*, 15 Wash. 613.

Executors as trustees are liable only for want of ordinary care, not for error of judgment or as insurers: *Sharp v. Greene*, 22 Wash. 677.

§ 1546. (6311.) Administrator not Accountable for Worthless Debts.

No executor or administrator shall be accountable for any debts due the estate, if it shall appear that they remain uncollected without his fault. [L. '54, p. 295, § 163; Cd. '81, § 1540; 2 H. C., § 1053.]

Cited in 15 Wash. 618.

The appraised value of an estate is not conclusive upon the accounting as to the assets or their value: *Horton v. Barto*, 17 Wash. 675; *In re Smith's Estate*, 18 Wash. 129.

The fact that an administrator, by mistake or in ignorance of legal rights, in-

cluded his own property in an inventory of the estate would not estop him from subsequently asserting his ownership: *Filley v. Murphy*, 30 Wash. 1.

An administrator is chargeable with use and possession of decedent's premises: *Alfstad's Estate*, 27 Wash. 175.

§ 1547. (6312.) Compensation and Expenses Allowed.

He shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as the law provides, but when the deceased, by will, shall have made some other provision for the compensation of his executor, that shall be deemed a full compensation for his services, unless he shall, by a written instrument, filed in the court, renounce all claim for compensation provided by the will. [L. '54, p. 295, § 164; Cd. '81, § 1541; 2 H. C., § 1054.]

See *infra*, § 1549, commissions allowed.

Cited in 30 Wash. 561; 38 Wash. 268.

Compensation and expenses of executor or administrator: See 1 Remington's Digest, p. 1227, §§ 160-166; *Noble v. Whitten*, 38 Wash. 262; *In re Field's Estate*, 33 Wash. 63; *Wilbur v. Wilbur*, 17 Wash. 683; *Horton v. Barto*, 17 Wash. 675; *In re Smith's Estate*, 18 Wash. 129; *In re Mason's Estate*, 26 Wash. 259.

If an administrator acts as attorney for the estate and collects a claim for damages for the death of his decedent, he is only entitled to the usual commissions, although he may have made an agreement with the heirs for extra compensation: *Kuhn's Appeal*, 4 Wash. 534.

§ 1548. (6313.) Shall not Purchase Claim Against Estate.

No administrator or executor shall purchase any claim against the estate he represents; and if he shall have paid any claim for less than its nominal value, he shall only be entitled to charge in his account so much as he shall have actually paid. [L. '54, p. 295, § 165; Cd. '81, § 1542; 2 H. C., § 1055.]

§ 1549. (6314.) Commissions Allowed.

When no compensation shall have been provided by will, or the executor shall renounce his claim thereto, he shall be allowed commission on the whole

estate accounted for by him as follows: For the first one thousand dollars, at the rate of seven per cent; for all above that sum, and not exceeding two thousand dollars, at the rate of five per cent; for all above that sum, at the rate of four per cent; and the same commission shall be allowed to administrators. In all cases such further allowance may be made as the court shall deem just and reasonable for any extraordinary services not required of an executor or administrator in the common course of his duty: Provided, that the total amount of such allowance shall not exceed the amount of commission allowed in this section. [L. '54, p. 295, § 166; Cd. '81, § 1543; 2 H. C., § 1056.]

See supra, § 1093, compensation to assignees.

See supra, § 1547, compensation and expenses.

Cited in 17 Wash. 677; 26 Wash. 263; 38 Wash. 265; 42 Wash. 353.

An order fixing the compensation of an administrator is appealable as a final order: Horton v. Barto, 17 Wash. 675; Wilbur v. Wilbur, 17 Wash. 683.

§ 1550. (6315.) **Exhibit to be Rendered.**

Within six months after his appointment, and thereafter at any time when required by the court, either upon its own motion or the application of any person interested in the estate, the executor or administrator shall render, for the information of the court, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs. [L. '54, p. 296, § 167; Cd. '81, § 1544; 2 H. C., § 1057.]

§ 1551. (6316.) **Court may Require Exhibit.**

If the executor or administrator fail to render an exhibit within six months, as required in the last preceding section, it shall be the duty of the court to issue a citation requiring him to appear and render it. [L. '54, p. 296, § 168; Cd. '81, § 1545; 2 H. C., § 1058.]

§ 1552. (6317.) **Interested Persons may Require Exhibit.**

Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the court, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit shall be made. [L. '54, p. 296, § 169; Cd. '81, § 1546; 2 H. C., § 1059.]

§ 1553. (6318.) **Citation to Compel Exhibit.**

If the court be satisfied, either from the oath of the applicant, or from any other testimony that may be offered, that the facts alleged are true, and shall consider the showing of the applicant sufficient, a citation shall be issued to the executor or administrator requiring him to appear on some day named in the citation, and render an exhibit as prayed for. [Cf. L. '54, p. 296, § 170; Cd. '81, § 1547; L. '91, p. 388, § 33; 2 H. C., § 1060.]

§ 1554. (6319.) **Objections to Exhibit.**

When an exhibit is rendered by an executor or administrator, any person interested may appear, and, by objections in writing, contest any account or statement therein contained. The court may examine the executor or admin-

istrator, and if he has been guilty of negligence, or wasted, embezzled, or mismanaged the estate, his letters shall be revoked. [L. '54, p. 296, § 171; Cd. '81, § 1548; 2 H. C., § 1061.]

§ 1555. (6320.) Attachment, etc., for Failure to Render Exhibit.

If any executor or administrator neglect or refuse to appear and render an exhibit after having been duly cited, an attachment may be issued against him, or his letters may be revoked, in the discretion of the court. [L. '54, p. 296, § 172; Cd. '81, § 1549; 2 H. C., § 1062.]

§ 1556. (6321.) Annual Account—Proceedings on Default of.

Every executor or administrator shall render a full account of his administration at the expiration of one year from the time of his appointment. If he fail to present his account, it shall be the duty of the court to compel the rendering of such account by attachment, and any person interested in the estate may apply for and obtain an attachment, but no attachment shall issue unless a citation shall have been first issued and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. [L. '54, p. 296, § 173; Cd. '81, § 1550; 2 H. C., § 1063.]

§ 1557. (6322.) Citation to Account After Revocation of Authority.

Whenever the authority of an executor or administrator shall cease, or be revoked for any reason, he may be cited to account before the court, at the instance of the person succeeding to the administration of the estate, in like manner as he might have been cited by any person interested in the estate during the time he was administrator or executor. [Cf. L. '54, p. 296, § 174; L. '60, p. 212, § 254; L. '73, p. 304, § 247; Cd. '81, § 1551; 2 H. C., § 1064.]

§ 1558. (6323.) Revocation of Letters for Failure to Account.

If the executor or administrator resides out of the county, or absconds or conceals himself so that the citation cannot be personally served, and shall neglect to render an account within thirty days after the time above prescribed, or if he shall neglect to render an account within thirty days after having been committed where the attachment has been executed, his letters shall be revoked. [Cf. L. '54, p. 297, § 175; L. '73, p. 304, § 248; Cd. '81, § 1552; 2 H. C., § 1065.]

See supra, § 1379, revocation of letters.

See supra, § 1415, suspension.

§ 1559. (6324.) Vouchers to be Filed, etc.

In rendering his accounts the executor or administrator shall produce vouchers for the expenses and charges which he shall have paid, which vouchers shall be filed and remain in court; and he may be examined on oath touching such payments, and also touching any property and effects of the deceased, and the disposition thereof. [L. '54, p. 297, § 176; Cd. '81, § 1553; 2 H. C., § 1066.]

§ 1560. (6325.) Voucher Unnecessary. When.

On the settlement of his account, he may be allowed any item of expenditure not exceeding twenty dollars for which no voucher is produced, if

such item be supported by his own oath, positive to the fact of payment, specifying when, where, and to whom payment was made, if such oath be uncontradicted; but such allowances, in the whole, shall not exceed three hundred dollars for payment in behalf of any one estate. [Cf. L. '54, p. 297, § 177; L. '73, p. 304, § 250; Cd. '81, § 1554; 2 H. C., § 1067.]

§ 1561. (6326.) Erection of Monument, When.

Executors and administrators of the estates of deceased persons are hereby authorized, by and with the consent of the court of the proper county, to expend a reasonable sum out of the estate of the decedent to erect a monument or tombstone, suitable to mark the grave of said decedent, and the expense thereof shall be paid as the expenses of administration are paid. [L. '75, p. 127, § 1; Cd. '81, § 1555; 2 H. C., § 1068.]

See *infra*, § 1571, funeral expenses include monument.

§ 1562. (6327.) Final Hearing and Settlement—Notice of.

When the account is rendered for settlement, the court, or the judge thereof, shall appoint a day for the hearing and settlement of the same, and notice of such hearing and settlement shall be given by posting notices thereof in three of the most public places in the county, and publishing a similar notice for such time as the court or judge may order, in a newspaper published in the county, or if there be no newspaper published in the county, then in a newspaper published in the state, and of general circulation in the county. The notice shall set forth the name of the estate, of the executor or administrator and the day appointed for the settlement of account, which shall be on some day not more than six weeks after the filing of the account. [Cf. L. '54, p. 297, § 178; L. '73, p. 305, § 251; Cd. '81, § 1556; L. '91, p. 388, § 34; 2 H. C., § 1069.]

See *supra*, § 1544, chargeable with whole estate.

See *infra*, § 1566, effect of settlement.

See *infra*, § 1567, notice necessary to obtain settlement.

See *infra*, § 1587, distribution on final settlement.

See *infra*, § 1608, decree of final settlement and discharge.

A conditional order of the court discharging an administrator upon his final accounting, which has never been made absolute, may be set aside by the court at any time: *State v. Superior Court*, 13 Wash. 25.

§ 1563. (6328.) Exceptions to Final Account—Contest.

On the day appointed, or on any subsequent day to which the hearing may have been adjourned by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same. [L. '54, p. 297, § 179; Cd. '81, § 1557; 2 H. C., § 1070.]

See §§ 1546, 1547, *supra*, and notes thereto.

The appraised value of an estate is not conclusive upon the accounting, as to the assets or their value: *Horton v. Barto*, 17 Wash. 675; *In re Smith's Estate*, 18 Wash. 129.

Administratrix is chargeable upon final accounting for use and possession of decedent's premises: See *In re Alstad's Estate*, 27 Wash. 175.

A decedent's estate cannot be charged with the expense of attorney fees incurred by the administratrix in securing her appointment as such, nor in litigating her right to inherit as sole heir: *Wilbur v. Wilbur*, 17 Wash. 683.

As to allowance of attorneys' fees: See *In re Mason's Estate*, 26 Wash. 259.

§ 1564. (6329.) Guardian for Minor—Compensation.

If there be any minor interested in the estate who has no legally appointed guardian, the court shall appoint some disinterested person to repre-

sent him, who, on behalf of the minor, may contest the account as any other person interested might contest it, and who shall be allowed by the court reasonable compensation for his services. [L. '54, p. 297, § 180; Cd. '81, § 1558; 2 H. C., § 1071.]

§ 1565. (6330.) Hearing may be Adjourned.

The hearing and allegations of the respective parties may be adjourned from time to time as shall be necessary. [Cf. L. '54, p. 297, § 181; L. '60, p. 213, § 261; Cd. '81, § 1559; 2 H. C., § 1072.]

§ 1566. (6331.) Settlement, When and When not Conclusive.

The settlement of the account and the allowance thereof by the court, [or upon appeal], shall be conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, the right to proceed against the executor or administrator, either individually or upon his bond, within two years after their respective disabilities shall have ceased; and in any action brought by any such person. the allowance and settlement of the account shall be deemed presumptive evidence of its correctness. [L. '54, p. 297, § 182; Cd. '81, § 1560; 2 H. C., § 1073.]

Words "or upon appeal" have no application under present organization of courts.

Jurisdiction of courts over final account of executors or administrators: See 1 Remington's Digest, p. 1226, § 156; *Seattle v. McDonald*, 26 Wash. 98; *In re MacDonald's Estate*, 29 Wash. 422; *Drasdo v. Jobst*, 39 Wash. 425.

Although a final account in the administration of an estate has been rendered and an order of distribution made and carried into effect, such fact will not be prejudicial to an action by the executor in the interest of the estate, if he has not received his final discharge and his bondsmen have not been released: *Denny v. Sayward*, 10 Wash. 422.

An action to quiet title cannot be maintained until after the close of administration on the ancestor's estate: *Hazelton v. Bogardus*, 8 Wash. 102; *Dunn v. Peterson*, 4 Wash. 170; and the court retains jurisdiction even after final account until there has been a final settlement or distribution of the property, or some other act equivalent thereto: *Hazelton v. Bogardus*, *supra*; *Balch v. Smith*, 4 Wash. 497.

If the administratrix purchased land in her own name, and subsequently, by mis-

take or otherwise, was credited in her account with a portion of the purchase price, no trust in the land results in favor of the estate: *Bowen v. Hughes*, 5 Wash. 442.

The settlement of a so-called final account of an administrator does not preclude him from asserting, as an individual, error in subsequent orders affecting his relation to the estate since the making of the orders: *In re Sullivan's Estate*, 48 Wash. 631.

A creditor of an estate having a preferred claim which was on presentation disallowed for want of funds, who took no appeal or proceedings to question the administrator's sale of real estate for a nominal sum, or the administrator's discharge on final accounting, until after the lapse of more than three years and then only to interpose his claim as a counterclaim to an action on account, is concluded by the probate proceedings, and cannot reopen the same for fraud which he might have discovered with reasonable diligence: *Lauridsen v. Lewis*, 50 Wash. 605.

§ 1567. (6332.) Proof of Notice of Settlement.

The account shall not be allowed by the court until it be first proven that notice has been given as required by this chapter, and the decree shall show that such proof was made to the satisfaction of the court, and shall be conclusive evidence of the fact. [L. '54, p. 298, § 183; Cd. '81, § 1561; 2 H. C., § 1074.]

See *supra*, § 1562, final hearing and settlement of account.

§ 1568. (6333.) Order of Payment of Debts.

The debts of the estate shall be paid in the following order:—

1. Funeral expenses;

2. Expenses of the last sickness;
3. Debts having preference by the laws of the United States;
4. Wages due for labor performed within ninety days immediately preceding the death of decedent;
5. Taxes or any debts or dues, owing to the state;
6. Judgments rendered against the deceased in his lifetime which are liens upon real estate on which execution might have issued at the time of his death, and debts secured by mortgages, in the order of their priority;
7. All other demands against the [e]state. [Cf. L. '54, p. 298, § 184; L. '60, p. 213, § 264; Cd. '81, § 1562; 2 H. C., § 1075; L. '97, p. 22, § 1.]

See supra, § 1205, preference rights of employees.

See infra, § 1571, payment of funeral expenses.

Cited in 2 Wash. 335; 25 Wash. 436, 543; 50 Wash. 396.

If a party dies possessed of an interest in community property, not required to pay community debts, and not otherwise exempt, such interest is liable for separate debts

when separate property is exhausted: Columbia Nat. Bank v. Embree, 2 Wash. 331.

The word "estate" relates to separate property of deceased as well as community property; and "debts" include separate as well as community debts: Columbia Nat. Bank v. Embree, supra.

§ 1569. (6334.) **Extent of Mortgage Preference.**

The preference given in the preceding section to a mortgage or judgment shall only extend to the proceeds of the property subject to the lien of such mortgage or judgment. [Cf. L. '54, p. 298, § 185; Cd. '81, § 1653; 2 H. C., § 1076; L. '97, p. 22, § 2.]

See supra, § 1529, redemption or sale of mortgaged property.

§ 1570. (6335.) **Estate Insufficient, Dividend to be Paid.**

If the estate shall be insufficient to pay the debts of any one class, each creditor shall be paid a dividend in proportion to his claim, and no creditor of any one class shall receive any payment until all those of the preceding class shall have been fully paid. [L. '54, p. 298, § 186; Cd. '81, § 1564; 2 H. C., § 1077.]

Cited in 50 Wash. 396.

§ 1571. (6336.) **Funeral Expenses and Expenses of Last Sickness.**

It shall be the duty of the executor or administrator, as soon as he may have sufficient funds in his hands, to pay the funeral expenses, and expenses of the last sickness, and the allowance made to the family of the deceased, and he may retain in his hands the necessary expenses of administration; but he shall not be obliged to pay any other debt or any legacy until, as prescribed by this chapter, the payment has been ordered by the court. [L. '54, p. 298, § 187; Cd. '81, § 1565; 2 H. C., § 1078.]

See supra, § 1561, monument as funeral expenses.

See supra, § 1568, order of payment of debts.

Cited in 50 Wash. 396.

Compensation for services of physicians, rendered to deceased during his last sickness, do not depend upon a contract with

the deceased, but are given a preference right of payment over ordinary expenses of the estate: Cunningham v. Lakin, 50 Wash. 394.

§ 1572. (6337.) **Payment of Debts on Annual Settlement.**

Upon the settlement of the accounts of the executor or administrator at the end of the year, as required by this chapter, the court shall make an order for the payment of the debts, as the circumstances of the estate shall require.

If there be not sufficient funds in the hands of the executors or administrators, the court shall specify in the decree the sum to be paid to each creditor. [L. '54, p. 298, § 188; Cd. '81, § 1566; 2 H. C., § 1079.]

See supra, § 1556, annual account.

§ 1573. (6338.) Provisions for Disputed or Contingent Claims.

If there be any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part thereof as the holder would be entitled to if the claim were due, established, or absolute, shall be paid into the court, where it shall remain, to be paid over to the party when he shall become entitled thereto; or if he fail to establish his claim, to be paid over or distributed, as the circumstances of the case may require: Provided, that if any creditor whose claim has been allowed, but is not yet due, shall appear and assent to a reduction therefrom of the legal interest for the time the claim has yet to run, he shall be entitled to be paid accordingly. [L. '54, p. 298, § 189; Cd. '81, § 1567; 2 H. C., § 1080.]

Cited in 21 Wash. 615.

§ 1574. (6339.) Administrator Personally Liable to Creditors, When.

Whenever a decree shall have been made by the court for the payment of creditors, the executor or administrator shall be personally liable to each creditor for his claim, or the dividend thereon; and execution may be issued on such decree, as upon a judgment, in favor of each creditor. The executor or administrator shall also be liable on his bond to each creditor. [Cf. L. '54, p. 299, § 190; Cd. '81, § 1568; L. '91, p. 389, § 35; 2 H. C., § 1081.]

See supra, § 1535, actions by and against administrators.

§ 1575. (6340.) Claims not Included in Order for Payment, How Disposed of.

When the accounts of the executor or administrator have been settled, and an order made for the payment of the debts and distribution of the estate, no creditor whose name was not included in the order of payment shall have any right to call upon the creditors who have been paid, or upon the heirs, legatees, or devisees, to contribute for the payment of his claim; but if the executor or administrator shall have failed to give the notice to creditors as prescribed in this chapter, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to had it been allowed: Provided, that this section shall not apply to any creditor whose claim was not due one year before the day of settlement, or whose claim was contingent, and did not become absolute one year before such day. [Cf. L. '54, p. 299, § 191; L. '60, p. 214, § 271; Cd. '81, § 1569; 2 H. C., § 1082.]

§ 1576. (6341.) Order of Payment of Legacies—Extension of Time.

If all the debts shall have been paid by the first distribution, the court shall proceed to direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled; but if there be debts remaining unpaid, the court shall give such extension of time as may be reasonable for the final settlement of the same. [L. '54, p. 299, § 192; Cd. '81, § 1570; 2 H. C., § 1083.]

See supra, § 1341, order of descent of real property.

See supra, § 1523, contribution of distributees.

See infra, § 1582, payment of legacies before settlement, when.

An order of distribution does not operate to relieve the administrator of his trust, and thereby create merely the relation of debtor and creditor between him and those entitled to distribution, but the court has authority to compel the administrator to make distribution without requiring the distributees to resort to another forum: *McLaughlin v. Barnes*, 12 Wash. 373.

An administrator cannot hold any portion from distribution in settlement of an indebtedness due him from a cestui que trust, arising out of a claim for services rendered prior to his appointment; nor can the same result be obtained by colorable assignment of the claim to a third party: *Id.*

§ 1577. (6342.) When Final Account is to be Rendered.

At the time designated, or sooner, if within that time all property of the estate shall have been sold, or there shall be sufficient funds in his hands to pay all the debts due by the estate, the executor or administrator shall render a final account and pray a settlement of the estate. [L. '54, p. 299, § 193; Cd. '81, § 1571; 2 H. C., § 1084.]

See supra, § 1562, final hearing and settlement.

§ 1578. (6343.) Neglect to Render Final Account—Proceedings.

If the executor or administrator neglect to render his final account, the same proceedings may be had as are prescribed in this chapter in regard to the first account to be rendered by him; and all the provisions of this chapter relative to the last mentioned account, and the notice and settlement thereof, shall apply to his account presented for final settlement. [Cf. L. '54, p. 299, § 194; Cd. '81, § 1572; L. '91, p. 389, § 36; 2 H. C., § 1085.]

See supra, §§ 1550-1553, exhibits to be rendered.

Negotiable notes found with deceased at the time of his death in the state of Oregon are property, payable in that state, though secured by mortgages in this state; and a proper accounting to the Oregon court will

relieve an administrator in that court from any liability in the courts of this state, in an action begun against him by an administrator appointed under the laws of this state: *McCoy v. Ayres*, 2 W. T. 307.

CHAPTER XV.

PARTITION AND DISTRIBUTION OF ESTATES.

§ 1579. (6347.) Application for Payment of Legacies—Bond.

At any time after six months from the issuing letters testamentary or of administration, any heir, legatee, or devisee, may present his petition to the court that the legacy or share of the estate to which he is entitled may be given to him upon his giving bond, with security, for the payment of his proportion of the debts of the estate. [Cf. L. '54, p. 300, § 195; Cd. '81, § 1573; L. '91, p. 389, § 37; 2 H. C., § 1086.]

See supra, § 1576, payment of legacies and distribution.

The executor does not sustain such a trust relation to a legatee under the will as to render fraudulent per se the purchase by him from the legatee of the property ac-

quired under the will, and only in case of actual fraud could such a sale be set aside: *O'Neile v. Ternes*, 32 Wash. 528.

§ 1580. (6348.) Notice of Application.

Notice of the application shall be given to the executor or administrator, and to all persons interested in the estate, in the same manner that notice is

required to be given of the settlement of the account of the executor or administrator. [L. '54, p. 300, § 196; Cd. '81, § 1574; 2 H. C., § 1087.]

§ 1581. (6349.) Who may Resist Application.

The executor, administrator, or any person interested in the estate, may appear and resist the application; or any other heir, legatee, or devisee may make a similar application for himself. [Cf. L. '54, p. 300, § 197; L. '60, p. 216, § 277; Cd. '81, § 1575; 2 H. C., § 1088.]

§ 1582. (6350.) Decree for Payment of Legacies—Conditions of.

If, on the hearing, it appear to the court that the estate is but little in debt, and that the share of the parties applying may be allowed without injury to the creditors of the estate, the court shall make a decree in conformity with the prayer of the applicant or applicants: Provided, each one of them shall first execute and deliver to the executor or administrator a bond in such sum as shall be designated by the court, and with sureties to be approved by the judge thereof, to the executor or administrator, conditioned for the payment by the devisee or legatee, whenever required, of his proportion of the debts due from the estate. [L. '54, p. 300, § 198; Cd. '81, § 1576; 2 H. C., § 1089.]

See supra, § 1523, contribution.

See supra, § 1576, payment of legacies and distribution.

Cited in 16 Wash. 18.

A debt due from a devisee can be retained from his portion of the real estate, as a setoff: *Boyer v. Robinson*, 26 Wash. 117.

§ 1583. (6351.) Decree, What may Contain.

Such decree may order the executor or administrator to deliver to the heir, devisee, or legatee the whole portion of the estate to which he may be entitled, or only a part thereof. [L. '54, p. 301, § 199; Cd. '81, § 1577; 2 H. C., § 1090.]

§ 1584. (6352.) Partition may be Made When Necessary.

If, in execution of such decree, any partition be necessary between two or more of the parties interested, it shall be made in the manner hereinafter prescribed. [L. '54, p. 301, § 200; Cd. '81, § 1587; 2 H. C., § 1091.]

§ 1585. (6353.) Applicant to Pay Costs.

The cost of the proceedings authorized by the preceding section shall be paid by the applicant, or if there be more than one, shall be equally apportioned among them. [Cf. L. '54, p. 301, § 201; L. '60, p. 216, § 281; Cd. '81, § 1579; 2 H. C., § 1092.]

§ 1586. (6354.) Order for Payment of Bond, and Suit Thereon.

Whenever any bond has been executed and delivered under the provisions of the preceding sections, and the executor or administrator shall ascertain that it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, he shall petition the court for an order requiring the payment, and shall have a citation issued and served on the party bound, requiring him to appear and show cause why the order shall not be made. At the hearing, the court, if satisfied of the necessity of the payment, shall make an order accordingly, designating the amount and giving the time within which it shall be paid; and if the money shall not be

paid within the time allowed, an action may be maintained by the executor or administrator on the bond. [Cf. L. '54, p. 301, § 201; L. '60, p. 216, § 282; Cd. '81, § 1580; 2 H. C., § 1093.]

§ 1587. (6355.) Distribution of Estate upon Final Settlement.

Upon the settlement of the account of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee, or legatee, the court shall proceed to distribute the residue of the estate among the persons who are by law entitled. [Cf. L. '54, p. 301, § 202; L. '60, p. 217, § 283; Cd. '81, § 1581; 2 H. C., § 1094.]

See supra, § 1562, notice of final hearing and settlement.

See supra, § 1566, final settlement, effect of.

See supra, this title, chapters 7 and 8, descent and distribution.

Cited in 7 Wash. 651; 27 Wash. 183; 31 Wash. 646.

Effect of payment or distribution: See 1 Remington's Digest, p. 1216, § 100; Griffin v. Warburton, 23 Wash. 231; Sturgiss v. Dart, 23 Wash. 244.

The intervention of the probate court and an adjudication and distribution thereunder are essential to passing title of ancestor to heirs; Balch v. Smith, 4 Wash. 497, 503; Lawrence v. Bellingham Bay etc. Ry. Co., 4 Wash. 664; but see § 1366 et seq., title vests in heirs and devisees when.

Allowances to executor or administrator for advances made before distribution: See In re Murphy's Estate, 30 Wash. 9.

An order of final distribution of an estate, requiring all real and personal property except cash on hand to be turned over to the distributees at once, will, on appeal by the administrator, be modified so as to decree distribution subject to the charge for final settlement purposes, where more than a year has elapsed since the filing of the report showing the cash on hand, which cash may not be ample for all purposes of final settlement: In re Sullivan's Estate, 48 Wash. 631.

An administrator has an appealable interest in an order of final distribution of an estate, since it is his duty to guard against error in distribution without ample provision for obligations of the estate: Id.

§ 1588. (6356.) Decree of Distribution, What to Contain.

In the decree, the court shall name the person and the portion or part to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession. [L. '54, p. 301, § 203; Cd. '81, § 1582; 2 H. C., § 1096.]

Cited in 4 Wash. 502; 7 Wash. 651.

§ 1589. (6357.) Decree Made Only After Notice.

The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator. The court may order such further notice to be given as it may deem proper. [L. '54, p. 301, § 204; Cd. '81, § 1583; 2 H. C., § 1096.]

Cited in 22 Wash. 628.

Proceedings for payment or distribution: See 1 Remington's Digest, p. 1216, § 101; McGowan v. Smith, 22 Wash. 625; Reformed Presbyterian Church v. McMillan, 31 Wash. 643; In re Sullivan's Estate, 36 Wash. 217.

Order or decree for distribution: See 1 Remington's Digest, p. 1217, §§ 102-105; Huston v. Becker, 15 Wash. 586; Horton v.

Barto, 17 Wash. 675; Wilbur v. Wilbur, 17 Wash. 683; Griffin v. Warburton, 23 Wash. 231; McLaughlin v. Barnes, 12 Wash. 373; Prefontaine v. McMicken, 16 Wash. 16; Noble v. Whitten, 34 Wash. 507; Drasdo v. Jobst, 39 Wash. 425.

Proceedings, under this section without notice are void: McGowan v. Smith, 22 Wash. 625.

§ 1590. (6358.) Estate in Common may be Partitioned.

When the estate, real or personal, assigned to two or more heirs, devisees, or legatees, shall be in common and undivided, and the respective shares shall

not be separated and distinguished, partition and distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the court, who shall be duly sworn to the faithful discharge of their duties, and the court shall issue a warrant to them for that purpose. [L. '54, p. 301, § 205; Cd. '81, § 1584; 2 H. C., § 1097.]

Cited in 4 Wash. 502.

§ 1591. (6359.) Estate in Different Counties, How Partitioned.

If the real estate be in different counties, the court may, if it shall judge proper, appoint different commissioners for each county; and in such cases the estate in each county shall be divided separately, as if there were no other estate to be divided, but the commissioners first appointed shall, unless otherwise directed by the court, make division of such real estate, wherever situated within the state. [L. '54, p. 302, § 206; Cd. '81, § 1585; 2 H. C., § 1098.]

§ 1592. (6360.) Partition and Distribution After Notice.

Such partition and distribution may be ordered on the petition of any of the persons interested in the estate; but before any partition shall be ordered as directed in this chapter, notice shall be given to all persons interested who shall reside in this state, or to their guardians, and to agents, attorneys, or guardians, if there be any in this state, of such as reside out of the state, either personally or by public notice, as the court may direct. [L. '54, p. 302, § 207; Cd. '81, § 1586; 2 H. C., § 1099.]

Cited in 4 Wash. 502.

§ 1593. (6361.) Partition Though Some Heirs have Parted with Their Interest.

Partition of the real estate may be made as provided in this chapter, although some of the original heirs, or devisees may have conveyed their shares to other persons, and such shares shall be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs or devisees. [L. '54, p. 302, § 208; Cd. '81, § 1587; 2 H. C., § 1100.]

Cited in 22 Wash. 628; 33 Wash. 206.

§ 1594. (6362.) Shares to be Set Out by Metes and Bounds.

The several shares in the real and personal estate shall be set out to each individual in proportion to his right, by such metes, bounds, and descriptions that the same may be easily distinguished, unless two or more of the parties shall consent to have their shares set out so as to be held by them in common and undivided. [L. '54, p. 302, § 209; Cd. '81, § 1588; 2 H. C., § 1101.]

§ 1595. (6363.) Assignment of Whole Estate to One—Compensation to Others.

When any such real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein, who will accept it, providing the party so accepting the whole shall pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, and the true value of the estate shall be ascertained by the commissioners appointed by the court, and sworn for that purpose. [Cf. L. '54, p. 302, § 210; L. '73, p. 311, § 284; Cd. '81, § 1589; 2 H. C., § 1102.]

§ 1596. (6364.) Equality for Inequality of Shares.

When any tract of land or tenement shall be of greater value than either party's share of the estate to be divided, and cannot be divided without injury to the same, it may be set off, by the commissioners appointed to make partition, to either of the parties who will accept it, giving preference as prescribed in the preceding sections; provided the party so accepting shall pay or secure to one or more of the others such sums as the commissioners shall award to make the partition equal, and the commissioners shall make their award accordingly; but such partition shall not be established by the court until the sums so awarded shall be paid to the parties entitled to the same, or secured to their satisfaction. [L. '54, p. 302, § 211; Cd. '81, § 1590; 2 H. C., § 1103.]

§ 1597. (6365.) Estate may be Sold and Proceeds Distributed, When.

When it cannot be otherwise fairly divided, the whole or any part of the estate, real or personal, may be recommended by the commissioners to be sold; and if the report be confirmed, the court may order a sale by the executor or administrator, and distribute the proceeds. [Cf. L. '54, p. 303, § 212; L. '60, p. 218, § 293; Cd. '81, § 1591; 2 H. C., § 1104.]

§ 1598. (6366.) Duties of Commissioners Where Estate Held in Common.

When partition of real estate among heirs or devisees shall be required, and such real estate shall be undivided and in common with the real estate of any other person, the commissioners shall first divide and sever the estate of the deceased from the estate with which it lies in common; and such division so made and established by the court shall be binding upon all the persons interested. [L. '54, p. 303, § 213; Cd. '81, § 1592; 2 H. C., § 1105.]

§ 1599. (6367.) Notice to Guardians, etc., Before Partition.

Before any partition shall be made, or any estate divided, as provided in this chapter, guardians shall be appointed for all minors and insane persons interested in the estate to be divided; and some discreet persons shall be appointed to act as agent for such parties as reside out of the state, and notice of the appointment of such agent shall be given to the commissioners in their warrant, and notice shall be given to all persons interested in the partition, their guardians or agents, by the commissioners, of the time when they shall proceed to make partition. [L. '54, p. 303, § 214; Cd. '81, § 1593; 2 H. C., § 1106.]

See *infra*, § 1603, agent to take possession.

§ 1600. (6368.) To Make Report and Partition to be Recorded.

The commissioners shall make a report of their proceedings in writing, and the court may, for sufficient reasons, set aside such report and remit the same to the same commissioners or appoint others; and the report, when finally accepted and established, shall be recorded in the records of the court, and a certified copy thereof, under the seal of the court, shall be recorded in the office of the county auditor of the county where the land lies. [Cf. L. '54, p. 303, § 215; Cd. '81, § 1594; L. '91, p. 389, § 38; 2 H. C., § 1107.]

§ 1601. (6369.) When Commissioners Unnecessary.

When the court shall make a decree assigning the residue of any estate to one or more persons entitled to the same, it shall not be necessary to ap-

point commissioners to make partition or distribution of such estate, unless the parties to whom the assignment shall have been decreed, or some of them, shall request that such partition be made. [L. '54, p. 303, § 216; Cd. '81, § 1595; 2 H. C., § 1108.]

§ 1602. (6370.) Advancements to Heirs.

All questions as to advancement made, or alleged to have been made, by the deceased to any heirs may be heard and determined by the court, and shall be specified in the decree assigning the estate, and in the warrant to the commissioners, and the final decree of the court, or in case of appeal, of [to] the supreme court, shall be binding on all parties interested in the estate. [L. '54, p. 303, § 217; Cd. '81, § 1596; 2 H. C., § 1109.]

§ 1603. (6371.) Court may Appoint Agent to Take Possession of Absentee's Estate.

When any estate shall have been assigned by decree of the court, or distributed by commissioners, as provided in this chapter, to any person residing out of this state, and having no agent therein, and it shall be necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absentee in the partition and distribution. [L. '54, p. 303, § 218; Cd. '81, § 1597; 2 H. C., § 1110.]

See supra, § 1599, notice to agent before partition.

§ 1604. (6372.) Agent to Give Bond, Compensation of.

Such agent shall give a bond to the state of Washington, to be approved by the court conditioned faithfully to manage and account for such estate, before he shall be authorized to receive the same, and the court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses. [Cf. L. '54, p. 304, § 219; L. '57, p. 24, § 3; Cd. '81, § 1598; 2 H. C., § 1111.]

§ 1605. (6373.) Unclaimed Estates, How Disposed of.

When the estate shall have remained in the hands of the agent unclaimed for one year, it shall be sold under order of the court, and the proceeds, deducting the expenses of the sale, to be allowed by the court, shall be paid into the county treasury. When the payment is made the agent shall take triplicate receipts, one of which he shall file with the county auditor, and another with the court. [Cf. L. '54, p. 304, § 220; L. '57, p. 24, § 4; Cd. '81, § 1599; 2 H. C., § 1112.]

§ 1606. (6374.) Agent's Liability on Bond.

The agent shall be liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of sale as required by the preceding section, and may be sued thereon by any person interested. [L. '54, p. 304, § 221; Cd. '81, § 1600; 2 H. C., 1113.]

§ 1607. (6375.) Auditor to Draw Warrant.

When any person shall appear and claim the money paid into the treasury, the court making the distribution, being first satisfied of his right,

shall order the payment of such money, and, upon the presentation of a certified copy of the order to the county auditor, he shall draw his warrant on the county treasurer for the amount. [Cf. L. '54, p. 304, § 222; Cd. '81, § 1601; L. '91, p. 390, § 39; 2 H. C., § 1114.]

§ 1608. (6376.) Final Settlement, Decree and Discharge.

When the estate has been fully administered, and it shall have been shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under order of the court, all property of the estate to the persons entitled, the court shall make a decree discharging him from all liability to be incurred thereafter. [L. '54, p. 304, § 223; Cd. '81, § 1602; 2 H. C., § 1115.]

See supra, § 1562, final hearing and settlement of account.

A finding upon the final settlement of the estate that there are no debts is sustained where the evidence showed no debts except funeral expenses and the costs of administration, and the only bill presented was disallowed: *Drasdo v. Jobst*, 39 Wash. 425.

§ 1609. (6377.) Discovery of Further Property After Final Settlement—Proceedings.

The final settlement of the estate shall not prevent a subsequent issuance of letters of administration, should other property of the estate be discovered, or it should become necessary and proper from any cause that letters should be again issued. [L. '54, p. 304, § 224; Cd. '81, § 1603; 2 H. C., § 1116.]

CHAPTER XVI.

SPECIFIC PERFORMANCE OF DECEDENT'S CONTRACTS.

§ 1610. (6381.) Decedent's Contract to Convey may be Enforced.

If any person, who is bound by contract, in writing, to convey any real property, shall die before making the conveyance, the superior court of the county in which such real estate or any portion thereof is situate may make a decree authorizing and directing his executor or administrator to convey such real property to the person entitled thereto. [Cf. L. '54, p. 292, § 150; L. '77, p. 130, § 626; Cd. '81, § 623; L. '91, p. 390, § 40; 2 H. C., § 1117.]

See supra, § 1447, performance of contracts of testator, nonintervention wills.

See notes to § 1449, supra, right to possession of estate.

Cited in 5 Wash. 381; 10 Wash. 594; 46 Wash. 185, 189.

Contracts of decedent: See 1 Remington's Digest, p. 1207, § 49.

The legal title to decedent's land vests in the administrator for the purpose of passing title to purchasers in conformity with conditions of contracts of sale made by the testator: *Hyde v. Heller*, 10 Wash. 586, 599; and the language of this section applies to all persons who have contracted in writing to convey real property, whether they have died testate or intestate, and

without regard to the conditions of their will: *Id.*

This section is not impliedly repealed by section 1366 et seq., providing that upon the death of a person, the lands of which he died seised shall immediately vest in the heirs; since repeals by implication are not favored, and lands held by the deceased under contract to convey may be treated as personalty; hence, upon proceedings by the purchaser for specific performance against the administrator, under the statute, the heirs are not necessary parties defendant: *Griggs Land Co. v. Smith*, 46 Wash. 185.

§ 1611. (6382.) Petition for Executor to Make Conveyance and Notice of Hearing.

On filing and presentation of a petition of any person claiming to be entitled to such conveyance under such contract, setting forth the facts upon

which such claim is predicated, the court, or the judge thereof, shall make an order appointing a time for hearing, to be published four successive weeks next before such hearing, in such newspaper in the state as the court shall designate; and in case such deceased person was an inhabitant of this state at the time of his death, or died in this state, and in all other cases in which an executor or administrator has been appointed in this state, the court shall further order that the notice be personally served upon the executor or administrator, by delivery to him of a copy of the same, together with a copy of the petition. [Cf. L. '54, p. 292, § 151; L. '77, p. 130, § 627; Cd. '81, § 624; L. '91, p. 390, § 41; 2 H. C., § 1118.]

The proceedings must be held in the county where the land is situated: *Reese v. Murnan*, 5 Wash. 373, 381.

In a proceeding where the administrator was not served with copies of the petition and notice, and there was no adjournment of the hearing, the court was without jurisdiction at a later date to entertain the petition or to reopen the case to allow a party served by publication only to appear and

defend: *Sander-Boman Co. v. Yesler Estate*, 2 Wash. 430.

In a proceeding under this statute to enforce the specific performance of a contract to convey real estate made by a decedent, a notice of publication to the administrator of the estate, "and all persons having an interest in said estate," is sufficient without being directed to "all persons interested as creditors, heirs, devisees or personal representatives" thereof: *Id.*

§ 1612. (6383.) Proceedings at Hearing, Contest.

At the time appointed for such hearing, or at such other time as the same may be adjourned to, upon proof of the publication of the notice and of personal service thereof where personal service is required, the court shall proceed to a hearing, and all persons interested as creditors, heirs, devisees, or personal representatives may appear and resist such petition, by filing their objections in writing, and the court shall examine, on oath, the petitioners, and all witnesses who may be produced on the hearing, by an interested party, for that purpose. [Cf. L. '54, p. 293, § 152; Cd. '81, § 625; L. '91, p. 340, § 42; 2 H. C., § 1119.]

§ 1613. (6384.) Decree for Conveyance.

After a full hearing, upon such petition and objections, of the facts and circumstances of the claim, if the court is satisfied that the petitioner is entitled, in equity, to a conveyance of the real estate described in the petition, of any part thereof, or any interest therein, the court shall make a decree authorizing and directing the execution and delivery of a conveyance to the petitioner. [Cf. L. '54, p. 293, § 153; L. '77, p. 130, § 629; Cd. '81, § 626; 2 H. C., § 1120.]

The decree is made upon notice only to the administrator, and while heirs, creditors or devisees may appear and resist the applica-

tion, notice to the administrator is the test of jurisdiction: *Hyde v. Heller*, 10 Wash. 586, 598.

§ 1614. (6385.) Conveyance, by Whom Executed.

Such conveyance shall be executed by the executor or administrator of the estate of the deceased, if the deceased was a resident of or had his place of abode at the time of his death in this state, or if he died therein, or if an executor or administrator has been appointed therein; but in such case no decree for conveyance shall be made, unless the executor or administrator shall have been served with a copy of the said petition and the notice provided for in section 1611, at least twenty days prior to the time appointed for the hearing. [Cf. L. '77, p. 130, § 630; Cd. '81, § 627; L. '91, p. 391, § 43; 2 H. C., § 1121.]

§ 1615. (6386.) Proceedings Where There is No Executor or Administrator.

If the deceased died out of the state, and was not an inhabitant thereof at the time of his death, and no executor or administrator shall have been appointed in the state, such conveyance shall be executed by a commissioner to be appointed by the court, in the decree, for that purpose; but in such case, in addition to the notice provided in section 1611, it shall appear to the satisfaction of the court at the hearing, that the executor or administrator of such deceased duly appointed in another state, territory, or country, or his heirs or devisees, shall have had reasonable notice personally of the pendency of said petition, and of the time and place appointed for such hearing. And such foreign executor or administrator shall have the same right to file objections and resist the claim of the petitioners as an executor or administrator appointed under the laws of this state would have; and it shall not be necessary, in such case, that an administration of the estate of the deceased be had in the state, to authorize the decree of conveyance prayed for. [Cf. L. '77, p. 131, § 631; Cd. '81, § 628; L. '91, p. 391, § 44; 2 H. C., § 1122.]

§ 1616. (6387.) Form and Effect of Such Conveyance.

A conveyance executed under the provisions of this chapter shall so refer to the decree authorizing the conveyance that the same may be readily found, but need not recite the record in the case generally, and the conveyance made in pursuance of a decree shall pass to the grantee all the estate, right, title, and interest contracted to be conveyed by the deceased, as fully as if the contracting party himself were still living and executed the conveyance in pursuance of such contract. [L. '77, p. 131, § 632; Cd. '81, § 629; 2 H. C., § 1123.]

Cited in 10 Wash. 594.

§ 1617. (6388.) Appeal from Decree—Recording, Effect of.

Any party interested may appeal therefrom to the supreme court, in the same manner as appeals are taken and prosecuted from final decrees or judgments in equity causes; but if no appeal be taken from such decree within the time limited therefor, or if such decree be affirmed on appeal, it shall be the duty of the executor, administrator, or commissioner to execute and deliver the conveyance according to the directions contained in the decree; and a certified copy of the decree shall be recorded with the deed in the office of the auditor of the county where the lands lie, and shall be conclusive evidence of the correctness of the proceedings and of the authority of the executor, administrator, or commissioner to make such conveyance. [Cf. L. '54, p. 293, § 154; L. '73, p. 300, § 227; L. '77, p. 131, § 633; Cd. '81, § 630; L. '91, p. 391, § 45; 2 H. C., § 1124.]

Cited in 10 Wash. 598.

A decree in a proceeding ordering the administrator to execute a deed forthwith, and, in default thereof within ten days, decreeing that a commissioner shall execute

the same, is erroneous, as, under this section, a conveyance is not to be made until after the time for an appeal shall have elapsed: *Sander-Boman Co. v. Yesler Estate*, 2 Wash. 430.

§ 1618. (6389.) Effect of Recording Copy of Decree.

A copy of the decree for conveyance, made by the court, and duly certified, and recorded in the office of the auditor of the county wherein the land

is situate, shall, after affirmance upon appeal, or after expiration of the time for taking an appeal in case no appeal be taken, give to the person entitled to the conveyance a right to the immediate possession of the land contracted for, and of holding the same according to the terms of the intended conveyance, in like manner and with like effect as if they had been conveyed in pursuance of the decree. [Cf. L. '54, p. 293, § 157; L. '77, p. 131, § 634; Cd. '81, § 631; L. '91, p. 392, § 46; 2 H. C., § 1125.]

§ 1619. (6390.) Proceedings Where Party to Whom Conveyance is Made Dies.

If the person to whom the conveyance was to be made shall die before the commencement of the proceedings according to the provisions of this chapter, or before the completion of the conveyance, any person who would have been entitled to the conveyance under him, as heir, devisee, or otherwise, in case the conveyance had been made according to the terms of the contract, or the executor or administrator of such deceased person, for the benefit of persons entitled, may commence such proceedings, or prosecute the same if already commenced; and the conveyance shall be so made as to vest the estate in the persons who would have been entitled to it, or in the executor or administrator for their benefit. [Cf. L. '54, p. 299, § 159; Cd. '81, § 532; L. '91, p. 392, § 47; 2 H. C., § 1126.]

§ 1620. (6391.) Depositions on Hearing.

The testimony of witnesses in support of the claim of the petitioner may be taken by deposition whenever the deposition of such witnesses might be taken to be used in the trial of a civil action; but notice of the time and place of taking such deposition shall be published by the petitioner, in the paper required to be designated by section 1611, for three successive weeks prior to taking the same, which notice shall also state the name of the officer before whom the deposition is to be taken, and the name[s] of the witnesses whose testimony is proposed to be taken at such time and place, and shall also be served personally in all cases wherein personal service of the notice is required by the provisions of section 1611. Any party interested in the estate may appear and cross-examine such witnesses, and the manner of examination and the form of such deposition shall be in conformity with the statute regulating depositions of witnesses in civil actions. Any party interested in the estate, and resisting the claim of the petitioner, may, after filing his objections, take the testimony of witnesses in his behalf in like manner as in civil actions. [Cf. L. '77, p. 132, § 636; Cd. '81, §§ 633, 634; L. '91, p. 392, § 48; 2 H. C., § 1127.]

CHAPTER XVII.

GUARDIANSHIP OF INFANTS, AND OF THE INSANE.

§ 1621. (6395.) Guardians for Minors Appointed, When.

The superior court of each county, when it shall become necessary, may appoint guardians to minors resident in said county, who have no guardian appointed by will; or who may reside out of the state, having estate within the county. [Cf. L. '55, p. 15, § 1; L. '73, p. 314, § 299; Cd. '81, § 1604; 2 H. C., § 1128.]

Only the next four sections of this chapter (§§ 1622-1625) and §§ 1638 to 1640, inclusive, relate to the guardianship of the insane: See § 1654 et seq.

See *infra*, note to § 1674, sales of property of nonresident wards.

Cited in 24 Wash. 128.

§ 1622. Petition for Appointment.

When a petition is presented to the superior court verified by the petitioner, and showing that a person, resident of the county where the petition is filed, is a minor, or is insane, or mentally incompetent, and that such person has property needing care and attention and praying for the appointment of a guardian for such minor, insane or mentally incompetent person's property, the court shall thereupon make an order setting a time for the hearing on said petition, and directing the clerk of the court to issue a notice stating that such a petition has been filed, and the time and place of the hearing thereon and stating that all persons interested shall appear at the time and place of the hearing and show cause if any there be, why a guardian should not be appointed for the estate of such minor, insane, or mentally incompetent person. [L. '09, p. 408, § 1. Cf. L. '03, p. 242, §§ 1-5.]

This act supersedes the act of 1903.

As to proceedings for appointment, under this act, see 2 Remington's Digest, p. 1513, Laws 1903, page 242, §§ 1-5, superseded by § 6; *Coleman v. Cravens*, 41 Wash. 1.

§ 1623. Notice, How Served.

The notice of the hearing shall be served upon such minor personally if over fourteen years of age, or such insane or incompetent person, and also upon the head of the family with whom such minor, insane or incompetent person resides, and if such minor, insane or incompetent person is in the care and custody of an officer, or institution, then upon such officer or head of such institution, at least ten days prior to the time set for the hearing; and proof of such service shall be made and filed in the same manner as proof of the service of a summons: Provided, however, that in case that the person making application for the appointment of such guardian, is the parent of a minor under fourteen years of age, then the notice herein provided for shall be dispensed with and the court may make the order appointing the parent as such guardian upon his or her petition being presented. [L. '09, p. 408, § 2. Cf. L. '03, pp. 242, 243, §§ 2, 3.]

§ 1624. Prosecuting Attorney to Appear for Ward.

Before the hearing the petition or a copy thereof shall be submitted to the prosecuting attorney who shall appear for such minor, insane or in-

competent person at said hearing, and if the prosecuting attorney desires further time in which to make an investigation, the court shall at his request continue the hearing to some certain day, and the court may on its own motion or at the request of the prosecuting attorney, direct that the minor, insane or mentally incompetent person, be brought into court in person, and for this purpose may make an order directing the sheriff to bring him or her into court.

In case the prosecuting attorney or his deputy is unable to attend at the hearing, the court may appoint some suitable person to act in his place: Provided, however, that nothing herein shall prevent the minor, insane or mentally incompetent person from appearing by an attorney selected by himself, or by some one on his behalf, in which case it will not be necessary for the prosecuting attorney to appear at the hearing. [L. '09, p. 409, § 3. Cf. L. '03, p. 243, § 4.]

§ 1625. Service on Nonresidents—Publication.

When a minor, insane or mentally incompetent person, resides out of the state of Washington, and has property within the state requiring the care of a guardian, and a petition is filed in the county where such minor, insane or mentally incompetent person has property, the petitioner shall make an affidavit stating the fact of the nonresidence of such minor, insane or mentally incompetent person, and then the notice provided for in section 1622 shall be served by publication in some newspaper printed and of general circulation in the county where the petition is filed for four weeks, to wit; for five successive weekly issues of such paper prior to the time set for the hearing and proof of such publication shall be made and filed, as in the case of a summons by publication, and thereafter the same proceedings shall be had as hereinbefore provided. [L. '09, p. 409, § 4. Cf. L. '03, p. 243, § 5.]

This section may perhaps supersede 1 Hill's Code, §§ 3071-3078 (Code 1881, §§ 1658-1665), given in note to § 1674 *infra*.

See *infra*, § 1674 *et seq.*, appointment of guardian for nonresident insane.

§ 1626. (6396.) Who may Nominate—Disqualifications.

If the minor is under fourteen years of age, the judge may nominate and appoint his guardian; if said minor be over fourteen years of age, he or she may nominate the guardian, who, if approved by the superior court, shall be appointed accordingly: Provided, that no judicial officer, excepting justice of the peace, no person of unsound mind, or a party convicted of felony, or a misdemeanor involving moral turpitude, shall be appointed guardian, and when a guardian shall incur either of the foregoing disabilities, he shall be displaced. If a guardian becomes superior judge, the superior court of the proper [adjoining] county shall appoint his successor. [Cf. L. '55, p. 15, § 2; L. '60, p. 225, § 322; L. '73, p. 314, § 300; Cd. '81, § 1605; 2 H. C., § 1129.]

See *infra*, § 1629, who entitled to guardianship.

§ 1627. (6397.) Appointment must be Approved by Court.

If the guardian nominated by the minor be not approved by the judge, or if the minor shall reside out of the state, or if, after being duly cited by the court he shall neglect for ten days to nominate a suitable person, the

court may appoint the guardian in the same manner as if the minor were under the age of fourteen years. [L. '60, p. 226, § 323; Cd. '81, § 1606; 2 H. C., § 1130.]

§ 1628. (6398.) Guardian not to be Removed Without Cause.

When a guardian has been appointed for any minor under the age of fourteen, such guardian shall not be removed when such minor arrives at the age of fourteen, except for good cause shown. [L. '55, p. 15, § 3; Cd. '81, § 1607; 2 H. C., § 1131.]

§ 1629. (6399.) Who Entitled to Guardianship.

The father of the minor if living, and in case of his decease the mother, being themselves respectively competent to transact their own business, shall be entitled to the guardianship of a minor. [Cf. L. '60, p. 226, § 235; L. '73, p. 315, § 303; Cd. '81, § 1608; 2 H. C., § 1132.]

See *supra*, § 1626, who may nominate—disqualifications.

§ 1630. (6400.) Guardian to have Custody of Ward, When.

If the minor have no father or mother living, and competent to have the custody and care of the education of such minor, the guardian so appointed shall have the custody and tuition of his ward. [L. '60, p. 226, § 326; Cd. '81, § 1609; 2 H. C., § 1133.]

See *infra*, § 1664, custody of person and estate of insane ward.

Cited in 45 Wash. 50, 51.

Persons who may be appointed: See 1 Remington's Digest, p. 1342, § 1; Lovell v. House of the Good Shepherd, 9 Wash. 419; Willet v. Warren, 34 Wash. 647; Russner v. McMillan, 37 Wash. 416.

It is not a valid objection to the appointment of a guardian for an adopted child

that the guardian would inherit from the child, in case of her decease without issue, and that it would be to the guardian's interest to prevent her marriage, especially where the court has found such guardian to be a suitable and proper person: *In re Master-son's Estate*, 45 Wash. 48.

§ 1631. (6401.) Guardianship Terminates, When.

Every guardian appointed as aforesaid shall have the custody and tuition of the minor, and the care and management of the estate of such minor, except as hereinafter provided, until he or she shall have attained the age of majority; and males shall be deemed of full and legal age when they shall be twenty-one years old, and females shall be deemed of full and legal age when they shall be eighteen years old, or at any age under eighteen, when, with the consent of the parent or guardian, or other person under whose care or government they may be, they shall have been lawfully married. [Cf. L. '55, p. 16, § 6; L. '60, p. 326, § 327; L. '73, p. 315, § 305; Cd. '81, § 1610; 2 H. C., § 1134.]

Cited in 50 Wash. 476.

Personal appearance of a ward who has attained his majority, upon the hearing of the final account of a guardian of a minor, is sufficient, without the appointment of a guardian ad litem, to give the court jurisdiction to order a discharge of the guardian, where the court had jurisdiction of the guardianship: *Meeker v. Mettler*, 50 Wash. 473.

The finding of a court having jurisdiction of the guardianship of a minor, that the ward has attained his majority is binding upon the ward and privies in estate until vacated or set aside for fraud or error; and is consequently a bar to an action by his heirs to set aside his subsequent conveyances on the ground that he was a minor: *Id.*

§ 1632. (6403.*) Bond of Guardian.

The court shall take of each guardian appointed under this act a bond, with approved security payable to the state of Washington, in the sum of not less than twice the value of the personal property and twice the estimated value of the annual rents, profits and issues of the real property belonging to the estate, conditioned as follows: The condition of this obligation is such that if the above-bound A. B., who has been appointed guardian for C. D. shall faithfully discharge the office and trust of such guardian according to law, and shall render a fair and just account of his said guardianship to the superior court for the county of — from time to time as he shall thereto be required by said court, and comply with all orders of said court, lawfully made relative to the goods, chattels and moneys of such minor, and render and pay to such minor all moneys, goods and chattels, title papers and effects which may come into the hands or possession of such guardian belonging to such minor, when such minor shall thereto be entitled, or to any subsequent guardian, should such court so direct, this obligation shall be void, or otherwise to remain in full force and virtue. Which bond shall be for the use of such minor, and shall not become void upon the first recovery, but may be put in suit from time to time against all or any one or more of the obligors, in the name and for the use and benefit of any person entitled by a breach thereof, until the whole penalty shall be recovered thereon. The judge may require an additional bond whenever a sale of real estate belonging to a minor is ordered by him, but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or of any bond given in place thereof is equal to twice the value of the personal property remaining in or that may come into the possession of the guardian, including the annual rents, profits and issues of real estate and twice the probable amount to be realized on the sale of the property ordered to be sold. [L. '05, p. 33, §1, Cf. L. '60, p. 226, § 329; Cd. '81, § 1612; 2 H. C., § 1136.]

See *infra*, § 1633, provisions applicable to bond.

See *infra*, § 1657, bond of guardian for insane person.

Cited in 23 Wash. 151.

§ 1633. (6408.) Provisions Applicable to Bond of Guardian.

All the provisions of chapter eight of this title relative to bonds given by executors and administrators shall apply to bonds taken of guardians. [L. '60, p. 228, § 334; Cd. '81, § 1617; 2 H. C., § 1141.]

See *supra*, § 1395 et seq., bonds of administrators, etc.

See *supra*, § 1632, bond of guardian, conditions and form of.

§ 1634. (6420.) Discharge of Sureties.

Sureties in the bond of any guardian may be discharged from liability therein, under the same rule and regulation prescribed for the discharge of the sureties in the bond of executors and administrators, and the provisions of the chapter regulating the same shall apply to guardians, and guardians' bonds and sureties. [Cf. L. '55, p. 19, § 26; L. '60, p. 229, § 346; Cd. '81, § 1629; 2 H. C., § 1153.]

See *supra*, § 1402, new bond discharges.

See *supra*, § 1432, limitations of actions against.

See *infra*, § 8336, release of sureties.

§ 1635. (6404.) Court may Require Accounting and Further Security.

Superior courts shall have power, in their respective counties, with or without previous complaint, by an order duly made and served, to oblige all guardians of minors, from time to time, to render their respective accounts, upon oath, touching their guardianship, to said courts for adjustment, and shall have power to compel such guardian to give supplementary security, whenever it shall judge proper, and in default thereof, to remove such guardian. [L. '60, p. 227, § 330; Cd. '81, § 1613; 2 H. C., § 1137.]

Cited in 48 Wash. 428.

§ 1636. (6405.) Duties of Guardian.

It shall be the duty of the guardian of any minor,—

1. To make out and file, within three months after his appointment, a full inventory, verified by oath, of the real and personal estate of his ward, with the value of the same, and failing so to do, it shall be the duty of the court to remove him and appoint a successor;

2. To manage the estate for the best interest of his ward;

3. To render on oath to the proper court an account of his receipts and of his expenditures, with vouchers therefor, at least once in every two years, and whenever cited so to do, and failing so to do, he shall receive no allowances for services, and be liable to said ward on his bond in damages for ten per cent of the whole amount of the estate, both real and personal, in his hands belonging to such ward;

4. At the expiration of his trust fully to account for and pay over to the proper person all the estate of said ward remaining in his hands;

5. To pay all just debts due from such ward out of the estate in his hands, and to collect all debts due such ward, and in case of doubtful debts, to compound the same, and to appear for and defend, or cause to be defended, all suits against such ward;

6. When any ward has no father or mother, or such father or mother is unable or fails to educate such ward, it shall be the duty of his guardian to provide for him such education as the amount of his estate may justify. [Cf. L. '55, p. 16, § 9; L. '60, p. 227, § 331; Cd. '81, § 1614; 2 H. C., § 1138; L. '95, p. 65, § 1.]

See *infra*, §§ 1660–1664, duty of guardians of insane persons.

Cited in 27 Wash. 257.

Custody and care of ward's person and estate: See 1 Remington's Digest, p. 1343, §§ 4-7; *Terry v. Sicade*, 37 Wash. 249; *Schulteis v. Nash*, 27 Wash. 261; *Burgert v. Caroline*, 31 Wash. 62.

An order requiring a guardian to pay over to a ward, who had become of age, her proportion of certain moneys alleged to be in his hands as such guardian, and to account to those of his wards who had not become of age, is a final and appealable order: In *re* Guardian of Hill's Heirs, 7 Wash. 421.

In such case where the order adjudges that the guardian pay the costs, he has sufficient interest in the subject matter of the order to authorize him to appeal therefrom: *Id.*

Where an insurance policy is made payable to the children of the deceased, the money collected thereon is no part of decedent's estate, but goes to the heirs directly; In *re* Hill's Heirs, 8 Wash. 330; and, if a guardian, who is an executor of the estate of his ward's deceased father, allows the funds of his ward to become commingled with those of the testator's estate, and his accounts as guardian to become confused with those of the executor's, the court is warranted in finding that the minor heirs had been supported from the funds of the estate, and that insurance money collected by the guardian had been kept intact for the use of the ward: *Id.*

As to time within which ward, after arriving at age, must commence action against guardian for fraud, see *Wickham v. Sprague*, 18 Wash. 466.

§ 1637. (6402.) Guardian may Prosecute and Defend for Ward.

Guardians, by virtue of their office as such, shall be allowed in all cases to prosecute and defend for their wards. [L. '60, p. 226, § 328; Cd. '81, § 1611; 2 H. C., § 1135.]

Cited in 27 Wash. 257.

Where a suitable general guardian has been appointed, it is error to appoint a temporary guardian for a special purpose, without a clear showing of the necessity thereof: *Reed v. Brown*, 36 Wash. 130.

§ 1638. Compromise of Suits by Guardian.

Every minor, imbecile or insane person, having a cause of action against him, or in his favor, shall be bound by any compromise or settlement thereof to the same extent as a person not under legal disability would be bound; providing such compromise is made by the guardian of such minor, imbecile or insane person by and with the advice of the court, by whom such guardian was appointed. Before making a compromise, the guardian shall file in the court wherein he is appointed, and to which he is accountable, a petition briefly stating the nature of the claim, together with the reasons for the making of such compromise. In case the ward is a minor more than fourteen years of age, a copy of the petition with a notice of the time of hearing, shall be served upon the ward. The guardian shall call to the attention of the court all facts pertaining to said matter, and if the court, after such hearing, directs a compromise to be made, the guardian is hereby authorized to make and accept acquittances which shall be forever binding upon his ward. [L. '03, p. 153, § 1.]

§ 1639. (6405a.) Presentation of Claim to Guardian.

No holder of a claim, demand or judgment against an estate of a person under guardianship shall maintain an action thereon or enforce the same, unless the claim demand or judgment shall have been first presented to such guardian and by him rejected in whole or in part. A failure or neglect to allow a claim for thirty days after the same is presented, shall be deemed a rejection thereof. [L. '97, p. 203, § 1.]

The title of this act relates to the insane as well as to minors.

§ 1640. (6405b.) Judgments to be Presented for Allowance.

No judgment entered against the estate or person of a ward, except for the foreclosure of a mortgage or lien, shall be a lien against or upon the estate of such ward, but such judgment shall be presented and paid as other claims of the same class or grade. [L. '97, p. 203, § 2.]

See note to last section.

§ 1641. (6406.) Court may Change Investment.

The court may, on the application of a guardian or any other person, said guardian having due written notice thereof, order and decree any change to be made in the investment of the estate of any ward that may to such court seem advantageous to such estate. [Cf. L. '55, p. 17, § 10; L. '60, p. 227, § 332; Cd. '81, § 1615; 2 H. C., § 1139.]

§ 1642. (6407.) Removal of Guardian and Proceedings Thereafter.

The court in all cases shall have power to remove guardians for good and sufficient reasons, which shall be entered of record, and to appoint others in their place or in the place of those who may die, who shall give bond and

security for the faithful discharge of their duties as heretofore prescribed in this chapter; and when any guardian shall be removed or die, and a successor be appointed, the court shall have power to compel such guardian to deliver up to such successor all goods, chattels, moneys, title-papers, or other effects belonging to such minor which may be in the possession of such guardian so removed, or of the executors or administrators of a deceased guardian, or of any other person or persons who have the same, and upon failure, to commit the party offending to prison, until he, she, or they comply with the order of the court. [Cf. L. '55, p. 17, § 11; L. '60, p. 227, § 333; Cd. '81, § 1616; 2 H. C., § 1140.]

§ 1643. (6409.) Testamentary Guardian, Appointment and Bond of.

The father of every legitimate child, who is a minor, may, by his last will in writing, appoint a guardian or guardians for his minor children, whether born at the time of making such will or afterwards, to continue during the minority of such child, or for any less time, and every such testamentary guardian shall give bond in like manner and with like condition as hereinbefore required, and he shall have the same powers and perform the same duties with regard to the person and estate of the ward as a guardian appointed as aforesaid. [L. '60, p. 228, § 335; Cd. '81, § 1618; 2 H. C., § 1142.]

§ 1644. (6410.) Court may Appoint Guardian ad Litem.

Nothing contained in this chapter shall affect or impair the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein, or to commence and prosecute any suit in his behalf. [Cf. L. '60, p. 228, § 336; L. '73, p. 318, § 314; Cd. '81, § 1619; 2 H. C., § 1143.]

See supra, § 187, appointment of guardian ad litem.

Cited in 23 Wash. 151; 24 Wash. 128.

A judgment against minors resulting from an appearance in the suit by one who assumed, without lawful authority, to be their guardian, does not conclude them, and they may question it in a collateral proceeding: *Hatch v. Ferguson*, 57 Fed. 96d.

The guardian of a minor who wages an action has the same right to control it that any other suitor has, and may stipulate for dismissal of appeal regardless of his attorney's objections: *So. Bend Land Co. v. Denio*, 7 Wash. 303.

§ 1645. (6411.) Estate may be Sold Under Order of Court, When.

Whenever necessary for the education, support, or payment of the just debts of any minor, or for the discharge of any liens on the real estate of such minor, or whenever the real estate of such minor is suffering unavoidable waste, or a better investment of the value thereof can be made, the court may, on the application of such guardian, order the same or a part thereof to be sold. [L. '55, p. 17, § 14; Cd. '81, § 1620; 2 H. C., § 1144.]

See infra, § 1683 et seq., private sales of real property.

See infra, §§ 1693-1695, validity of sales of real property.

See infra, note to § 1674, sale of nonresident minor's property.

Cited in 39 Wash. 687.

§ 1646. (6412.) Requisites of Petition.

Such application shall be by petition, verified by the oath of the guardian, and shall substantially set forth:—

1. The value and character of all personal estate belonging to such ward that has come to the knowledge or possession of such guardian;
2. The disposition made of such personal estate;
3. The amount and condition of the ward's personal estate, if any, dependent upon the settlement of any estate, or the execution of any trust;
4. The annual value of the real estate of the ward;
5. The amount of rent received and the application thereof;
6. The proposed manner of reinvesting the proceeds of the sale, if asked for that purpose;
7. Each item of indebtedness, or the amount and character of the lien, if the sale is prayed for the liquidation thereof;
8. The age of the ward, where and with whom residing;
9. All other facts connected with the estate and condition of the ward necessary to enable the court fully to understand the same. If there is no personal estate belonging to such ward, in possession or expectancy, and none has come into the hands of such guardian, and no rents have been received the fact shall be stated in the application. [Cf. L. '55, p. 17, § 15; L. '60, p. 228, § 338; Cd. '81, § 1621; 2 H. C., § 1145.]

A partition of property may be voluntary, and if the act of the guardian in proceedings therein, and in making a sale of the allotted part, is not disaffirmed by the ward within a reasonable time after attaining majority, he will be deemed to

have ratified it: *Brazeo v. Schofield*, 2 W. T. 209.

Parol partition, consummated by possession and dominion in severalty, confirmed by long-continued acquiescence and many changes of title, will not be disturbed in equity: *Id.*

§ 1647. (6413.) Manner and Terms of Sale.

If it shall appear to the court from such petition, and from the hearing thereon, that it is necessary or would be beneficial to the ward that such real estate or some part of it should be sold, the court may authorize the said guardian to sell the same at public sale, on the same terms and notice required for sales of real estate by executors and administrators. [Cf. L. '60, p. 229, § 339; L. 73, p. 319, § 317; Cd. '81, § 1622; 2 H. C., § 1146.]

See *supra*, § 1499, et seq., order to show cause for sale.

Sale—Requisites and validity, notice, ratification, etc.: See 1 Remington's Digest, pp. 1343, 1344, §§ 8-12; *Brazeo v. Schofield*, 2 W. T. 209; *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132.

§ 1648. (6414.) Provisions Applicable to Sales by Guardians.

All the provisions of the chapter regulating sales by executors and administrators shall be applicable to sales made by guardians. [L. '60, p. 229, § 340; Cd. '81, § 1623; 2 H. C., § 1147.]

See *supra*, § 1498 et seq., sales by administrators, etc.

§ 1649. (6415.) Report of Sale.

Within thirty days after such sale, such guardian shall make report thereof to the court, and produce the proceeds of such sale, and the notes or obligations or other securities taken to secure the payment of the purchase money. [L. '60, p. 229, § 341; Cd. '81, § 1624; 2 H. C., § 1148.]

Cited in 23 Wash. 151.

§ 1650. (6416.) Confirmation of Sale.

The court, in confirming such sale and directing a conveyance, shall be governed by the law regulating the confirming of sales of real estate made by

executors or administrators, and the making of conveyances on such sales. [L. '60, p. 229, § 343; Cd. '81, § 1625; 2 H. C., § 1149.]

See supra, § 1515, and notes, confirmation of sale.
See infra, § 1693, validity of sales.

§ 1651. (6417.) Powers of Guardian in Partition.

The guardian of any minor may join in and assent to the partition of the real estate of such minor, under the direction of the court, upon a petition for partition. [L. '55, p. 19, § 24; Cd. '81, § 1626; 2 H. C., § 1150.]

See supra, § 1599, guardian to be appointed when, in partition.

§ 1652. (6418.) Compensation and Expenses.

Every guardian shall be allowed by the court, on settling his accounts, the amount of all reasonable expenses incurred in the execution of his trust, and also such compensation for his services as the court shall deem reasonable. [L. '55, p. 19, § 25; Cd. '81, § 1627; 2 H. C., § 1151.]

See supra, §§ 1547-1549, compensation of administrators.

§ 1653. (6419.) Nonresidents may Remove Ward's Property, When.

When the guardian and ward are both nonresidents, and the ward is entitled to property in this state, which may be removed to another state or territory, without conflict to any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state or territory in which such ward may reside, upon the application of the guardian to the judge of the superior court of the county in which the estate of the ward, or the principal part thereof, may be, in the manner following: The guardian so applying must produce a transcript from the records of a court of competent jurisdiction, certified according to the laws of this state, showing his appointment as guardian of the ward in the state or territory in which he and the said ward reside; that he has qualified as such according to the laws thereof, and given bond, with sureties for the performance of his trust; and must also give thirty days' notice to the resident executor, administrator, guardian, agent, or trustee, if there be such, of the applications. Thereupon, if no objection be made, or if no good cause be shown to the contrary, the judge of the court shall make an order granting such guardian leave to remove the property of said ward to the state or territory in which he or she may reside; which order shall be full and complete authority to said guardian to sue for and receive the same in his own name, for the use and benefit of said ward. [L. '73, p. 320, § 323; Cd. '81, § 1628; 2 H. C., § 1152.]

Cited in 42 Wash. 369.

Ward may compel accounting against executor of foreign guardian by an action in the superior court, where both ward and guardian were originally residents of the state of Indiana, where the guardian, before discharge and accounting to his ward, removed to this state and died here, and where the partner of the guardian here was appointed as his executor: *Ong v. Whipple*, 3 W. T. 233; and

in such case it is not necessary to first present his claim for allowance to the executor: *Id.*

Choses in action are "property" within the meaning of this section: *Crosby*, In re, 42 Wash. 366.

The superior court has jurisdiction to grant a foreign guardian of nonresident wards leave to bring action against an executor in this state: *Id.*, 42 Wash. 366.

CHAPTER XVIII.

THE GUARDIANSHIP OF IDIOTS AND INSANE PERSONS.

§ 1654. (6424.) Guardians for Idiots, Insane and Other Persons.

The several superior courts [in their respective counties] shall have power to appoint guardians to take the care, custody, and management of all idiots, insane persons, and all who are incapable of conducting their own affairs; and of their estates, real and personal; the maintenance of themselves and families, and the education of their children. [Cf. L. '60, p. 231, § 348; L. '73, p. 321, § 326; Cd. '81, § 1631; 2 H. C., § 1154.]

See supra, §§ 1622-1625, procedure for appointment of guardian.

See infra, § 1674, estates of nonresident insane.

See supra, § 1638, compromise of claims against.

See supra, §§ 1639, 1640, presentation of claims and payment of judgments against.

See infra, § 5953 et seq., commitment of insane patients.

Cited in 2 Wash. 273, 275, 278; 13 Wash. 630.

Guardianship of insane persons: See 2 Remington's Digest, p. 1513, §§ 4-8; Coleman v. Cravens, 41 Wash. 1; Dickman v. Strobach, 26 Wash. 558.

The appointment of a guardian for the person and estate of one whose mind has become unsound from the constant and excessive use of alcoholic liquors, thereby rendering him incapable of conducting his own affairs, is authorized by this section: In re Wetmore, 6 Wash. 271, 274.

Although the court appointed a guardian for an habitual drunkard, the latter not being before the court at the time, yet where, without attacking the proceedings, he subsequently submits himself to the jurisdiction of the court by filing a petition denying the allegation of the original peti-

tion, and asking for an investigation upon the merits and for an order to set aside the appointment of such guardian, the court thereby obtains jurisdiction of his person, and from any final order in the premises an appeal will lie: Id.

The word "insane" as used in this and following sections includes every person for whom a guardian may be appointed under the same. It includes idiotic persons, as well as those who are incapable of managing their own affairs by reason of any unsoundness of mind due to whatever cause: Id.

As to notice and the record of appointment of a guardian for an incompetent person, see 1 Remington's Digest, p. 1343, § 3; State ex rel. Lowary v. Superior Court, 41 Wash. 450.

§ 1655. (6425.) Court to Appoint Guardian, When.

If it be found by the court that the person so brought before the court is of unsound mind and incapable of managing his own affairs, the court shall appoint a guardian for the estate of such insane person. [Cf. L. '60, p. 231, § 350; L. '73, p. 322, § 330; Cd. '81, § 1635; 2 H. C., § 1155.]

Cited in 6 Wash. 274, 276.

§ 1656. (6426.) Costs Taxed Against Prosecuting Witness, When.

If the person alleged to be insane shall be discharged, and it shall be thought by the court that there were no grounds for such impression of insanity, then the cost shall be paid by the person at whose instance the proceeding was had, and execution may issue for the same. [Cf. L. '60, p. 231, § 352; L. '73, p. 322, § 332; Cd. '81, § 1637; 2 H. C., § 1156.]

Cited in 6 Wash. 274.

§ 1657. (6427.) Bond.

Every such guardian so appointed shall, before entering upon the duties assigned him, enter into bond to the board of county commissioners, in such sum and with such security as the court shall approve, conditioned that he will take proper care of such insane person, and manage and minister his

effects to the best advantage, according to law; and that he will faithfully discharge all duties as such guardian which may by law, or by the order, sentence, or decree of any court of competent jurisdiction, devolve upon him; which bond shall be filed in the office of the clerk of the superior court. A copy thereof, duly certified, shall be evidence in all respects as the original. [L. '60, p. 231, § 353; Cd. '81, § 1638; 2 H. C., § 1157.]

Cited in 26 Wash. 560.

A bond, given under this section, is not an obligation in itself, but merely collateral security for the proper discharge of

duties imposed by the statutes; and an action thereon is not an action upon a contract liability in writing: *Dickman v. Strobach*, 26 Wash. 558.

§ 1658. (6428.) Notice of Appointment to be Published.

It shall be the duty of every such guardian, within twenty days after his appointment, to cause notice thereof to be published in some newspaper printed in this state, or otherwise publish such notice, at such time and place and in such manner as the court shall decide. [Cf. L. '60, p. 231, § 354; L. '73, p. 323, § 334; Cd. '81, § 1639; 2 H. C., § 1158.]

§ 1659. (6429.) Custody of Ward's Estate.

It shall be the duty of such guardian to collect and take into his possession the goods, chattels, moneys, effects, and other evidences of debt, and all writings touching the estate, real and personal, of the person under his guardianship. [L. '60, p. 232, § 356; Cd. '81, § 1640; 2 H. C., § 1159.]

§ 1660. (6430.) Guardian to File Inventory.

Within forty days after his appointment, such guardian shall make out, and file in the office of the clerk of the superior court by which he was appointed, a just and true inventory of the real and personal estate of his ward, stating the income and profits thereof, and the debts, credits and effects, as the same shall have come to his knowledge. And if, after having filed such inventory, it shall be found that there is other property belonging to said estate, it shall be the duty of such guardian to make out and file an additional inventory, containing a just and full account of the same, from time to time, as the same may be discovered. [Cf. L. '60, p. 232, §§ 357, 358; L. '73, p. 323, § 336; Cd. '81, § 1641; 2 H. C., § 1160.]

§ 1661. (6431.) Inventory to be Witnessed and Verified.

All such inventories shall be made in the presence of and attested by two credible witnesses in the neighborhood, and shall be verified by the oath of the guardian. [L. '60, p. 232, § 359; Cd. '81, § 1642; 2 H. C., § 1161.]

§ 1662. (6432.) Guardian to Prosecute and Defend Actions for Ward.

It shall be the duty of every such guardian to prosecute all actions commenced at the time of his appointment, or thereafter to be commenced, by or on account of his ward, and to defend all actions [pending or] which may be brought against such ward. [L. '60, p. 232, § 360; Cd. '81, § 1643; 2 H. C., § 1162.]

See supra, § 1638, compromise of suit by guardian.

See supra, § 1639, claims to be presented to guardian.

Cited in 29 Wash. 421.

Under this section a guardian is without authority to enter into a stipulation agreeing to abide the result of an action

under a defense imposed by another party: *Mattson v. Mattson*, 29 Wash. 417.

§ 1663. (6433.) Guardian to Collect Dues, and Pay Debts.

Every such guardian is authorized and required to collect all debts due to his ward, and give acquittances and discharges thereof and adjust, settle, and pay all demands due and becoming due from his ward, so far as his estate and effects will extend. [L. '60, p. 232, § 361; Cd. '81, § 1644; 2 H. C., § 1163.]

§ 1664. (6434.*) Power of Court Over Person and Estate.

The superior court shall have power to make orders for the restraint, support and safekeeping of such person, for the management of his estate, and the support and maintenance of his family, and education of his children, out of the proceeds of his estate; to set apart and reserve, for the use of such family, all property, real or personal, not necessary to be sold for the payment of debts; and to let, sell or mortgage any part of such estate, real or personal, when necessary for the payment of debts, the maintenance of such insane person or his family, or the education of his children; and to order the sale of any property when a better investment can be made of the proceeds. [L. '07, p. 73, § 1. Cf. L. '60, p. 232, § 362; L. '73, p. 324, § 340; Cd. '81, § 1645; 2 H. C., § 1164.]

§ 1665. (6435.*) Sale, Mortgage, or Lease of Real Estate.

When cause shall exist therefor it shall be the duty of such guardian to lay the same before the superior court by whom he was appointed, setting forth the particulars relative to the estate, real and personal, of such person, and all the debts by him owing, or the reasons why a better investment can be made accompanied by a correct and true account of his doings therewith; whereupon, if the court shall find in the exercise of its sound discretion that it is necessary for the payment of debts to dispose of such estate, real or personal, or a portion thereof, or that a better investment of such estate or a portion thereof can be made, it shall be the duty of such court to make an order directing the mortgage, lease or sale at his discretion, of the whole or such part of the real estate as may be necessary. [L. '07, p. 73, § 2. Cf. L. '60, p. 232, § 363; Cd. '81, § 1646; 2 H. C., § 1165.]

See *infra*, § 1679, sale of nonresident insane person's community real estate.

See *infra*, § 1683 et seq., private sales by guardians.

§ 1666. (6436.) Order of Sale and Proceedings.

The court making such order shall direct the time and terms of such sale, mortgage, or lease of such estate, and the manner in which the proceeds shall be applied; and shall give due notice thereof, together with a full description of the property to be thus disposed of, at which time and place it shall be the duty of the guardian to execute the order of said court, and to make a full report of his doings therein, which report shall be accompanied by the affidavit of the guardian verifying the report, and stating that such guardian did not directly or indirectly become the purchaser thereof; or if otherwise disposed of, that he is not directly or indirectly interested personally in the agreement. [L. '60, p. 233, § 364; Cd. '81, § 1647; 2 H. C., § 1166.]

See *infra*, § 1683 et seq., private sale of real property.

§ 1667. (6437.*) Execution of Instruments by Guardian.

When any such sale, mortgage or lease is approved by the court ordering the same, as having been executed according to law, and not under such

circumstances as to operate prejudicially to the interest of such ward, it shall be the duty of the guardian to execute a deed, mortgage or other instrument of writing, which shall be as valid and effective in law as if executed by such ward when of sound mind and discretion. In case of the sale of community property the sane member of the community may either join in the conveyance by the guardian or execute a separate conveyance for the property. [L. '07, p. 74, § 3. Cf. L. '60, p. 233, § 365; L. '73, p. 324, § 343; Cd. '81, § 1648; 2 H. C., § 1167.]

§ 1668. (6438.) Proceedings may be Set Aside.

If such proceedings be disapproved by said court, the court may set them aside, and proceed in like manner as if no sale had been made. [Cf. L. '60, p. 233, § 366; L. '73, p. 325, § 344; Cd. '81, § 1649; 2 H. C., § 1168.]

§ 1669. (6439.) Guardian to Account, When.

Every such guardian, as often as required by the court appointing him, shall render a true and perfect account of his guardianship. [L. '60, p. 233, § 367; Cd. '81, § 1650; 2 H. C., § 1169.]

No provision in this chapter for compensation of guardian.

§ 1670. (6440.) Ward Exempt from Process.

No such ward shall be held to bail, or his body be taken in execution, in any civil action; and in all actions commenced against him the process shall be served upon his guardian, and in all judgments against such ward (or his guardian as such) the execution shall be against the property of the ward only, and in no case against his body, nor against that of his guardian, nor the property of said guardian, unless he shall have rendered himself liable thereunto. [Cf. L. '60, p. 233, § 368; L. '73, p. 325, § 346; Cd. '81, § 1651; 2 H. C., § 1170.]

See supra, § 1640, judgment not to be a lien against estate.

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| <p>Cited in 13 Wash. 630. Actions against insane persons: See 1 Remington's Digest, p. 1514, §§ 10-14; Townsend v. Price, 19 Wash. 415. It was not the intention of the legislature to exempt the property of a lunatic</p> | <p>from the operations of a legal judgment, but if the judgment has been fraudulently obtained, the remedy is in equity to set it aside: Pollock v. Horn, 13 Wash. 626, 630.</p> |
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§ 1671. (6441.) Proceedings in Case Ward Recovers His Reason.

Whenever the court shall receive information that such ward has recovered his reason, he shall immediately inquire into the facts, and if he finds that such ward is of sound mind, he shall forthwith discharge such person from care and custody; and the guardian shall immediately settle his accounts and restore to such person all things remaining in his hands belonging or appertaining to such ward. [L. '60, p. 233, § 369; Cd. '81, § 1652; 2 H. C., § 1171.]

§ 1672. (6442.) Death of Ward, Effect of.

In case of the death of any such ward while under guardianship, the power of the guardian shall cease, and the estate descend and be disposed of in the same manner as if said ward had been of sound mind; the guardian shall immediately settle his accounts and deliver the estate and the effects of such ward to his legal representatives. [Cf. L. '60, p. 234, § 370; L. '73, p. 326, § 351; Cd. '81, p. 1656; 2 H. C., § 1172.]

§ 1673. (6443.) Removal of Guardian, When.

The several superior courts shall have the power to remove any such guardian at any time, for neglect of duty, mismanagement, or of disobedience to any lawful order, and appoint another in his place, whereupon such guardian shall immediately settle his account and render to his successor the estate and effects of his ward. [L. '60, p. 234, § 371; Cd. '81, § 1657; 2 H. C., § 1173.]

CHAPTER XIX.

ESTATES OF NONRESIDENT PERSONS OF UNSOUND MIND.

§ 1674. (6447.) Nonresident Guardian—Letters, How Obtained.

Whenever any insane person or person non compos mentis who resides without this state, and who shall have no guardian within this state, or, if he or she has a foreign guardian, the said guardian may file an authenticated copy of his letters of guardianship in the office of the clerk of the superior court of any county in this state in which there may be property of his ward, and upon the filing of such authenticated copy of his letters of guardianship as aforesaid, the court shall order him to enter into a good and sufficient bond, in such sum as the court may require, conditioned and subject to all the provisions of law concerning the bonds of guardians of minors in this state, with sufficient freehold surety resident in said county. After said bond is duly approved by the court said guardian shall be considered for all purposes as a domestic guardian. [L. '93, p. 286, § 1.]

See supra, § 1625, procedure for appointment of guardian for person residing out of this state, a later enactment.

Section 10 of the Act of 1893, p. 291, attempting to repeal §§ 3071-3078 of 1 Hill's Code, is insufficient under Constitution, Article II, § 19, as the repealing clause is not within the title of the act; hence these sections are inserted in the notes as still in force, except perhaps, as to estates of insane persons. But see § 1625, supra, requiring the appointment of a guardian to control the estates of nonresident wards "requiring the care of a guardian."

"§ 3071. (1658.) Real estate belonging to minors and persons of unsound mind, residing out of this state, may be sold upon the application of the foreign guardian of such minor or person of unsound mind to the superior court of the county in which such land is situated, upon the same terms as are or may be provided by law in case of the sale of real estate belonging to minors residing in this state.

"§ 3072. (1659.) When any minor or person of unsound mind residing out of the limits of this state has any real estate, goods, chattels, rights, credits, moneys or effects in this state, the superior court having jurisdiction of the county in which such property or any part thereof is situate or may be, shall, upon the application of the foreign guardian of such minor or person of unsound mind, appoint a trustee of such minor or person of un-

sound mind to manage, collect, lease, and take care of said property.

"§ 3073. (1660.) The first appointment of a trustee, lawfully made, shall extend to all the property and effects of the minor in this state, and shall exclude the jurisdiction of the superior court of any other county.

"§ 3074. (1661.) The said trustee shall give bond with surety to the satisfaction of the superior court, and shall take upon himself the management of the estate and property of such minor or person of unsound mind, situate in this state, and the collection of debts and other demands due such minor or person of unsound mind from persons residing or being in this state, and shall settle with the court, and be liable to suit or removal, or both, for neglect or misconduct in the performance of his duties, in like manner as is or may by law be provided in the case of guardians of minors.

"§ 3075. (1662.) The said trustees shall, under the order of the superior court, deliver up to the foreign guardian of such minor or person of unsound mind all the personal property, rights and credits belonging to such minor or person of unsound mind; provided, that the superior court shall make no such order except upon application of the foreign guardian, and sufficient proof of his ap-

pointment and qualification in accordance with the laws of the state or place of residence of such guardian.

"§ 3076. (1663.) The said trustee shall have no power to apply to the superior court for the sale of real estate of such minor or person of unsound mind.

"§ 3077. (1664.) The said trustee, unless removed by the court, holds his appointment so long as the services of a trustee may be required, and shall receive such compensation for his services as may be stipulated between him and the for-

eign guardian; and in case no agreement has been made, then such compensation as is or may be by law provided for such guardians.

"§ 3078. (1665.) All moneys due such minor or person of unsound mind, in the hands of such trustee, shall be paid over to the foreign guardian so long as he shall remain such guardian, or in case of the decease of such minor or person of unsound mind, then to the administrator or legal representative of such minor or person of unsound mind."

§ 1675. (6448.) Other Persons may Obtain Letters, When.

Should the said foreign guardian fail to file a duly authenticated copy of his said letters of guardianship and the bond required by section 1674 of this chapter within ninety days after his appointment as such foreign guardian, or within ninety days after such insane person or person non compos mentis shall become the owner of any real estate or personal property within this state, or, should said insane person or person non compos mentis have no guardian without this state, any creditor or other person interested in the property or estate of such insane person or person non compos mentis may apply by petition, to the superior court of any county in this state where any of the real estate or personal property of such insane person or person non compos mentis may be situated, for letters of guardianship for the estate and property of such insane person or person non compos mentis. [L. '93, p. 287, § 2.]

See supra, § 1625, appointment of guardian for nonresident, a later enactment.

§ 1676. (6449.) Hearing—Appointment.

Upon the hearing of such petition, on a day to be fixed by the court, and upon proof of the insanity of such person, or that such person is non compos mentis, the court may appoint the petitioner or some other suitable person possessing all of the qualifications necessary or requisite for the guardianship of a minor of this state as such guardian, who, upon the filing and approval of a bond as is provided herein for foreign guardians, shall be the duly constituted guardian of the estate of such ward in this state: Provided, nothing herein shall annul the appointment of any ancillary guardians heretofore appointed by any court of this state, which appointments are hereby ratified, and all such ancillary guardians shall hereafter be subject to all the provisions of this chapter. [L. '93, p. 287, § 3.]

§ 1677. (6450.) Notice to Creditors.

It shall be the duty of the guardian who has been appointed as hereinbefore provided, to cause to be published in a newspaper published in the county in which he was appointed, if any there be, and if there be no newspaper published in said county, then in a newspaper to be designated by the court, a notice to the creditors of the said ward requiring them to present their claims, with the necessary vouchers, within a time to be fixed by the court, at a place of residence or business of such guardian, to be specified in the notice; such notice shall be published as often as the court shall deem necessary, not less than once a week for four successive weeks. [L. '93, p. 287, § 4.]

See supra, § 1639, presentation of claims to guardians.

§ 1678. (6451.) Duties of Guardian.

It shall be the duty of every such guardian,—

1. To make and file within thirty days after his appointment a full inventory, verified by his oath, of all the real or personal property of such ward, with the value of the same, and on failure so to do it shall be the duty of the court to remove him and appoint a successor;

2. To manage the personal and real estate of his said ward to the best interest of said ward;

3. To render under oath to the said court an account of his receipts and expenditures as such guardian, verified by vouchers or proofs, at least once in every two years, or whenever cited by the court to do so. On failure to so account he shall be in contempt of court and subject to such penalties as the court may fix;

4. To pay all just debts due from said ward and collect all debts due said ward by action or otherwise and in case of doubtful debts, under the order of the court, to compound the same, and to appear for and defend or cause to be defended all suits against said ward. [L. '93, p. 288, § 5.]

See supra, § 1638, compromise of suits by guardian.

§ 1679. (6452.) Community Realty, How Disposed of to Pay Debts, etc.

In all cases where guardians have been or may hereafter be appointed for insane persons or persons non compos mentis, under the provisions of this chapter; and who own or may hereafter own community real estate, the husband or wife of such insane person or person non compos mentis, under the order of the court, may join with the guardian in the execution of deeds or mortgages for the disposition or encumbrance of such estate, and the guardian shall, upon application to the court for that purpose, be authorized to sell or mortgage the estate or interest of the said insane person or person non compos mentis for the purpose of paying the debt or providing for the support or maintenance of such ward or the wife of such ward or for the better investment of the proceeds of such estate. [L. '93, p. 288, § 6.]

See infra, § 1683 et seq., private sales by guardians.

§ 1680. (6453.) Proceedings on Failure of Spouse to Join in Conveyance, etc.

In all cases where community debts exist and the husband or wife of any insane person or person non compos mentis, under guardianship, shall fail or refuse for sixty days after an order of the court, to join the said guardian in a sale or conveyance or mortgage of the said community property of the said insane person or person non compos mentis, found necessary by the court for the payment of such community debts, any creditor may commence his action by attachment against any such insane person or person non compos mentis, and the husband or wife of the said insane person or person non compos mentis and the guardian provided for in this chapter: Provided, that any suit or suits which may have heretofore or may hereafter be brought for the purpose of subjecting the property of such insane person or person non compos mentis to the payment of the debts of such insane person or person non compos mentis, shall be consolidated, and in case the writs of attachment levied in such actions shall not have been levied upon all community property of such insane person or person non compos mentis, alias writs of attachment may issue and successive levies may be made of them

to cover and bring into court all of the property of such insane person or person non compos mentis and the husband or wife of either. Such action may be brought only in the court granting the letters of guardianship, and writs of attachment may issue to any county in this state where the said insane person or person non compos mentis may have any property. All known creditors, whether secured by mortgage or otherwise, shall be made parties to such action, and all suits or actions brought for the purpose of enforcing any mortgage or lien shall be consolidated with said action. All creditors shall be made parties to such action and the same shall be prosecuted for the benefit of all creditors, whether they may be made parties or not, and the person so bringing the action herein provided for shall share pro rata with all other creditors, and upon the trial of such action the court may, upon proofs, render such judgment as may be necessary for the protection of all parties, and shall settle and decree the priorities between creditors. The guardian may employ counsel in any such action, and the compensation of such counsel shall be fixed by the court and taxed as a part of the cost in such action. After judgment the court shall order the community property of such insane person or person non compos mentis sold, and under the order of sale in such action the separate property of such insane person or person non compos mentis shall also be sold if the same shall be found by the court to be necessary to pay the debts of such insane person or person non compos mentis, and the proceeds of such sale shall be paid into court for distribution according to the priorities as decreed by the court, and any residue or overplus remaining in the court after paying all the debts found due shall be paid over to the guardian. This chapter shall not suspend or abrogate the existing liens of any attachment, mortgage or other lien, and all such liens shall merge into the judgment of the court rendered in such action according to the priority of each. The court may order all or such part of the community and separate property of the said insane person or person of unsound mind, as it may deem necessary for the payment of the judgment rendered, to be sold, and successive sales may be made under such judgment until an amount sufficient to pay such judgment is realized. All such sales shall be confirmed by the court as in cases of mortgage or other sales, and the court may, if it deem the amount bid at any sale inadequate, order a resale of any property sold under said order. [L. '93, p. 289, § 7.]

See *supra*, § 1515, confirmation.

§ 1681. (6454.) Surplus Moneys, How Disposed of.

When it shall appear to the court that all the real and personal property of such ward has been sold and the debts herein authorized to be paid have been satisfied, and that there are moneys and property in the hands of such guardian, upon the foreign guardian of such ward filing with the clerk of said court a duly certified copy of his appointment as such guardian, by a court of competent jurisdiction in any state or territory where said ward resides, with a copy of his bond, the sufficiency of which shall be certified by the said court, the court shall order all money and property in the hands of the said guardian in this state to be paid and turned over to the said foreign guardian upon his receipting therefor, and upon the filing of the said receipt by the said guardian with the clerk of the court, said guardian and his sureties shall be released from all liabilities for all money and prop-

erty so paid and turned over, and should said guardian fail or refuse to pay or turn over such money or property as provided in said order, the said foreign guardian is hereby empowered as such guardian to sue for and recover the same. [L. '93, p. 290, § 8.]

§ 1682. (6455.) Discharge of Sureties.

The sureties on the bond of any such guardian appointed in this state may be discharged from all liability thereunder under the same rules and regulations as are prescribed for the discharge of the sureties upon the bonds of executors and administrators in this state. [L. '93, p. 291, § 9.]

See references to § 1634, *supra*.

CHAPTER XX.

PRIVATE SALES OF REAL PROPERTY OF ESTATES.

§ 1683. (6460.) Private Sales of Real Property of Estates Generally.

Real property belonging to the estates of decedents, minors, idiots and insane persons may be sold at private sale according to the following provisions. [Cf. L. '91, p. 168, § 1; 2 II. C., § 1174; L. '93, p. 85, § 1.]

See *supra*, §§ 1491, 1499, 1501 et seq., sale or mortgage of real property of decedents' estates.

See *supra*, § 1520, sales without order of court.

See *supra*, § 1645 et seq., sales of minors' lands.

See *supra*, § 1665 et seq., sale of insane wards' lands.

Cited in 39 Wash. 687.

§ 1684. (6461.) Showing Necessary—Extent of Order.

When the court is satisfied after a full hearing upon the petition and an examination of the proof and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary for any of the causes specified in the laws of the state of Washington, or if such sale be assented to by all the persons interested in a decedent's estate, an order must be made to sell the whole or so much and such parts of the real estate described in the petition as the court shall judge necessary or beneficial at either public or private sale. [Cf. L. '91, p. 168, § 2; 2 II. C., § 1175; L. '93, p. 85, § 2.]

"Public sale": the title of this act relates only to "private sales."

§ 1685. (6462.) Order of Sale—Procedure Under.

The order of sale must describe the lands to be sold and the terms of sale, which may be for cash or on a credit not exceeding three years, payable in gross or in installments, and in such kind of money, with interest, as the court may direct. The land may be sold in one parcel or in subdivisions, as the executor, administrator or guardian shall judge the most beneficial to the estate, unless the court otherwise specially directs. Every such sale must be ordered to be made at public auction, unless in the opinion of the court it would benefit the estate to sell the whole or some part of such real estate at private sale. The court may, if the same is asked for in the petition, order or direct such real estate or any part thereof to be sold at either public or private sale, as the executor, administrator or guardian shall judge most beneficial for the estate. If the executor, administrator or guardian objects or refuses to make a sale under the order and as directed therein, he may be

compelled to sell by order of the court made on motion after due notice by any party interested. [L. '91, p. 168, § 3; 2 H. C., § 1176; L. '93, p. 85, § 3.]

"Public auction": See note to last section.

§ 1686. (6463.) Notice—Bids, etc.

When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper if there is one printed in the same county; if none then in such paper as the court or a judge thereof may direct, for two weeks successively next before the day on which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the court to which the return of sale must be made, at any time after the first publication of the notice and before the making of the sale. If it be shown that it will be for the best interests of the estate the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight days from the first publication of the notice of sale, and the sale may be made to correspond with such order. [Cf. L. '91, p. 169, § 4; 2 H. C., § 1177; L. '93, p. 86, § 4.]

§ 1687. (6464.) Sale, Price Necessary to Obtain.

No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real property has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or low, appraisers may be appointed, and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate; this may be done at any time before the sale or the confirmation thereof. [Cf. L. '91, p. 169, § 5; 2 H. C., § 1178; L. '93, p. 86, § 5.]

See *infra*, § 1691, confirmation.

§ 1688. (6465.) Security on Credit Sales.

The executor, administrator, or guardian must, when the sale is made upon a credit, take the notes of the purchaser for the purchase money with a mortgage on the property to secure their payment. [Cf. L. '91, p. 169, § 6; 2 H. C., § 1179; L. '93, p. 86, § 6.]

Under this chapter a guardian of a nonresident insane person may be empowered by the court to sell the real estate belonging to such persons: *Coleman v. Cravens*, 41 Wash. 1.

§ 1689. (6466.) Return of Sale—Hearing—Vacation of.

The executor, administrator or guardian after making such sale of real property must make a return of his proceedings to the court, which must be

filed in the office of the clerk within ten days. A hearing upon the return of the proceedings may be asked for by any interested party by petition, and thereupon the court or judge must fix the day for a hearing, of which notice of at least ten days must be given by the clerk, by notices posted in three public places in the county or by publication in a newspaper, or both, as the court or judge shall direct, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent, exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given and the sale in all respects conducted as if no private sale had taken place. If an offer of ten per cent more in amount than that named in the return be made to the court in writing by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person or to order a new sale. [Cf. L. '91, p. 170, § 7; 2 H. C., § 1180; L. '93, p. 87, § 7.]

§ 1690. (6467.) Objections to Confirmation.

When the return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof and may be heard thereon when the return is heard by the court or judge, and may produce witnesses in support of his objections. [Cf. L. '91, p. 170, § 8; 2 H. C., § 1181; L. '93, p. 87, § 8.]

§ 1691. (6468.) Confirmation—Conveyance.

If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid in section 1689 of this chapter be made and accepted by the court, the court must make an order confirming the sale and directing conveyances to be executed. [Cf. L. '91, p. 170, § 9; 2 H. C., § 1182; L. '93, p. 87, § 9.]

See supra, § 1515, confirmation of administrators' sales.

See supra, § 1650, confirmation of guardians' sales.

See supra, § 1687, confirmation prohibited, when.

§ 1692. (6469.) Other Provisions Applicable.

In all other respects such sale shall be governed by the laws of the state of Washington now in force governing the sale of real property belonging to such estates. [Cf. L. '91, p. 171, § 10; 2 H. C., § 1183; L. '93, p. 88, § 10.]

See references to § 1683, supra.

CHAPTER XXI.

THE VALIDITY OF SALES OF ESTATES.

§ 1693. (6474.) Sales not Void on Account of Irregularity.

In case of an action relating to any estate sold by an executor, administrator, or guardian, in which an heir or person claiming under the deceased, or in which the ward or any person claiming under him, shall contest the validity of the sale, it shall not be voided on account of any irregularity in the proceedings: Provided, it appears,—

1. That the executor, administrator, or guardian was ordered to make the sale by the probate or superior court having jurisdiction of the estate;

2. That he gave a bond which was approved by the probate or superior judge, in case a bond was required upon granting the order;

3. That he gave notice of the time and place and sale, as in the order and by law prescribed; and

4. That the premises were sold accordingly, by public auction, and the sale confirmed by the court, and that they are held by one who purchased them in good faith. [L. '90, p. 82, § 2; 1 H. C., § 3066.]

See *supra*, § 158, limitations of actions to recover real estate sold by executor or administrator.

Cited in 7 Wash. 380, 381; 8 Wash. 105; 23 Wash. 192; 27 Wash. 134; 34 Wash. 311, 312.

As to operation and effect of this chapter, see 1 Remington's Digest, p. 1222, § 132; *Id.*, p. 1344, §§ 10, 11; *Ball v. Clothier*, 34 Wash. 299; *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132.

A sale under an order which gives such an indefinite description of the land as that the same cannot be located, validat-

ing statutes cannot cure: *Hazleton v. Bogardus*, 8 Wash. 102.

If purchasers hold land in good faith under an administrator's sale, although such sale may be irregular, yet if the court had jurisdiction to order the sale and the same was had at public auction after due notice of the time and place, the sale confirmed by court, it will not be disturbed: *Ackerson v. Orchard*, 7 Wash. 377.

§ 1694. (6475.) Conveyance Valid if Sale Authorized by Court.

If the validity of a sale is drawn in question by a person claiming adversely to the title of the deceased, or the ward, or claiming under a title that is not derived from or through the deceased or ward, the sale shall not be void on account of any irregularity in the proceedings, if it appears that the executor, administrator, or guardian was licensed to make the sale by a probate or superior court having jurisdiction of the estate, and that he did, accordingly, execute and acknowledge, in legal form, a deed for the conveyance of the premises. [L. '90, p. 82, § 3; 1 H. C., § 3067.]

§ 1695. (6476.) Chapter Applies to Past as Well as Future Sales.

This chapter shall apply to sales heretofore as well as hereafter made, and all sales heretofore made in conforming with the provisions of this chapter are declared valid. [L. '90, p. 82, § 4; 1 H. C., § 3068.]

CHAPTER XXII.

THE ADOPTION OF CHILDREN.

By incorporated societies, see *infra*, § 1700.

§ 1696. (6480.*) **Petition for Leave to Adopt.**

Any inhabitant of this state, not married, or any husband and wife jointly, may petition the superior court of their proper county for leave to adopt and change the name if desired, of any child under the age of twenty-one years, but a written consent must be given to such adoption by the child, if of the age of fourteen years, and by each of his or her living parents who is not hopelessly insane or a confirmed drunkard. If there be no such parents, or if the parents be unknown, or shall have abandoned such child, or if such parents, or either of them, are hopelessly insane, or a confirmed drunkard, then by the legal guardian; if there be no such guardian, then by a discreet and suitable person appointed by said court to act in the proceedings as the next friend of such child: Provided, however, that if the parents are living separate and apart, the consent of both is not required, but such consent may be given by the parent having the care, custody and control of such child; And provided further, that either spouse may adopt a child of the other. [L. '05, p. 296, § 1. Cf. L. '75, pp. 110-112; L. '79, p. 136, § 1; Cd. '81, § 1667; 1 H. C., § 1418; L. '97, p. 46, § 1.]

See Const., Art. II, § 28, subd. 16, prohibiting special legislation.

See notes to § 1341, *supra*.

Cited in 14 Wash. 246; 42 Wash. 414; 43 Wash. 189.

Adoption: See 1 Remington's Digest, pp. 41, 42, §§ 1-7; Knight v. Gallaway, 42 Wash. 413; James v. James, 35 Wash. 655; State ex rel. Le Brook v. Wheeler, 43 Wash. 183.

The adoption of an heir is a matter purely statutory, which can be accompanied only by strict compliance with

the statute, and can never be sustained by mere presumption of compliance: In re Renton's Estate, 10 Wash. 533.

If a wife named as beneficiary in her husband's will dies before the testator, her children by a former marriage, when they have not been legally adopted by the testator, cannot contest the legality of a will revoking the one in favor of the mother: *Id*.

§ 1697. (6481.) **Separate Examination of Wife.**

If the petition be filed by husband and wife, the court shall examine the wife separate and apart from her husband, and shall refuse leave for such adoption, unless the court shall be satisfied, from such examination, that the wife, of her own free will and accord, desire such adoption. [L. '79, p. 136, § 2; Cd. '81, § 1668; 1 H. C., § 1419.]

§ 1698. (6482.) **Order Confirming Adoption.**

Upon the compliance with the foregoing provisions, if the court shall be satisfied of the ability of the petitioner or petitioners to bring up and educate the child properly, having reference to the degree and condition of the child's parents, and shall be satisfied of the fitness and propriety of such adoption, the court shall make an order setting forth the facts and declaring that from that date such child, to all legal intents and purposes, is the child of the petitioner or petitioners, and that the name of the child is hereby changed. [L. '79, p. 136, § 3; Cd. '81, § 1669; 1 H. C., § 1420.]

An order for the adoption of children may be collaterally attacked by a parent in habeas corpus proceedings to recover possession, where the parent was not a

party to the proceedings and had no actual or constructive notice thereof: Beatty v. Davenport, 45 Wash. 555.

§ 1699. (6483.) Effect of Adoption—Descent of Property.

By such order the natural parents shall be divested of all legal rights and obligations in respect to such child, and the child shall be free from all legal obligations of obedience and maintenance in respect to them, and shall be, to all intents and purposes, the child and legal heir of his or her adopter or adopters, entitled to all rights and privileges and subject to all the obligations of a child of the adopter or adopters begotten in lawful wedlock: Provided, that on the decease of parents who have adopted a child or children under this chapter, and the subsequent decease of such child or children without issue, the property of such adopting parents shall descend to their next of kin, and not to the next of kin of such adopted child or children. [L. '79, p. 137, § 4; Cd. '81, § 1670; 1 H. C., § 1421.]

See *supra*, § 1341 et seq., descent and distribution.

Cited in 38 Wash. 389; 45 Wash. 50, 51.

Effect of adoption: See 1 Remington's Digest, p. 42, §§ 6, 7; *James v. James*, 35 Wash. 655; *Van Brocklin v. Wood*, 38 Wash. 384.

Under this section, the natural mother of a minor, by consenting to an adoption of the child, waives and forfeits any right or claim she may have under § 1629, providing that the mother is entitled to the

guardianship of a minor in case of the decease of the father; hence, upon the death of the adoptive parents, the appointment of some other suitable person, having regard to the welfare of the child, cannot be questioned by the natural mother: *Master-son's Estate*, 45 Wash. 48.

For the same reason, the rights of natural grandparents are divested in the decree of adoption: *Id.*

CHAPTER XXIII.

PROTECTION OF ORPHAN, HOMELESS, OR NEGLECTED CHILDREN.

Delinquent children: See *infra*, § 1987.

§ 1700. Adoption by Incorporated Societies.

Any benevolent or charitable society incorporated under the laws of this state for the purpose of receiving, caring for or placing out for adoption, or improving the condition of orphan, homeless, neglected or abused minor children of this state shall have authority to receive, control, and dispose of children under eighteen (18) years of age under the following provisions:

(a) When the father and mother or the person or persons legally entitled to act as guardian of the person of any minor child shall, in writing, surrender such child to the charge and custody of said society, such child shall thereafter be in the legal custody of such society for the purposes herein provided.

(b) In case of death or legal incapacity of a father or his abandonment or neglect to provide for his family, the mother shall have authority to make such surrender, and in case of the death or legal incapacity of a mother, or her abandonment of such child, then the father shall have authority to make such surrender.

(c) In all cases where the person or persons legally authorized to make such surrender are not known, any judge of superior court may cause a notice of hearing to be published in any newspaper of general circulation printed and published in the county, and if he deems it best for such orphan, homeless, neglected or abused child, he may surrender it to any benevolent or charitable society incorporated under the laws of Washington and having for its object the care of such children.

(d) When any child shall have been surrendered in accordance with any of the preceding clauses and such child shall have been accepted by such society, then, (but not otherwise), the rights of its natural parents or of the guardian of its person (if any) shall cease and such corporation shall become entitled to the custody of such child, and shall have authority to care for and educate such child or place it either temporarily or permanently in a suitable private home in such manner as shall best secure its welfare. Such corporation shall have authority when any such child has been surrendered to it in accordance with any of the preceding provisions, and it is still in its control, to consent to its adoption under the laws of Washington. The custody or control of any such child by any such corporation or by any other corporation, institution, society or person may be inquired into, and, in the discretion of the court, terminated at any time by the superior court of the county where the child may be, upon the complaint of any person, and a showing that such custody is not in the interest of the child. [L. '03, p. 58, § 1.]

See L. '99, pp. 9-12, repealed by this act, § 9.

Proceedings for the adoption of a child where the society had no right to the custody of the child: *State ex rel. Le Brook v. Wheeler*, 43 Wash. 183.

§ 1701. Issue of Warrant for Taking Child into Custody—Proceedings.

Upon complaint of any person in writing other than an officer or agent of such society or corporation to any judge of the superior court giving the names and residences of the parents, guardian (if any) or the next of kin of such child, so far as known, and alleging that the father of such minor child is dead, or has abandoned his family or is an habitual drunkard or is a man of notoriously bad character, or is imprisoned for crime, or has grossly abused or neglected such child, and that the mother of such child is an habitual drunkard or imprisoned for crime, or an inmate of a house of ill-fame, or a woman of notoriously bad character or is dead, or has abandoned her family, or has grossly abused or neglected such child, and alleging that the welfare of such child requires that legal steps be taken to provide for its care and custody, a warrant shall issue directing the proper officer, to take such child into custody and care for or dispose of it as such judge shall direct, until a hearing can be had, such proceedings shall have precedence of other causes, of which hearing not less than five days notice shall be given to such parents, guardian or next of kin and such judge shall hear the allegations of the complaint and all testimony offered for or against the same and determine whether in his judgment there is cause for a change in the care and custody of such child. If the judge shall decide to change the care and custody of such child, he may commit the child to the care and custody of any such benevolent society contemplated in this act which is willing to receive it, and such commitment shall carry with it the same powers and authority as above provided in case of voluntary surrender, or he may enter in such findings and transmit the papers and a transcript of his proceedings to the county commissioners of the county in which the case arises and surrender such child to the care and custody of such commissioners and it may be disposed of without further notice to the parents, guardian or next of kin. [L. '03, p. 60, § 2.]

§ 1702. County Charges—Surrender to Society.

When any minor is a county charge, the board of county commissioners, if they think the welfare of the child demands it, may surrender such child to the care and custody of any benevolent society or corporation without the consent of its parents unless within twenty days after the notice of the intention of such commissioners so to do, given in writing to parents, guardian or next of kin of such child so far as known, to said commissioners, such parents, guardian or next of kin shall provide for such child and relieve the county thereof and when any child has been so surrendered by the county commissioners, it may be disposed of as herein provided for the disposition of other children. [L. '03, p. 60, § 3.]

§ 1703. Investigation of Neglect—Duty of Police.

When any officer or agent of any such society shall request a police officer or other peace officer, to investigate or assist in the investigation of any alleged case of any such neglected or abused child, such officer shall immediately make or assist in such investigation and if he deem it proper shall forthwith take such child into custody without warrant, taking such child and reporting such case at once to the judge of the superior court for such proceedings as may be proper under the provisions of this chapter. [L. '03, p. 61, § 4.]

§ 1704. Minor Convicted of Offense—Rights of Parent.

When any minor under eighteen years of age shall be convicted on any charge, the punishment for which may be imprisonment or confinement in the reform school, the judge of the superior court, if he finds that the good of such minor demands it, and such minor is an orphan, or a homeless, neglected or abused minor within the terms of this act, or is a county charge, or the parents or guardian of such minor consent thereto, may suspend sentence and surrender the custody of such minor to any society, as is contemplated in this act, when such society is willing to receive such minor, until such minor shall attain the age of majority, or for a term of years to be fixed in the order of surrender, and such society may find a home for such minor and surrender his custody to the person providing such home for the term fixed in said order of surrender, which surrender by the society shall be approved by an order of said court: Provided, that nothing in this section shall be held to affect the natural rights of said minor or of his parents or guardian, except in the matter of his custody: and provided further, that if said minor shall fail to conform to the order of court fixing his custody, he may be apprehended and brought before the court, and the court may sentence said minor as provided by law, or resurrender him as the court may deem best for the interests of said minor. [L. '03, p. 61, § 5.]

§ 1705. Society not to Act as Guardian.

Nothing in this chapter shall entitle any such society to act as guardian or to have control of the estate of any minor child. [L. '03, p. 62, § 6.]

§ 1706. Hearing on Habeas Corpus—Evidence.

Upon the hearing of any writ of habeas corpus for the custody of any such child, if it appears that such child has been surrendered to any such corporation under the provisions of this chapter, such surrender shall be taken

as prima facie evidence that such child was legally and properly surrendered to such corporation and that such corporation is entitled to the custody and control of such child under the provisions of this chapter. [L. '03, p. 62, § 7.]

§ 1707. County Charges—County to Pay Expenses.

The board of county commissioners shall pay the expenses of bringing the child before the court and caring for it pending a hearing under this act; when a child is surrendered to a benevolent society under the provisions of this act by the superior court, the county shall pay such society a reasonable compensation for the temporary care of such child until it is placed in a family but not to exceed fifty [\$50] dollars in each case. No clerk, sheriff, police officer, member of the board of county commissioners or agent of any such society shall charge or be allowed to charge any costs whatever in these proceedings, except where a complaint shall be adjudged to be without sufficient cause and malicious, in which event all costs shall be taxed against the complainant: Provided, that the provisions of this section shall not apply to cases under section 1704. [L. '03, p. 62, § 8.]

CHAPTER XXIV.

HABITUAL DRUNKARDS.

§ 1708. (6487.) Who may be Adjudged an Habitual Drunkard.

Any person addicted to the use of intoxicating liquors may, upon complaint thereof, or upon certificate of a justice of the peace, as hereinafter provided, be adjudged an habitual drunkard. [Cf. L. '79, p. 113, § 1; Cd. 81, § 1673; L. '83, p. 32, § 1; 1 H. C., § 2523.]

See *infra*, § 6289, action for injuries caused by intoxication.

§ 1709. (6488.) Complaint, Who may Make.

Either the father, husband, mother, wife, son or daughter of any person addicted to the excessive use of intoxicating liquors or any person in the interest of the relative aggrieved, or of the general public, may make complaint to the superior court of the county, wherein such person so addicted resides, that the person complained of is an habitual drunkard, and that in consequence thereof, such person is squandering his earnings or property, or that he neglects his business, or that he abuses or maltreats his family, which complaint must be verified by the oath of the complainant to the effect that the same is true. And every justice of the peace in whose court any person shall have been convicted twice on a charge of being drunk, or drunk and disorderly, shall certify to the superior court of the county in which he resides, that said person has thus twice been convicted. [Cf. L. '79, p. 113, § 2; L. '81, p. 13, § 1; Cd. '81, § 1674; L. '83, p. 32, § 1; 1 H. C., § 2524.]

§ 1710. (6489.) Summons—Hearing.

Upon filing of the complaint, duly verified, the superior judge shall cause a copy thereof to be served upon the accused forthwith, and shall summon him to appear and answer, giving at least ten days' notice; and if upon the hearing of the evidence the allegations of the complaint are sustained, or upon filing a certificate of a justice of the peace, as above provided, such judge shall, in open court, declare the accused to be an habitual drunkard, and shall cause

the proceeding to be entered in full upon the records of the court. [Cf. L. '79, p. 114, § 3; L. '81, p. 13, § 2; Cd. '81, § 1672; L. '83, p. 32, § 1; 1 H. C., § 2525.]

§ 1711. (6490.) Fees of Officers—Costs.

The same fees shall be allowed to the superior court, justice of the peace, and the sheriff or constable, in all proceedings under the foregoing section [§ 1710] of this chapter, as are allowed by law for like processes and services, and like fees for witnesses, as in civil cases before justice of the peace; and if the complaint is not sustained, the person making the complaint shall pay the costs; and in case the complaint is sustained, the person accused shall pay the costs. [Cf. L. '79, p. 114, § 4; L. '81, p. 13, § 3; Cd. '81, § 1673; L. '83, p. 32, § 1; 1 H. C., § 2526.]

§ 1712. (6491.) Penalty for Selling Liquor to Habitual Drunkard.

Any person who shall sell or give any intoxicating liquors to any habitual drunkard, as defined in the foregoing section [§ 1708] of this chapter, shall be deemed guilty of a misdemeanor, and on conviction thereof, by any court having criminal jurisdiction, shall be fined in any sum not less than fifty dollars or more than three hundred dollars, or be imprisoned in the county jail not less than one or more than six months, at the discretion of the court. [L. '79, p. 114, § 5; Cd. '81, § 1674; 1 H. C., § 2527.]

§ 1713. (6492.) Liability for Furnishing Liquor to Habitual Drunkard.

Any person who shall be injured in person or property or means of support by any habitual drunkard, as defined by this chapter, while in a state of intoxication, or in consequence of such intoxication, shall have a right of action in his or her own name, severally or jointly against any person or persons who shall, by selling or giving intoxicating liquors to such habitual drunkard, have caused his intoxication, in whole or in part, and such person selling or giving such intoxicating liquors as aforesaid shall be liable severally or jointly for all damages sustained, and the same may be recovered in a civil action. A married woman may bring such action in her own name, and all damages recovered by her shall inure to her separate use, and all damages recovered by a minor under this chapter shall be paid either to such minor or to such person in trust for him or her as the court may direct. [L. '79, p. 114, § 6; Cd. '81, § 1675; 1 H. C., § 2528.]

Compare §§ 6289-6291, civil remedies against liquor dealers.

§ 1714. (6493.) List of Habitual Drunkards to be Posted.

It shall be the duty of the superior judge of each county to furnish a list of the names of all persons adjudged habitual drunkards, to all parties licensed to sell, by retail, intoxicating liquors in such county, and such retail dealer shall keep posted up in some conspicuous place in his place of business a list of such habitual drunkards. A person failing to keep such list so posted shall forfeit his license, and if he thereafter sells intoxicating liquors, he shall be punished as if selling without a license. [Cf. L. '81, p. 14, § 4; Cd. '81, § 1676; L. '83, p. 32, § 1; L. '86, p. 160, § 1; 1 H. C., § 2529.]

§ 1715. (6494.) Order, How Vacated.

Any person so declared to be an habitual drunkard may, at any time after the expiration of two years from the time he was so declared to be such,

by a petition addressed to the judge of the court in which he was so adjudged, have a hearing in such court, upon a day which shall be by such court set, which day shall not be more than ten days after the filing of such petition in such court, which petition may contain a statement of facts tending to show the improved condition and habits of such petitioner and to establish his character for sobriety, and a prayer that the order on record so declaring him to be such habitual drunkard be vacated and he be released from the effects thereof; which petition shall be duly verified by the petitioner. And if upon the hearing of such petition, and the evidence in support thereof, it appear to the judge that such petitioner is entitled to have such record vacated and be so released, then he shall make an order so declaring that such record be vacated and annulled, and that the petitioner be thereafter released from the effects thereof. [L. '81, p. 14, § 4; Cd. '81, § 1677; 1 H. C., § 2530.]

TITLE XI.

APPEALS TO THE SUPREME COURT.

The supreme court: See supra, §§ 1-14. Judges of the supreme court: See infra, § 9050.

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| 1723. Temporary injunction to remain in force, when. | 1743. Death of party not to affect appeal. |
| 1724. Injunction where appeal to United States supreme court. | 1744. Costs of appeal. |
| 1725. Justification of sureties. | 1745. Effect of appeal in criminal actions. |
| 1726. Exception to surety—Certificate—New bond. | 1746. Same—Date of commencement of sentence. |
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| 1732. Calendar, how prepared. | 1752. Appeals to be heard on merits. |
| 1733. Motion to dismiss. | 1753. Rules and regulations. |
| 1734. Hearing and disposition of motion. | 1754. Method herein provided exclusive. |
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§ 1716. (6500.*) When Allowed.

Any party aggrieved may appeal to the supreme court in the mode prescribed in this title from any and every of the following determinations, and no others, made by the superior court, or a judge thereof, in any action or proceeding.

(1) From the final judgment entered in any action or proceeding, and an appeal from any such final judgment shall also bring up for review any order made in the same action or proceeding either before or after the judgment, in case the record sent up on the appeal, or any supplementary record sent up before the hearing thereof, shall show such order sufficiently for the purposes of a review thereof.

(2) From any order refusing to vacate an order of arrest in a civil action.

(3) From an order granting or denying a motion for a temporary injunction, heard upon notice to the adverse party, and from any order vacating or refusing to vacate a temporary injunction: Provided, that no appeal shall be allowed from any order denying a motion for a temporary injunction, or vacating a temporary injunction unless the judge of the superior court shall have found upon the hearing, that the party against whom the injunction was sought was insolvent.

(4) From any order discharging or refusing to discharge an attachment.

(5) From any order appointing or removing, or refusing to appoint or remove, a receiver.

(6) From any order affecting a substantial right in a civil action or proceeding, which either, (1) in effect determines the action or proceeding and prevents a final judgment therein; or (2) discontinues the action; or (3) grants a new trial; or (4) sets aside or refuses to affirm an award of arbitrators, or refers the cause back to them.

(7) From any final order made after judgment, which affects a substantial right; and an appeal from any such order shall also bring up for review any previous order in the same action or proceeding which involves the merits and necessarily affects the order appealed from, in case the record sent up on the appeal, or any supplementary record sent up before the hearing thereof, shall show such previous order sufficiently for the purposes of a review thereof. But an appeal shall not be allowed to the state in any criminal action, except when the error complained of is in setting aside the indictment or information, or in arresting the judgment on the ground that the facts stated in the indictment or information do not constitute a crime, or is some other material error in law not affecting the acquittal of a prisoner on the merits. [L. '93, p. 119, § 1; L. '01, p. 28, § 1.]

See supra, § 381 et seq., exceptions, etc.

Cited in 6 Wash. 261; 7 Wash. 751; 8 Wash. 231; 10 Wash. 13, 42, 66, 153, 163; 12 Wash. 2, 555, 560, 631, 661, 662; 14 Wash. 112; 16 Wash. 442, 445; 17 Wash. 676; 18 Wash. 362, 451, 462, 483, 652; 19 Wash. 119, 196, 355, 629; 20 Wash. 109, 541; 21 Wash. 20, 105, 254, 261, 407; 23 Wash. 249, 722; 24 Wash. 77, 78, 243; 25 Wash. 183, 424; 26 Wash. 42, 281, 299, 331, 434, 435; 28 Wash. 406, 620; 29 Wash. 320; 30 Wash. 45, 384; 31 Wash. 314, 342; 32 Wash. 153, 404, 695; 34 Wash. 58, 647; 35 Wash. 137; 37 Wash. 485; 39 Wash. 374; 40 Wash. 577; 42 Wash. 689; 43 Wash. 22, 36, 113, 560; 45 Wash. 261; 46 Wash. 91, 92; 47 Wash. 184, 186; 49 Wash. 407; 50 Wash. 455; 52 Wash. 552.

WHO MAY APPEAL: See 1 Remington's Digest, pp. 101, 103, §§ 80-89. One not an active party to the proceedings in the lower court cannot appeal from any decision rendered therein: Nicol v. Boom Co., 12 Wash. 230.

The right of appeal is reciprocal: Pen-ter v. Staight, 1 Wash. 365; Bennett v. Thorne, 36 Wash. 253.

Sureties on delivery or cost bond may appeal: Carstens v. Gustin, 18 Wash. 90; Trumbull v. Jefferson County, 37 Wash. 604.

Stockholders may appeal, when: Ben-nett v. Thorne, 36 Wash. 253.

Persons acting in a representative or official capacity may appeal: See 1 Remington's Digest, p. 101, § 83; Cannon's Estate, In re, 18 Wash. 101; Hallam v. Tillinghast, 19 Wash. 20; Hills' Heirs, In re, 7 Wash. 421; State ex rel. Tilton v. Superior Court, 7 Wash. 74.

State has no right of appeal in divorce proceedings, when: See Lee v. Lee, 19 Wash. 355.

As to persons other than parties or privies, see 1 Remington's Digest, p. 102, § 85; State v. Fair, 35 Wash. 127; Port Townsend v. Trumbull, 40 Wash. 386; Morath v. Gorham, 11 Wash. 577; Lawry v. Board, 12 Wash. 446; Wooding v. Wood-ing Co., 10 Wash. 531.

Interveners may not, when application to intervene is first made in supreme court: Hight v. Batley, 32 Wash. 165.

As to right of appeal by persons having interest in subject matter of action, see 1 Remington's Digest, p. 102, § 87; State ex rel. Race v. Cranney, 30 Wash. 594; Durk v. Scully, 41 Wash. 357; Oudin & Bergman etc. Co. v. Conlan, 34 Wash. 216; Schulze v. Oregon R. etc. Co., 41 Wash. 614.

A sheriff who has been enjoined from proceedings to sell property under execution has such an interest in the controversy as to entitle him to appeal from the judgment: Heintz v. Brown, 46 Wash. 387.

A purchaser at a tax sale is a party in interest and entitled to appeal from an order vacating the tax foreclosure judgment: Pierce County v. Bunch, 49 Wash. 599.

The objection that the purchaser at a tax sale was not made a party by order of intervention, upon a motion to vacate the tax judgment, cannot be first raised in the supreme court: Pierce County v. Bunch, 49 Wash. 599.

As to parties injured or aggrieved, see 2 Remington's Digest, pp. 102, 103, § 88; Ault's Disbarment, In re, 15 Wash. 417; Schulze v. Oregon R. etc. Co., 41 Wash. 614.

In criminal cases, state has no right, when: See 1 Remington's Digest, p. 103, § 89; State v. Kemp, 5 Wash. 212; State v. Hubbell, 18 Wash. 482; State v. Heron,

19 Wash. 706; *State v. Murrey*, 30 Wash. 383.

Estoppel, waiver or agreements affecting right to appeal: See 1 Remington's Digest, pp. 103-108, §§ 90-107.

Cessation of controversy: See *Traves v. McLees*, 32 Wash. 258; *Stevens v. Jones*, 40 Wash. 484.

An appeal will not be dismissed on the ground of cessation of the controversy because of a tender by plaintiff of the amount claimed to be due, made after the appeal was taken, when the tender did not include the costs and was not accepted by the appellant, since an offer to settle, not accepted, does not end the controversy: *Loveday v. Parker*, 50 Wash. 260.

An appeal from an order appointing a temporary receiver will be dismissed because of the cessation of the controversy, where it is shown that, pending the appeal, the case had been tried on its merits and the temporary receivership superseded by a permanent receivership: *Kelso v. American Investment & Improvement Co.*, 48 Wash. 5.

Recognition of or acquiescence in decision: See 1 Remington's Digest, pp. 103, 104, § 91; *Pacific Supply Co. v. Brand*, 7 Wash. 357; *Hall v. Skavdale*, 21 Wash. 203; *McInnes v. Sutton*, 35 Wash. 384; *Clallam County v. Clump*, 15 Wash. 593.

An appeal will not be dismissed because one of the coappellants withdrew his appeal: *State v. Lewis*, 35 Wash. 261.

An appeal from an order dismissing garnishees will not be dismissed as having been made at the request of the plaintiff, where the main case had been involuntarily dismissed, as that operated to dismiss the garnishments, and the evident intent was to show that the garnishments were dismissed solely for that reason: *Loveday v. Parker*, 50 Wash. 260.

Right of appeal as affected by compliance with or payment of judgment or order: See 1 Remington's Digest, p. 104, §§ 93, 94; *State ex rel. Cann v. Moore*, 23 Wash. 276; *Campbell v. Hall*, 28 Wash. 626; *State ex rel. Bauer v. Sunset Tel. & Tel. Co.*, 30 Wash. 676; *Hindman v. Boyd*, 42 Wash. 17; *Duggan v. Smith*, 27 Wash. 702; *Dodds v. Gregson*, 35 Wash. 402; *Miller v. Seattle*, 41 Wash. 599; *Trumbull v. Jefferson County*, 37 Wash. 604; *Ogden v. Chehalis County*, 41 Wash. 45; *Smith v. Seattle*, 41 Wash. 60.

Where a tender was made by defendants and paid into court, the receipt of the same by plaintiff to be applied on the judgment after appeal and supersedeas is not a waiver of the judgment determining the action: *Traynor v. White*, 44 Wash. 560.

Waiver of appeal by acceptance of benefits, settlements, or surrender of rights, etc.: See 1 Remington's Digest, p. 105, §§ 95-98; *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349; *Thompson v. Sines*, 18 Wash. 359; *Seattle v. Liberman*, 9 Wash. 276; *Pelton v. Morgan*, 16 Wash. 30; *Puyallup*

Light etc. Co. v. Stevenson, 21 Wash. 604; *State ex rel. Scottish-Am. Mtg. Co. v. Meacham*, 17 Wash. 429; *Watson v. Merkle*, 21 Wash. 635.

Right of appeal as affected by pursuing other remedy or suits: See 1 Remington's Digest, p. 106, §§ 99-101; *Canada Settlers' Loan & T. Co. v. Murray*, 20 Wash. 656; *Sether v. Clark*, 24 Wash. 16; *Wagnitz v. Ritter*, 31 Wash. 343; *Hennessy v. Tacoma Smelting etc. Co.*, 33 Wash. 423; *State v. Murrey*, 30 Wash. 383; *Hewitt v. Root*, 31 Wash. 312.

Right of appeal as affected by cessation of controversy by lapse of time or expiration of term of office: See 1 Remington's Digest, pp. 106, 107, §§ 102, 103; *Holppa v. City Council of Aberdeen*, 34 Wash. 554; *State ex rel. Land v. Christopher*, 32 Wash. 59; *State ex rel. Orth v. Benson*, 21 Wash. 580.

In condemnation proceedings the defendant cannot allege error in that he was not allowed to show that his saloon license was rendered valueless by the appropriation, where pending appeal the license expired and he had received the benefit of it: since the controversy as to that had ceased before the hearing: *Port Townsend Southern R. Co. v. Nolan*, 48 Wash. 382.

An appeal from a judgment dismissing an action to enjoin the holding of a primary election will be dismissed because of cessation of controversy, where, before the hearing of the appeal, the time for holding the election has expired, and the election has been held or never can be held: *Mackay v. Dever*, 49 Wash. 439.

See, also, *State ex rel. Coiner v. Wickersham*, 16 Wash. 161; *Hice v. Orr*, 16 Wash. 163; *State ex rel. Taylor v. Cummings*, 27 Wash. 316; *State ex rel. Daniels v. Prosser*, 16 Wash. 608; *Lynde v. Dibble*, 19 Wash. 328; *State ex rel. Gill v. Byrne*, 31 Wash. 213.

Fact of cessation, how shown: See 1 Remington's Digest, p. 107, § 104; *State ex rel. Scottish-American Mtg. Co. v. Meacham*, 17 Wash. 429; *State ex rel. Lowary v. Superior Court*, 41 Wash. 450; *Hice v. Orr*, 16 Wash. 163; *Wood v. Seattle*, 23 Wash. 1; *White Crest Canning Co. v. Sims*, 29 Wash. 389; *Harrington v. Gordon*, 42 Wash. 692.

An appeal from a judgment dismissing an action to enjoin the issuance and payment of county warrants will be dismissed, where it is made to appear by affidavit before the hearing that the warrants had been issued and paid, there having been no temporary injunction in the case, since the controversy has ceased: *National Surety Co. v. Stephens*, 50 Wash. 397.

A motion to dismiss an appeal because of the cessation of the controversy may be supported by affidavits containing copies of parts of the record below, which need not be brought up by supplemental record where the affidavit is undenied: *Kelso v. American Investment & Improvement Co.*, 48 Wash. 5.

Right to appeal affected by release of errors: See 1 Remington's Digest, p. 107, § 105; Utterback v. Meeker, 16 Wash. 185; Hibbard, Spencer, Bartlett & Co. v. De Lanty, 20 Wash. 539; National Christian Assn. v. Simpson, 21 Wash. 16; State v. Boyce, 25 Wash. 422.

As to waiver of objections to right of appeal, see 1 Remington's Digest, p. 108, § 107; Howard v. Shaw, 10 Wash. 151; Jenkins v. Jenkins University, 17 Wash. 160.

As to joinder of proceedings and double appeals or other proceedings, see 1 Remington's Digest, p. 80, § 9; Hill v. Sawyer, 14 Wash. 275; Damon v. Leque, 17 Wash. 573; Watterson v. Masterson, 15 Wash. 511.

A cross-appeal may be taken from any part of a final judgment which is adverse to the claims of the respondent in whose favor the judgment was entered: McDonald v. White, 46 Wash. 334.

APPEALABLE ORDERS: See 1 Remington's Digest, pp. 82-100, §§ 15-79.

An order granting a temporary injunction, even though it was granted without notice to appellant: Watch Co. v. Rumpf, 12 Wash. 647; an order requiring a guardian to turn over certain funds and give an accounting: In re Hill's Heirs, 7 Wash. 421; an order directing the sale of certain property in the hands of a receiver pendente lite to satisfy the claims of preferred creditors: Radebaugh v. Ry. Co., 8 Wash. 570. See, also, Bennett v. Thorne, 36 Wash. 253; an order of the court discharging certain goods from the custody of a receiver pendente lite is appealable: Armstrong v. Ford, 10 Wash. 64; an order made upon the hearing of exceptions to a receiver's report of the sale of property, and the appeal must be taken within five days from the entry of such order: Nicol v. Boom Co., 12 Wash. 230; fixing the compensation of an assignee is appealable, irrespective of the disposition of the main case in which it is involved: Slater v. Bank, 12 Wash. 488; an order of the court granting a motion for a nonsuit which in effect amounts to a judgment of dismissal is appealable: De Graf v. Navigation Co., 10 Wash. 468; and a judgment dismissing an action, when plaintiff elects to stand upon his complaint after the sustaining of a demurrer thereto, is appealable: Van Horne v. Watrous, 10 Wash. 525; Peters v. Lewis, 28 Wash. 366; Lough v. John Davis & Co., 30 Wash. 204; Keef v. Tibbals, 18 Wash. 656; Dane v. Daniel, 28 Wash. 155.

An order granting a motion to strike certain allegations from the complaint is appealable when it affects a substantial right and determines the action as to the particular matter in issue: Snohomish Co. v. Ruff, 15 Wash. 637.

An order purporting to absolutely determine the right of a party to share in the proceeds of an insolvent estate and which prevents the collection of a judgment is

an order affecting a substantial right within the meaning of the statute governing appeals: Anderson v. Risdon-Cahn Co., 13 Wash. 494.

Where the only matter before the lower court for consideration was that of the final account of a receiver, and the order made and entered finally disposed of that question and directed a distribution, an appeal lies therefrom: Chandler v. Shingle Co., 13 Wash. 89.

As to the finality of the judgment or order, see 1 Remington's Digest, pp. 90-95, §§ 43-62.

Orders opening or vacating judgments, when appealable: See Id., p. 92, § 51; Nolan v. Arnot, 36 Wash. 101; State ex rel. Twigg v. Superior Court, 34 Wash. 643.

An order vacating a tax foreclosure judgment and tax sale and deed is appealable by the purchaser at the tax sale who was not a party to the suit, as a final order determining his rights, since he could not assert rights in the tax case or appeal from the judgment: Pierce County v. Bunch, 49 Wash. 599.

An order dissolving attachment is appealable when the jurisdiction is dependent upon the attachment: Augir v. Foresman, 23 Wash. 595.

An order quashing a writ of garnishment is appealable, when: Tatum v. Geist, 40 Wash. 575.

Orders distributing funds or fixing compensation are appealable when final orders: See 1 Remington's Digest, pp. 93, 94, § 58; Horton v. Barto, 17 Wash. 675; Wilbur v. Wilbur, 17 Wash. 683.

Orders concerning executions or judicial sales are appealable when final: See 1 Remington's Digest, p. 94, § 59; State ex rel. Hibbard & Co. v. Superior Court, 21 Wash. 631; State ex rel. Newland v. Superior Court, 16 Wash. 444; Dane v. Daniel, 28 Wash. 155; In re Barker's Estate, 33 Wash. 79; Kruntz v. Batts, 18 Wash. 460; Hewitt v. Root, 31 Wash. 312; Otis Bros. & Co. v. Nash, 26 Wash. 39.

Decisions reviewable in criminal cases: See 1 Remington's Digest, p. 837, § 381; State v. Boyce, 25 Wash. 422; State v. Seaton, 27 Wash. 120; State v. Hubbell, 18 Wash. 482; State v. Johnson, 24 Wash. 75; State v. Murrey, 30 Wash. 383.

An order denying a motion or petition to vacate a judgment is appealable as a final order: See 1 Remington's Digest, p. 94, § 60; Northern Pac. R. Co. v. Black, 3 Wash. 327; Myers v. Landrum, 4 Wash. 762; Lewis v. Gilbert, 5 Wash. 534; Seattle R. Co. v. Johnson, 7 Wash. 97; Titus v. Larsen, 18 Wash. 145; Lamona's Estate, In re, 29 Wash. 394; Chezum v. Claypool, 22 Wash. 498.

Or to vacate an order appointing a receiver: In re Sutton's Estate, 31 Wash. 340; McDonald v. McDonald, 34 Wash. 293.

Orders affecting substantial rights and interlocutory orders, when appealable: See 1 Remington's Digest, pp. 95-99, §§ 63-76.

Determining action and preventing judgment: See *Id.*, p. 95, § 63; *Vaktaren Pub. Co. v. Pacific Tribune Pub. Co.*, 41 Wash. 355; *Nolan v. Arnot*, 36 Wash. 101; *Embree v. McLennan*, 18 Wash. 651; *Carstens & Earles v. Leidigh etc. Lumber Co.*, 18 Wash. 450; *Deming Inv. Co. v. Ely*, 21 Wash. 102; *Wagnitz v. Ritter*, 31 Wash. 343; *Tatum v. Geist*, 40 Wash. 575; *Anderson v. Risdon-Cahn Co.*, 13 Wash. 494; *Snohomish County v. Ruff*, 15 Wash. 637; *State ex rel. Hubbard v. Superior Court*, 24 Wash. 438; *State ex rel. Stratton v. Tallman*, 29 Wash. 317; *In re Sutton's Estate*, 31 Wash. 340; *State ex rel. Twigg v. Superior Court*, 34 Wash. 643; *State ex rel. Richardson v. Superior Court*, 28 Wash. 677; *In re Crosby*, 42 Wash. 366; *Sutton's Estate, In re*, 31 Wash. 340.

An appeal by defendant from a judgment denying relief upon his counterclaim is not prematurely taken by reason of the pendency of plaintiff's motion to vacate the judgment denying plaintiff any relief, since the appeal was taken only from the other portion of the judgment, which the plaintiff would have no interest in vacating: *Lauridsen v. Lewis*, 47 Wash. 594.

After final judgment, an appeal lies from an order dissolving an attachment, or it is reviewable upon appeal from the final judgment: *Maxwell v. Griffith*, 20 Wash. 106.

An order which is a temporary mandatory injunction is appealable: *State ex rel. Byers v. Superior Court*, 28 Wash. 403.

Ex parte order appointing temporary receiver appealable, when: See *State ex rel. Washington Match Co. v. Superior Court*, 34 Wash. 123.

An order denying a motion to vacate the appointment of a receiver is an appealable order: *Davis v. Edwards*, 41 Wash. 480.

An order accepting a receiver's report and ordering his discharge is appealable as a final order: *Johnson v. Joslyn*, 47 Wash. 531.

Orders on motion for new trial appealable, when: See 1 Remington's Digest, p. 98, § 70; *Doyle v. Great Northern R. Co.*, 43 Wash. 558.

Orders after judgment are appealable when: See 1 Remington's Digest, p. 98, § 71; *Washington Dredging & Imp. Co. v. Kinnear*, 24 Wash. 405; *State ex rel. Sligh v. Superior Court*, 19 Wash. 118; *Brady v. Onffroy*, 37 Wash. 482; *Peterson v. Dillon*, 27 Wash. 78; *Sullivan's Estate, In re*, 40 Wash. 202.

What constitutes a final judgment: See 1 Remington's Digest, p. 100, §§ 76½-79; *Huntington v. Blakeney*, 1 W. T. 111; *Wilkins v. Wilkins*, 1 Wash. 87; *In re Foye*, 21 Wash. 250; *In re Baker*, 21 Wash. 259; *In re Sylvester*, 21 Wash. 263; *Chambers v. Hoover*, 3 W. T. 20; *Hays v. Dennis*, 11 Wash. 360; *Reichenbach v. Sage*, 8 Wash. 250; *Munson v. Mudgett*, 14 Wash. 662;

Baker v. Prewett, 3 W. T. 474; *Rhode Island Mtg. etc. Co. v. Spokane*, 19 Wash. 616; *Macy v. Sullivan*, 41 Wash. 564; *Walton v. Hartman*, 38 Wash. 34.

In an action to foreclose a mortgage, an order dismissing the action as to some of the defendants who assert interests in the property paramount to the mortgagee is appealable, although no judgment has been rendered against the mortgagors: *Mortgage Co. v. Gilbert*, 13 Wash. 684. See, also, *Keef v. Tibbals*, 18 Wash. 656; *Lough v. John Davis & Co.*, 30 Wash. 204.

An order purporting to dissolve an attachment after the rendition of judgment in the action in which it was issued, and which is in effect a direction by the court to the sheriff to disregard the rights of the attaching creditor in making a levy under the execution issued upon the judgment is an appealable order: *Sheppard v. Guisler*, 10 Wash. 41.

If the original judgment has been lost before entry, an affidavit of one of the attorneys describing the judgment will not constitute such a record on appeal as will warrant the reversal of the original judgment: *Reichenbach v. Sage*, 8 Wash. 250.

Where both parties move for a new trial and it is granted on the motion of one and denied on the motion of the other, neither party can appeal therefrom for the reason that the order must be held to have been granted at the request of each: *Clallam Co. v. Clump*, 15 Wash. 593.

A second mortgagee may appeal from a decree foreclosing the first and second mortgages, notwithstanding the fact that he has accepted a portion of the proceeds derived from the sale under said decree, where the part of the decree appealed from in no wise affects the part awarding him such proceeds: *Hinchman v. Railway Co.*, 14 Wash. 349.

ORDERS NOT APPEALABLE.—An appeal will not lie from an order sustaining a demurrer: *Mason County v. Dunbar*, 10 Wash. 163 (but will where a party refuses to plead further: See *Peters v. Lewis*, 28 Wash. 366); or discharging an attachment: *Jensen v. Hughes*, 12 Wash. 661; *Spokane Dry Goods Co. v. Fritz*, 26 Wash. 433; or removing one receiver and appointing another in his stead: *State v. Superior Court*, 7 Wash. 74; or from an order which postpones the right of plaintiff to proceed to judgment for default until the day following that upon which his motion therefor is made: *Schlotfeldt v. Bull*, 13 Wash. 242; or from a judgment which fails to dispose of all the defendants in the action, either by dismissal or by an affirmative judgment: *Fairfield v. Binnian*, 13 Wash. 1; *Johnson v. Lighthouse*, 8 Wash. 32.

In an original action instituted for the purpose of having a judgment vacated, an order setting aside a default and giving defendants leave to answer is not appealable: *Reitmeir v. Siegmund*, 13 Wash. 624; *Freeman v. Ambrose*, 12 Wash. 1.

Order setting aside a void default judgment is not appealable: See *Thompson v. Robbins*, 32 Wash. 149.

After a case has been reversed and remanded for a new trial, an order of the lower court directing the defendant to repay to plaintiff the sum collected under the original judgment is not appealable: *First Nat. Bank v. Carter*, 10 Wash. 11.

An appeal does not lie from a board of equalization to the superior court: *Knapp v. King County*, 15 Wash. 541.

Under the statute governing appeals to the supreme court, no authority is conferred upon the superior courts to certify questions to the supreme court for decision, and no appeal will lie from such an order: *Munson v. Mudgett*, 14 Wash. 662.

An order striking a complaint from the files for the reason that it contained two or more causes of action not separately stated is not a final order and is not appealable: *Vaktaren Pub. Co. v. Pacific etc. Pub. Co.*, 41 Wash. 355.

Where notice of appeal in a criminal action is given upon denying a motion for a new trial and before the entry of judgment, the appeal must be dismissed as not having been taken from an appealable order: *State v. Landes*, 26 Wash. 325.

Orders on motions for new trial, when not appealable: See 1 *Remington's Digest*, p. 98, § 70.

An order refusing to set aside the vacation of a judgment is not a final judgment: *Hibbard, Spencer, Bartlett & Co. v. De Lanty*, 20 Wash. 539. See, also, *Jordan v. Hutchinson*, 39 Wash. 373; *State ex rel. Post v. Superior Court*, 31 Wash. 53; *Post v. Spokane*, 35 Wash. 114; *Green v. Moore*, 24 Wash. 241; *Nash v. Wakefield*, 30 Wash. 556.

An order vacating a default is not appealable: *Nelson v. Denny*, 26 Wash. 327; *Hart Lumber Co. v. Rucker*, 17 Wash. 600; *Thompson v. Robbins*, 32 Wash. 149.

The opening of a default for the purpose of permitting a trial on the merits is within the discretion of the trial court, and will not be disturbed in the absence of abuse thereof: *Clauson v. Lawrence*, 47 Wash. 369.

An order overruling a motion to quash a summons is not appealable: *Prussian Nat. Ins. Co. v. Northwestern Fire etc. Ins. Co.*, 19 Wash. 281; *Powell v. Nolan*, 32 Wash. 403.

An order denying a temporary injunction is not appealable: *State ex rel. Young v. Superior Court*, 43 Wash. 34.

An order denying a temporary injunction is not appealable unless the court has found the party against whom it is sought to be insolvent, although the court attempted to fix the amount of a supersedeas bond; nor could the denial be considered a final determination as to the sufficiency of the complaint where the record fails to show that a demurrer thereto was passed upon: *Masoero v. Campbell & Co.*, 52 Wash. 551.

An order discharging a jury and ordering a retrial is not appealable: *Dossett v. St. Paul etc. Lumber Co.*, 28 Wash. 618.

An order opening or vacating judgment or order is not appealable: See 1 *Remington's Digest*, p. 99, § 74; *Nelson v. Denny*, 26 Wash. 327; *Metler v. Metler*, 28 Wash. 734; *State v. Boyce*, 25 Wash. 422; *National Christian Assn. v. Simpson*, 21 Wash. 16.

Upon an application to reappoint a trustee, who alleged that he had been induced to resign through fraud, the vacation of an ex parte order of reappointment, which could only be made on notice, is not appealable as a final order, since it does not dispose of the application: *In re Sinclaire's Estate*, 44 Wash. 119.

An ex parte appointment of a receiver, without any notice of hearing or bond, is void and could only be temporarily valid until notice could be given; and an order vacating the appointment is not an appealable order, as the ex parte appointment could not be restored or continued by the appeal: *Libert v. Unfried*, 47 Wash. 182.

An order vacating, upon defendant's motion, a void ex parte appointment of a receiver, is not an appealable order in that it in effect denies plaintiff's motion for a receiver, submitted at the same time, where (1) plaintiff's motion only requested the confirmation of the ex parte order theretofore made, and (2) was not noted for hearing as required, and (3) the record shows that only the defendant's motion was considered and passed upon: *Libert v. Unfried*, 47 Wash. 182.

Orders relating to costs are not appealable when: See 1 *Remington's Digest*, p. 99, § 76; *Durk v. Scully*, 41 Wash. 357; *Smith v. Palmer*, 38 Wash. 276.

No appeal lies from an order permitting the filing of an amended complaint: *Albin v. Seattle Electric Co.*, 46 Wash. 420.

An order granting a new trial is not appealable when it is made pursuant to directions of the supreme court in reversing the case on a former appeal: *Albin v. Seattle Electric Co.*, 46 Wash. 420.

Orders sustaining a demurrer to a complaint in intervention and denying leave to amend the complaint are not appealable as orders affecting a substantial right which in effect determine the proceeding or discontinue the action: *Seattle & Northern R. Co. v. Bowman*, 46 Wash. 90.

An order refusing a voluntary dismissal of an action is not appealable as a final order, but may be reviewed on appeal from the final judgment: *State ex rel. Korsstrom v. Superior Court*, 48 Wash. 671.

AMOUNT IN CONTROVERSY: See 1 *Remington's Digest*, pp. 87-89, §§ 33-42.

The fact that the amount of damage alleged in the complaint and for which judgment is prayed is in excess of \$200, will not authorize an appeal to the supreme court when it is evident from the pleadings that the original amount in controversy was less than \$200: *Doty v. Krutz*,

13 Wash. 169; Chapin v. Kenoyer, 12 Wash. 536; Bleeker v. Satsop R. Co., 3 Wash. 77; Penter v. Staight, 1 Wash. 365; Trumbull v. School District No. 7, 22 Wash. 631; Kirby v. Rainer-Grand Hotel Co., 28 Wash. 705. Before the supreme court will assume jurisdiction there must be a finding as to the value by the lower court, the mere allegation in the complaint that the value of the property in controversy is in excess of \$200 being insufficient: Herrin v. Pugh, 9 Wash. 637.

If the value of property seized under attachment proceedings exceeds \$200, an appeal will lie to the supreme court, although the claim of the attaching creditor is for a less sum: Edison v. Woolery, 10 Wash. 225. See Graves v. Thompson, 35 Wash. 282.

When the object of a garnishment proceeding is to ascertain the title and right of possession of personal property, the action is within the appellate jurisdiction of the supreme court, although the principal debt may be less than \$200: Campbell v. Simpkins, 10 Wash. 160.

Where the guarantor of a promissory note has been made a party defendant to an action, the judgment in which involves his contingent liability, the plaintiff is estopped from raising any question as to the guarantor's appealable interest: Howard v. Shaw, 10 Wash. 151.

If an equitable question is involved, the supreme court has jurisdiction, even though the amount in controversy is less than

\$200: Blake v. Savings Bank, 12 Wash. 619.

Where the validity of a statute is not involved, an appeal will not lie to the supreme court if the amount involved is less than \$200: Jacobs v. Puyallup, 10 Wash. 384.

An appeal from an order discharging a receiver, wherein is involved the disposition of \$135 collected by him, will not be dismissed because not within the constitutional limit, \$200, for actions at law for the recovery of money: Johnson v. Joslyn, 47 Wash. 531.

The supreme court will assume jurisdiction of a case where the amount involved is less than \$200, where the appeal is in reality an attempt to compel the lower court to obey the mandate of the supreme court upon a former appeal: Johnson v. Joslyn, 47 Wash. 531.

Upon appeal by defendant, the amount claimed by him in a counterclaim is the amount in controversy, and if over \$200, the court has jurisdiction of the appeal: Lauridsen v. Lewis, 47 Wash. 594.

An action of interpleader, under § 199, wherein the county auditor deposited a warrant in court and asked that the conflicting claims of the defendants thereto be determined, is of equitable cognizance, and appeal lies to the supreme court regardless of the amount in controversy: Agnew v. Barto & Son's Bank, 48 Wash. 66.

§ 1717. (6501.) Designation of Parties.

The party appealing shall be known as the appellant, and the adverse party as the respondent, and they shall be so designated in all papers in the cause after the notice of appeal shall have been given or served; but the title of the cause shall in other respects remain unchanged. [L. '93, p. 120, § 2.]

Cited in 27 Wash. 177; 49 Wash. 407.

Failure to designate a receiver as such in appellate proceedings is no ground for dismissal where the record plainly shows that he was sued in his representative

capacity: Chandler v. Shingle Co., 13 Wash. 89.

Name and designation of parties: See 1 Remington's Digest, p. 143, § 212.

§ 1718. (6502.) Time of Taking.

In civil actions and proceedings an appeal from any final judgment must be taken within ninety days after the date of the entry of such final judgment; and an appeal from any order, other than a final order, from which an appeal is allowed by this act, within fifteen days after the entry of the order, if made at the time of the hearing, and in all other cases within fifteen days after the service of a copy of such order, with written notice of the entry thereof, upon the party appealing, or his attorney. In criminal causes, an appeal must be taken within ninety days after the entry of final judgment. [L. '93, p. 120, § 3; L. '95, p. 81, § 1.]

Cited in 10 Wash. 380; 12 Wash. 232, 555; 13 Wash. 225; 15 Wash. 29; 17 Wash. 597; 20 Wash. 541; 21 Wash. 18; 26 Wash. 43, 230, 308; 27 Wash. 28, 317; 32 Wash. 168; 35 Wash. 67; 42 Wash. 688, 689; 49 Wash. 407; 50 Wash. 263, 455.

See 1 Remington's Digest, pp. 129-133, §§ 172-187.

An appeal taken within six months after judgment is in time, although prior to the taking thereof the act of 1895 was passed, reducing the time to ninety days, where

the latter act did not become effective until after the appeal had been taken: *Brookman v. Ins. Co.*, 15 Wash. 29. See *Seattle & M. R. Co. v. O'Meara*, 4 Wash. 17; *Western American Co. v. St. Ann Co.*, 22 Wash. 158; *Rogers v. Trumbull*, 32 Wash. 211.

Actual notice of the entry of a judgment or of an appealable order is as effective as the service of a copy of said judgment or order, to limit the time within which an appeal therefrom may be taken: *Braely v. Marks*, 13 Wash. 224; *Irwin v. Olympia Co.*, 12 Wash. 112; *McQuesten v. Morrill*, 12 Wash. 335.

Where a default judgment, erroneously entered instead of a judgment of dismissal, has been set aside, and a proper judgment entry made, the time within which an appeal may be taken must be computed from the date of the entry of the original judgment: *Agassiz v. Keller*, 11 Wash. 88.

Where no notice in writing of the entry of the order appealed from was ever served upon appellant, the appeal will not be dismissed because notice was not given within the prescribed time: *Debenture Corp. v. Warren*, 9 Wash. 312.

Where an appeal has been taken from a judgment, the appellant is estopped to afterward take advantage of the fact that no copy of the judgment had been served upon him: *Barkley v. Barton*, 15 Wash. 33.

Commencement of period of limitation: See 1 *Remington's Digest*, p. 130, §§ 173-177; *Leary v. Territory*, 3 W. T. 13; *National Christian Assn. v. Simpson*, 21 Wash. 16; *Wadhams v. Page*, 6 Wash. 103.

An appeal from the oral announcement of the judge's conclusions, made at the end of a trial without a jury, will be dismissed as premature, since it is not a final judgment until expressed in writing: *Robertson v. Shine*, 50 Wash. 433.

Effect of motion for new trial: See 1 *Remington's Digest*, p. 130, § 174; *Pedigo v. Fuller*, 37 Wash. 529; *State ex rel. Payson v. Chapman*, 35 Wash. 64; *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535; *Herzog v. Palatine Ins. Co.*, 36 Wash. 611; *Prospector's Development Co. v. Brook*, 32 Wash. 315; *Kubillus v. Ewert*, 40 Wash. 38; *Creech v. Aberdeen*, 42 Wash. 77.

The time for taking an appeal does not begin to run until the denial of a motion for a new trial, seasonably made: *Wittler-Corbin Machinery Co. v. Martin*, 47 Wash. 123.

Effect of motion to vacate judgment or order: *Leary v. Territory*, 3 W. T. 13; *National Christian Assn. v. Simpson*, 21 Wash. 16; *State ex rel. Hennessy v. Huston*, 32 Wash. 154; *Hennessy v. Tacoma Smelting etc Co.*, 33 Wash. 423.

An order dismissing a petition to vacate a judgment for fraud in obtaining

the same is a final order made after judgment affecting a substantial right; and therefore an appeal need not be taken within the fifteen days limited for other than final orders, and is in time if taken within ninety days: *Kath v. Histogenetic Medicine Co.*, 50 Wash. 454.

As to commencement of period on interlocutory and subsequent orders, see 1 *Remington's Digest*, p. 131, § 179; *Nicol v. Skagit Boom Co.*, 12 Wash. 230; *Otis Bros. & Co. v. Nash*, 26 Wash. 39; *Denison v. Spokane*, 27 Wash. 317; *Lamona's Estate, In re*, 29 Wash. 394.

The fact that an appeal from several orders was given too late to confer jurisdiction of the appeal as to the first order made does not operate to dismiss the appeal as to the other orders: *Loveday v. Parker*, 50 Wash. 260.

As to limitations applicable to particular proceedings—Final judgments, see 1 *Remington's Digest*, p. 131, § 180; *State v. Symes*, 17 Wash. 596; *National Christian Assn. v. Simpson*, 21 Wash. 16; *Krutz v. Isaacs*, 43 Wash. 714; *Seattle, Lake Shore & E. R. Co. v. Simpson*, 19 Wash. 628; *State ex rel. Tremblay v. McQuade*, 12 Wash. 554.

Where notice of appeal is not served within ninety days after the date of entry of judgment, the appeal will be dismissed: *Shipley v. McPherson*, 46 Wash. 172.

Where a judgment was immediately entered by the clerk upon rendition of the verdict, and a new trial was denied November 9th, an oral notice of appeal must, to be effective, be taken at that time; and the entry of a formal judgment December 9th, against the objection of the prevailing party, does not authorize an oral notice of appeal at that time: *Chilcott v. Globe Nav. Co.*, 49 Wash. 302.

Limitations applicable to interlocutory orders: See 1 *Remington's Digest*, pp. 131, 132, § 181; *Cole v. Price*, 22 Wash. 18; *Otis Bros. & Co. v. Nash*, 26 Wash. 39; *National Christian Assn. v. Simpson*, 21 Wash. 16; *Hewitt v. Root*, 31 Wash. 312; *Hibbard, Spencer, Bartlett & Co. v. De Lanty*, 20 Wash. 539.

An appeal from an order discharging a garnishee must be taken within fifteen days after the entry thereof, under this section: *Loveday v. Parker*, 50 Wash. 260.

Extension of time: See 1 *Remington's Digest*, p. 133, §§ 186, 187; *Leary v. Territory*, 3 W. T. 13; *Nicol v. Skagit Boom Co.*, 12 Wash. 230; *National Christian Assn. v. Simpson*, 21 Wash. 16; *State v. Boyce*, 25 Wash. 422; *Sturgiss v. Dart*, 23 Wash. 244; *Agassiz v. Kelleher*, 11 Wash. 88.

The courts have no power, even in a capital case, to extend the time: *State v. White*, 40 Wash. 428.

§ 1719. (6503.) Notice of.

A party desiring to appeal to the supreme court under the provisions of this title may, by himself or his attorney, give notice in open court or before the judge, if the judgment or order appealed from is rendered or made at chambers, at the time when such judgment or order is rendered or made, that he appeals from such judgment or order to the supreme court, and thereupon the court or judge shall direct the clerk to make an entry of such notice in the journal of the court. If the appeal be not taken at the time when the judgment or order appealed from is rendered or made, then the party desiring to appeal may, by himself or his attorney, within the time prescribed in section 1718, serve written notice on the prevailing party or his attorney that he appeals from such judgment or order to the supreme court, and within five days after the service of such notice he shall file with the clerk of the superior court the original or a copy of such notice, with proof or the written admission of the service thereof, and thereupon the clerk shall enter such notice, with the proof or admission of service thereof, in the journal of the court. The giving or service of a notice of appeal as prescribed in this section shall effect the appeal, but the same shall become ineffectual if an appeal bond for costs and damages be not given as required by section 1721 of this title. Two or more appealable orders with or without the judgment may be embraced in one appeal: Provided, that the time allowed in this title for appealing from each of such orders has not expired. The appellant in his notice of appeal shall designate with reasonable certainty from what judgment or orders, whether one or more, the appeal is taken, and if from part of any judgment or order, from what particular part. [L. '93, p. 120, § 4.]

Cited in 9 Wash. 665; 10 Wash. 380; 17 Wash. 366, 609; 18 Wash. 361; 20 Wash. 540, 690, 716; 22 Wash. 22, 695; 23 Wash. 251, 722; 24 Wash. 668; 25 Wash. 183; 26 Wash. 224; 27 Wash. 113; 30 Wash. 312; 32 Wash. 531; 34 Wash. 177, 514, 657; 37 Wash. 457; 42 Wash. 78; 43 Wash. 385; 45 Wash. 134; 48 Wash. 420; 49 Wash. 303, 407; 50 Wash. 587, 588, 592, 593.

The notice of appeal prescribed by the statute is essential to confer jurisdiction on the appellate court, and it is not competent for the parties to waive it: See 1 Remington's Digest, p. 141, § 209; Sawtelle v. Weymouth, 14 Wash. 21; Seattle, Lake Shore R. Co. v. Simpson, 19 Wash. 628; Winters v. Grays Harbor Boom Co., 19 Wash. 346; Clark v. Eltinge, 29 Wash. 215.

Notice is not necessary to parties who do not appear in the action, though named as defendants: Railway v. Johnson, 7 Wash. 97; and failure to serve a defendant who does not appear in the action is not ground for the dismissal of the appeal: Essency v. Essency, 10 Wash. 375; Eldridge v. Stenger, 19 Wash. 697; Home Savings etc. Assn. v. Burton, 20 Wash. 688; Collins v. Kinnear, 37 Wash. 453.

As to form and requisites of notice, see 1 Remington's Digest, pp. 141-144, §§ 210-214; Van de Vanter v. Flaherty, 37 Wash. 218; James v. James, 35 Wash. 655; Brown v. Calloway, 34 Wash. 175.

NOTICE IN OPEN COURT is not limited to judgments and orders rendered at chambers, but applies equally to all judgments or orders: Investment Trust v. Hender, 12 Wash. 559; and such notice is properly given at the time when the court orders the entry of judgment, even though the findings and conclusions upon which the judgment is based, as well as the judgment itself, appear to have been signed some time before: Id.

The fact that written notice of appeal has not been served upon all the parties to the action is immaterial, when oral notice has been given in open court after the rendition of judgment, and an appeal bond given thereafter within the time required: Seattle v. Liberman, 9 Wash. 276; Moore v. Brownfield, 7 Wash. 23.

As to the sufficiency of oral notice, see, also, 1 Remington's Digest, p. 142, § 211; Creech v. Aberdeen, 42 Wash. 77; Rananhan v. Gibbons, 23 Wash. 255; Thompson v. Sines, 18 Wash. 359; Brady v. Onffroy, 37 Wash. 482; Puckett v. Moody, 17 Wash. 609.

An oral notice of appeal, given in open court at the time of signing judgment of dismissal, is sufficient; and the claim of insufficiency on the ground that the adverse party was not present cannot be first made on appeal where the judgment was regular on its face: Carlson v. Curren, 48 Wash. 249.

As to the sufficiency of the designation of parties, see 1 Remington's Digest, p. 143, § 212; Carstens v. Gustin, 18 Wash. 90; Roberts v. Shelton S. W. R. Co., 21 Wash. 427; Alfstad's Estate, In re, 27 Wash. 175; Philadelphia Mtg. & Trust Co. v. Palmer, 32 Wash. 455; Noble v. Whitten, 34 Wash. 507.

As to the description of the judgment or order appealed from, see 1 Remington's Digest, pp. 143, 144, § 213; Shannon v. Consol. Tiger & Poorman Min. Co., 24 Wash. 119; Thompson v. Sines, 18 Wash. 359; Roberts v. Shelton S. W. R. Co., 21 Wash. 427; Clark v. Eltinge, 29 Wash. 215; Doremus v. Root, 23 Wash. 710; Norris v. Campbell, 27 Wash. 654; O'Neile v. Ternes, 32 Wash. 528; Horrell v. California etc. Assn., 40 Wash. 531.

A notice of appeal sufficiently describes the judgment by reference to the "decision" entered on a certain date, the record showing the judgment to have been entered on such date: Gilbert Co. v. Husted, 50 Wash. 61.

An appeal from a portion of a decree is expressly authorized by this section: State ex rel. Holcomb v. Yakey, 48 Wash. 419.

Service of notice of the appeal: See 1 Remington's Digest, pp. 144-147, §§ 215-223.

Notice of appeal must be served upon all parties to the action who do not join in the appeal, and if this is not done the appeal will be dismissed: Id., p. 126, § 165; Casey v. Oakes, 13 Wash. 38; Dewey v. Land Co., 11 Wash. 210; Lamey v. Coffman, 11 Wash. 301; Johnson v. Lighthouse, 8 Wash. 32; Bank v. Hotel Co., 4 Wash. 642; Traders' Bank v. Bokien, 5 Wash. 777; Cornell v. Hotel Co., 15 Wash. 433; Smalley v. Laugenour, 30 Wash. 307. See, also, Noble v. Whitten, 34 Wash. 507; Collins v. Kinnear, 37 Wash. 453.

As to service prior to other proceedings, see Lawyer Land Co. v. Steel, 41 Wash. 411.

By whom service may be made: See 1 Remington's Digest, p. 145, § 217; Belle City Mfg. Co. v. Kemp, 27 Wash. 111; Smalley v. Laugenour, 30 Wash. 307; Horr v. Aberdeen Packing Co., 7 Wash. 354.

The necessity for serving the notice upon all parties who have appeared in the action is not removed by reason of the fact that the parties not appealing and not served appeared in the superior court by the same attorneys as did the ones prosecuting the appeal: Casey v. Oakes, supra; Traders' Bank v. Bokien, supra; Dewey v. Land Co., supra; Cornell v. Hotel Co., supra; Home Sav. & Loan Assn. v. Burton, 20 Wash. 688. But see Murphy's Estate, In re, 26 Wash. 222; Smalley v. Laugenour, 30 Wash. 307.

Upon appeal from an order striking a petition in intervention, in an action to foreclose a mortgage, the notice of appeal must be served on all the defendants who claim a prior right to the mortgaged

premises, although notice of appeal was given in open court, where the only parties then present were the plaintiff and the intervener: Hinchman v. Railway Co., 14 Wash. 171.

An appeal will be dismissed if the notice was not served upon a party who has been recognized by the court and the other parties to the action as an intervener, although there is no formal order of intervention in the record: Grays Harbor Co. v. Wotton, 14 Wash. 87; Fairfield v. Binnian, 13 Wash. 1.

Where parties have appeared in an action, but the action has subsequently been dismissed as to them, with the consent of the other parties thereto, it is not necessary to serve them with notice of appeal: Watson v. Sawyer, 12 Wash. 35; Casey v. Oakes, supra.

Service of the notice upon a receiver is a sufficient service upon all creditors who have appeared in the action in which the receiver was appointed: Radebaugh v. Railway Co., 8 Wash. 570.

It is not sufficient to serve a portion only of the respondents and file proof thereof within the statutory time, but service and filing should be made as to all the respondents: Watson v. Pugh, 9 Wash. 665.

Service of notice of appeal and notice to settle a statement of facts upon the attorney of record of the adverse parties is sufficient when there is no showing that there was any substitution of attorneys: Tacoma Mill Co. v. Sherwood, 11 Wash. 492; Sturgiss v. Dart, 23 Wash. 244; Belle City Mfg. Co. v. Kemp, 27 Wash. 211.

If coparties not joining are not served, the appeal must be dismissed: See 1 Remington's Digest, p. 127, § 167; Dewey v. South Side Land Co., 11 Wash. 210; Winters v. Gray's Harbor Boom Co., 19 Wash. 346; Johnson v. Lighthouse, 8 Wash. 32; Smith v. Beard, 21 Wash. 204; Wax v. Northern Pac. R. Co., 32 Wash. 210; Davis v. Tacoma R. & P. Co., 35 Wash. 203. Even if the coparties are represented by the same attorney as appellant: Dewey v. South Side Land Co., 11 Wash. 210; Traders' Bank of Tacoma v. Bokien, 5 Wash. 777; Casey v. Oakes, 13 Wash. 38; Home Savings etc. Assn. v. Burton, 20 Wash. 688; Smalley v. Laugenour, 30 Wash. 307.

See further as to coparties: Spokane & Idaho Lum. Co. v. Loy, 21 Wash. 501; Cline v. Mitchell, 1 Wash. 24; Carstens v. Gustin, 18 Wash. 90; State ex rel. Billings v. Port Townsend, 27 Wash. 728; Pierce v. Commercial Inv. Co., 31 Wash. 655; O'Connor v. Lighthizer, 34 Wash. 152 (overruling Brockway v. Abbott, 34 Wash. 700); Wagner v. Royal, 36 Wash. 428.

An appeal will be dismissed as to a coparty where the record fails to show that he joined in the notice of appeal, or that he filed any appeal bond, and no brief was

filed in his behalf: *Perkins v. Pierce*, 48 Wash. 380.

See, also, *Noble v. Whitten*, 34 Wash. 507; *Aetna Ins. Co. v. Thompson*, 34 Wash. 610; *Winters v. Grays Harbor Boom Co.*, 19 Wash. 346; *First Nat. Bank of Seattle v. Gordon Hardware Co.*, 30 Wash. 127.

As to coparty's defective proceedings and necessity for service: See 1 Remington's Digest, p. 128, § 168; *Winters v. Grays Harbor Boom Co.*, 19 Wash. 346; *Hopkins v. Satsop R. Co.*, 18 Wash. 679; *Griffith v. Seattle Nat. Bank Bldg. Co.*, 16 Wash. 329.

Service upon parties dismissed from the suit, or defaulting: See 1 Remington's Digest, p. 128, § 169; *Sheehan v. Bailey Building Co.*, 42 Wash. 535; *Smalley v. Laugenour*, 30 Wash. 307; *First Nat. Bank of Seattle v. Gordon Hardware Co.*, 30 Wash. 127.

Service affected by transfer or devolution of interest: See 1 Remington's Digest, p. 128, § 170; *Currans v. Seattle & San Francisco R. & Nav. Co.*, 34 Wash. 512; *Hight v. Batley*, 32 Wash. 165.

Where actual notice of appeal cannot be had upon a party or his attorney, the return of the sheriff to that effect is the only competent evidence of the fact sufficient to justify service upon the clerk in behalf of the party not found: *Cornell v. Hotel Co.*, 15 Wash. 433.

A notice of appeal which is directed to all the parties appearing in the action, and duly served upon the attorneys appearing for them, is sufficient, although but one attorney may appear for several parties, and such attorney be served with but one copy: *Hendricks v. Edmiston*, 15 Wash. 687; *Home Sav. & Loan Assn. v. Burton*, 20 Wash. 688.

Service of the notice of appeal is not sufficiently proven by an affidavit in the record which recites that it was served upon a respondent "by delivering and leaving at the office of (his attorneys) a true copy of said notice of appeal": *Fairchild v. Binnian*, supra.

Where a lawyer appears for himself and as attorney for his wife, service of a notice of appeal upon him, directed to both, is a good service: *Howard v. Shaw*, 10 Wash. 151.

Service of notice of appeal upon one member of a firm who appeared for a party to an action is a good service when the other member is dead: *Id.* See *Seat-*

tle, Lake Shore & E. R. Co. v. Simpson, 19 Wash. 628.

Where an appeal has not been perfected after notice given, a new notice may be given if the statutory period therefor has not expired: *State v. Seavey*, 7 Wash. 562.

The notice need not be served upon defendants who come in after judgment has been rendered and file an answer in the cause: *Snohomish County v. Ruff*, 15 Wash. 637.

Notice of appeal may be served by mail: *Horr v. Packing Co.*, 7 Wash. 354.

Proof of service of the notice upon the prevailing party must be filed within five days after service, but proof of service upon coparties may be filed subsequently: *Howard v. Shaw*, supra.

A judgment announced by the court is so far complete as to sustain a notice of appeal, although it has not been duly signed and entered: *Hays v. Dennis*, 11 Wash. 360.

There is no statute in this state authorizing an appeal in forma pauperis in civil cases, and hence appeals must be taken and perfected in the same manner by all appellants: *Bokien v. State*, 14 Wash. 401.

As to return or proof of service: See 1 Remington's Digest, p. 146, § 221; *Puckett v. Moody*, 17 Wash. 609; *Kasch v. Nelson*, 20 Wash. 315; *Sackman v. Thomas*, 24 Wash. 660; *Embree v. McLennan*, 18 Wash. 651; *Hill v. Gardner*, 35 Wash. 529; *Reynolds v. Reynolds*, 42 Wash. 107; *Tischner v. Rutledge*, 35 Wash. 285.

As to filing notice and proof of service: See 1 Remington's Digest, pp. 146, 147, §§ 222, 223; *State v. Butler*, 19 Wash. 110; *Ward v. Springfield F. & M. Ins. Co.*, 12 Wash. 631; *Seattle Lake S. etc. R. Co. v. Simpson*, 19 Wash. 628; *Hibbard etc. Co. v. De Lanty*, 20 Wash. 539; *Van Dusen v. Kelleher*, 20 Wash. 716; *Collins v. Kinnear*, 37 Wash. 453; *Best v. Best*, 22 Wash. 695; *Watson v. Pugh*, 9 Wash. 665; *Best v. Best*, 22 Wash. 695; *Littlejohn v. Miller*, 5 Wash. 399; *Main Inv. Co. v. Olsen*, 43 Wash. 480.

Proof of service of notice of an appeal upon a coparty need not be filed within five days limited for filing proof of service upon the prevailing party: *Sipes v. Puget Sound Electric R. Co.*, 50 Wash. 585.

Amending record to show service: See *Puckett v. Moody*, 17 Wash. 609; *Seattle Lake S. etc. R. Co. v. Simpson*, 19 Wash. 628; *Ames v. Kinnear*, 40 Wash. 646.

§ 1720. (6504.) Who may Join in Notice.

All parties whose interests are similarly affected by any judgment or order appealed from may join in the notice of appeal whether it be given at the time when such judgment or order is rendered or made, or subsequently; and any such party who has not joined in the notice may at any time within ten days after the notice is given or served, serve an independent notice of like

appeal, or join in the appeal already taken by filing with the clerk of the superior court a statement that he joins therein or in some part thereof, specifying in what part. Any such party who does not so join shall not derive any benefit from the appeal unless from the necessity of the case; nor can he independently appeal from any judgment or order already appealed from, more than ten days after service upon him of written notice of the former appeal, unless such former appeal be afterwards dismissed. All parties who so join in an appeal after the notice is given or served shall be liable for the expenses thereof, and for costs and damages to the same extent and upon the same conditions as if they had originally joined in the notice. When the notice of appeal is not given at the time when the judgment or order appealed from is rendered or made, it shall be served in the manner required by law for the service of papers in civil actions and proceedings, upon all parties who have appeared in the action or proceeding: Provided, that where the record and files in the cause do not disclose the address of a party on whom notice should be made, or of his attorney, and neither such party nor his attorney can be found within the county in which the judgment or order appealed from was rendered or made (of which fact a return by the sheriff that they cannot be so found shall be proof), the notice of appeal need not be served on such party, but the appeal may be taken by filing the notice and such sheriff's return with the clerk. Service on an attorney who was the attorney of record for a party in the cause at the time when the judgment or order appealed from was rendered or made, shall be deemed service on such party in all cases where service is required by this title. [L. '93, p. 121, § 5.]

See notes to last section.

Cited in 4 Wash. 643; 9 Wash. 115; 10 Wash. 153; 11 Wash. 211; 13 Wash. 39; 14 Wash. 277; 15 Wash. 437; 16 Wash. 331; 17 Wash. 366, 575; 18 Wash. 94, 680; 19 Wash. 347; 21 Wash. 516; 24 Wash. 612, 668; 30 Wash. 312; 34 Wash. 156, 514; 37 Wash. 456; 39 Wash. 259; 43 Wash. 132, 384; 49 Wash. 407; 50 Wash. 586-588, 592, 593, 595.

See 1 Remington's Digest, pp. 125-128, §§ 164-171.

Parties joining in an appeal subsequent to the original notice must file an appeal bond in addition to that filed by the parties first appealing: *Stans v. Baitey*, 9 Wash. 115.

The fact that notice of appeal has been given but not served upon all parties will not preclude the parties not served from themselves giving notice of appeal and serving same upon all necessary parties; and, in such case, there is nothing objectionable in the abandonment of the first appeal and a joinder in the second: *Waterson v. Masterson*, 15 Wash. 511.

After an appeal from a final judgment in an equity cause has been taken and determined, a second appeal cannot be prosecuted from the same judgment by other parties. An appeal from a final judgment in equity takes up the entire case, and each party thereto must see to it that his rights are protected on that appeal: *Hill v. Sawyer*, 14 Wash. 275.

Service of a notice of appeal by mail is sufficient, when the person making the

service and the person upon whom service is made reside in different places between which there is regular communication by mail: *De Roberts v. Stiles*, 24 Wash. 611.

Substituted service of the notice by filing a copy with the clerk, under this section can only be made when the party cannot be found within the county, which fact can only be proven by the return of the sheriff: *Cornell University v. Denny Hotel Co.*, 15 Wash. 433.

Who is the prevailing or adverse party: See 1 Remington's Digest, p. 125, § 164; *Pacific Coast Trading Co. v. Bellingham Bay Baseball Assn.*, 18 Wash. 245; *Damon v. Leque*, 17 Wash. 573.

A garnishee is not the "adverse party" upon an appeal by plaintiff from a judgment in the principal action in favor of the defendant: *Seattle Trust Co. v. Pitner*, 17 Wash. 365.

Garnishees, who filed answers, are not adversely affected by a judgment in the main case, in favor of the defendant, and are not necessary parties to an appeal therefrom: *Sudden & Christenson v. Morse*, 48 Wash. 101.

A coparty dismissed from the action is not an adverse party upon whom service of notice of appeal, or of the statement of facts, need be made: *Woelflen v. Lewiston-Clarkston Co.*, 49 Wash. 405.

As to the appearance of parties: See 1 Remington's Digest, p. 126, § 165; *Smalley*

v. Laugenour, 30 Wash. 307; Noble v. Whitten, 34 Wash. 507.

As to intervention or addition of new parties, see *Old National Bank v. O. K. Gold Min. Co.*, 19 Wash. 194; *Wiseman v. Eastman*, 21 Wash. 163; *Willard v. Fisher*, 36 Wash. 229.

Interveners, whose affirmative answer was denied and who introduced no evidence in support of it, can derive no bene-

fit from joining in an appeal by the defendant, where their interests were entirely adverse to the defendant's interest: *Reiff v. Coulter*, 47 Wash. 678.

When coparty may take appeal or join: See 1 *Remington's Digest*, p. 132, § 182; *Griffith v. Seattle Nat. Bank Bldg. Co.*, 16 Wash. 329; *Damon v. Leque*, 17 Wash. 573.

§ 1721. (6505.) Bond for Costs.

An appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party conditioned for the payment of costs and damages as prescribed in section 1722, be filed with the clerk of the superior court, or money in the sum of two hundred dollars be deposited with the clerk in lieu thereof. But no bond or deposit shall be required when the appeal is taken by the state, or by a county, city, town or school district thereof, or by a defendant in a criminal action. [L. '93, p. 122, § 6.]

Cited in 11 Wash. 78, 479; 12 Wash. 563; 14 Wash. 323, 403; 15 Wash. 266; 16 Wash. 201; 17 Wash. 702, 367; 20 Wash. 130, 540, 716, 182; 21 Wash. 503; 24 Wash. 126, 613; 26 Wash. 199, 308; 28 Wash. 262, 627; 29 Wash. 582; 30 Wash. 268; 32 Wash. 148, 168; 34 Wash. 642; 36 Wash. 407, 408; 39 Wash. 134; 43 Wash. 384, 481; 45 Wash. 134; 49 Wash. 262.

See 1 *Remington's Digest*, pp. 133-141, §§ 189-208. See, also, notes to next section.

An appeal bond may be filed before the date of the taking of the appeal: *Deben-ture Corp. v. Warren*, 9 Wash. 312.

An appeal bond must be filed within five days after the notice of appeal is given, and if this is not done the failure will render the appeal ineffectual for any purpose: *Savage v. Graham*, 14 Wash. 323.

When the notice of appeal is not given until six months after the entry of the judgment, it is sufficient to file the appeal bond within five days after the expiration of the six months: *Asher v. Sekofsky*, 10 Wash. 379.

As to necessity of security to perfect appeal: See 1 *Remington's Digest*, pp. 133, 134, §§ 189, 190; *Kasch v. Nelson*, 20 Wash. 315; *State ex rel. Cann v. Moore*, 23 Wash. 276; *Townsend Gas L. Co. v. Hill*, 24 Wash. 469; *State ex rel. Smith v. Blumberg*, 34 Wash. 640; *State ex rel. Geiger v. Geiger*, 20 Wash. 181; *State ex rel. Roberts v. Superior Court*, 32 Wash. 743; *Campbell v. Hall*, 28 Wash. 626; *Jordan v. Seattle*, 29 Wash. 581; *Corbett v. Civil Service Com. of Seattle*, 33 Wash. 190; *Parish v. Collins*, 43 Wash. 392.

Upon appeals from the final judgment and from an order denying a new trial, only one bond on the appeal from the final judgment need be given: *Woelflen v. Lew-iston-Clarkston Co.*, 49 Wash. 405.

Filing and service of bonds, necessity and sufficiency: See 1 *Remington's Digest*, p. 135, §§ 192-194; *Dahl v. Tibbals*, 5 Wash. 259; *Runyan v. Russell*, 3 Wash. 665; *Laurendeau v. Fugelli*, 16 Wash. 367; *Ramage v. Littlejohn*, 16 Wash. 702; *Hibbard, Spencer, Bartlett & Co. v. De Lanty*, 20 Wash. 539; *Van Dusen v. Kelleher*, 20 Wash. 716; *Galloway v. Tjossem*, 22 Wash. 103; *First Nat. Bank of Cambridge v. Hatfield*, 20 Wash. 224; *Shannon v. Consolidated Tiger & P. Min. Co.*, 24 Wash. 119; *Main Inv. Co. v. Olsen*, 43 Wash. 480; *Hight v. Batley*, 32 Wash. 165.

An appeal will not be dismissed because it appears that the bond was filed after the time allowed by law, where it is shown by a supplemental record that the lower court has found that it was left with the clerk for filing within the time, but by inadvertence it was not marked filed until the time for filing had expired: *Main Investment Co. v. Olson*, 44 Wash. 121.

An appeal will not be dismissed for failure to file the notice and bond within five days after the date of acceptance of service appearing thereon, when such date antedates the notice and bond and was evidently a clerical error: *Andrews v. Uncle Joe Diamond Broker*, 44 Wash. 668.

Where an oral notice of appeal is given and the appeal duly perfected by the filing of an appeal bond within five days, the giving of a subsequent written notice of appeal without filing a bond will not amount to an abandonment of the first appeal; and in any event, the first bond is sufficient for either notice, as a bond on appeal may be filed before the giving of written notice: *Ayars v. O'Connor*, 45 Wash. 132.

Parties by and to whom security to be given: See 1 *Remington's Digest*, p. 136, §§ 195, 196; *Seattle Trust Co. v. Pitner*,

17 Wash. 365; *White Crest Canning Co. v. Sims*, 29 Wash. 389; *Shannon v. Consolidated Tiger & P. Min. Co.*, 24 Wash. 119; *State v. Fisher*, 4 Wash. 382; *Hopkins v. Satsop R. Co.*, 18 Wash. 679; *Stans v. Baitey*, 9 Wash. 115.

An appeal bond by defendants is sufficient without naming as obligee a codefendant dismissed from the action and not joined in the appeal: *Woelflen v. Lewiston-Clarkston Co.*, 49 Wash. 405.

As to the amount or penalty of bond or undertaking, see 1 Remington's Digest, pp. 137, 138, § 202; *Anderson v. Provident Life & T. Co.*, 26 Wash. 192; *Pierce v. Willeby*, 20 Wash. 129; *Sumner v. Rogers*, 21 Wash. 361; *Galloway v. Tjossem*, 22 Wash. 103; *Ritchey v. Cedar Mill Co.*, 22 Wash. 511; *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 25 Wash. 627; *Young v. Borzone*, 26 Wash. 4; *Hewitt v. Landsdale*, 26 Wash. 615; *Graham v. American Surety Co.*, 28 Wash. 735; *Winchester v. Morris*,

33 Wash. 706; *Hawthorne v. Washington & Gt. W. R. Co.*, 33 Wash. 707; *Ritchey v. Cedar Mill Co.*, 22 Wash. 511; *State ex rel. Martin v. Pendergast*, 39 Wash. 132; *Ahrens v. Seattle*, 39 Wash. 168.

As to the conditions of bond, form, contents, and execution, see 1 Remington's Digest, pp. 138, 139, §§ 202-204; *Anderson v. Bigelow*, 16 Wash. 198; *King v. Branscheid*, 32 Wash. 634; *Dossett v. St. Paul & Tacoma Lum. Co.*, 31 Wash. 489; *Ahrens v. Seattle*, 39 Wash. 168; *Forker v. Henry*, 21 Wash. 235; *Westland Publishing Co. v. Royal*, 36 Wash. 399; *Shannon v. Consolidated Tiger & P. Min. Co.*, 24 Wash. 119; *Spokane & Idaho Lum. Co. v. Loy*, 21 Wash. 501; *Pennsylvania Mtg. Inv. Co. v. Gilbert*, 18 Wash. 667; *Hill Estate Co. v. Whittlesey*, 21 Wash. 142; *De Roberts v. Stiles*, 24 Wash. 611; *Bloomington v. Weil*, 29 Wash. 611; *Ramsay v. Tacoma Land Co.*, 31 Wash. 351.

§ 1722. (6506.) Bond—Execution, Conditions and Effect of.

The appeal bond must be executed in behalf of the appellant by one or more sufficient sureties, and shall be in a penalty of not less than two hundred dollars in any case; and in order to effect a stay of proceedings as in this section provided, the bond, where the appeal is from a final judgment for the recovery of money, shall be in a penalty double the amount of the damages and costs recovered in such judgment and in other cases shall be in such penalty, not less than two hundred dollars, and sufficient to save the respondent harmless from damages by reason of the appeal, as a judge of the superior court shall prescribe. It shall be conditioned that the appellant will pay all costs and damages that may be awarded against him on the appeal, or on the dismissal thereof, not exceeding two hundred dollars. An appeal shall not stay proceedings on the judgment or order appealed from or on any part thereof, unless the original or a subsequent appeal bond be further conditioned that the appellant will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court, and (where such condition is applicable) shall pay all rents of or damages to property accruing during the pendency of the appeal, out of the possession of which any respondent shall be kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order it shall be varied so as to secure the part stayed alone. When such bond, further conditioned as hereinabove prescribed, has been filed the appeal shall operate so long as it shall remain effectual under the provisions of this title to stay proceedings upon the judgment or order appealed from; but in case of an appeal from an order other than an order granting a new trial, no appeal or appeal bond shall operate to stay proceedings in the cause except proceedings upon the order appealed from; and no appeal or stay shall vacate or affect any part of a judgment or order not appealed from and where an appeal is taken from an order vacating a temporary injunction, the appellant cannot proceed further in the cause in the superior court during the pendency of the appeal, except so far as may be rendered necessary by proceedings of an adverse party. [L. '93, p. 122, § 7.]

See *supra*, § 522 et seq., stay of execution.
See notes to last section.

Cited in 11 Wash. 78, 367; 14 Wash. 52, 366; 15 Wash. 266, 344; 17 Wash. 99; 18 Wash. 237; 20 Wash. 130; 21 Wash. 362, 504; 22 Wash. 104; 25 Wash. 629; 28 Wash. 362; 29 Wash. 622; 30 Wash. 233, 330; 26 Wash. 199, 308; 32 Wash. 637, 697; 34 Wash. 125; 35 Wash. 413; 37 Wash. 446; 38 Wash. 190; 42 Wash. 168; 43 Wash. 385; 46 Wash. 319; 48 Wash. 23, 421; 49 Wash. 407.

As to supersedeas or stay of proceedings, see 1 Remington's Digest, pp. 148-155, §§ 232-244.

An appeal will be dismissed where the bond does not, in form and substance, conform to the requisites of the statute: *Erickson v. Erickson*, 11 Wash. 76; and the supreme court has no authority to allow the amendment of an appeal bond which is defective in a substantial particular: *Investment Trust v. Hender*, 12 Wash. 559.

Where an appeal has been dismissed for failure to file bond within the time prescribed by statute, the appellate court is authorized to render judgment against the appellants, but not against the sureties on their appeal bond: *Grunewald v. Grocery Co.*, 11 Wash. 478.

The statute requiring a supersedeas bond in double the amount of the judgment applies to all appellants, irrespective of the question of liability under the judgment: *State v. Superior Court*, 14 Wash. 365.

It is only in cases where the appellant desires a stay of proceedings, or where the appeal is not from a final judgment for the recovery of money, that an order of the court fixing the amount of the bond is required: *Watch Co. v. Rumpf*, 12 Wash. 647.

In an action to foreclose a mortgage or mechanic's lien the amount of the supersedeas bond pending appeal is fixed by the statute providing that where the action is for the recovery of money the bond shall be double the amount of the judgment recovered, and the lower court has no power to fix the amount: *State v. Superior Court*, 14 Wash. 365; *State v. Superior Court*, 11 Wash. 366.

Upon an appeal from an order appointing a receiver, a stay of proceedings may be had, as in other cases, by complying with the provisions of the statute: *State v. Superior Court*, 12 Wash. 677.

As to right to supersedeas or stay, see 1 Remington's Digest, p. 148, § 232; *State ex rel. German American Safe Dep. etc. Bank v. Superior Court*, 12 Wash. 677; *State ex rel. Denham v. Superior Court*, 28 Wash. 590; *State ex rel. Marlin v. Poin-dexter*, 43 Wash. 147; *State v. Seaton*, 27 Wash. 120; *Northwestern etc. Bank v. Griffiths*, 17 Wash. 98.

As to the necessity, number and competency of the sureties, see 1 Remington's Digest, p. 136, §§ 197, 198; *White Crest Canning Co. v. Sims*, 29 Wash. 389; *Smith*

v. Beard, 21 Wash. 204; *David v. Gulch*, 30 Wash. 266; *Roberts v. Shelton S. W. R. Co.*, 21 Wash. 427; *Dodge v. Corliss*, 27 Wash. 685; *De Roberts v. Stiles*, 24 Wash. 611; *Murray v. Moynahan*, 27 Wash. 379.

A bond on appeal given on behalf of the appellant is sufficient if executed by the surety alone: *Fidelity & Deposit Co. v. Seattle, Renton & Southern R. Co.*, 50 Wash. 391.

No revenue stamp required on bond: See *Dawson v. McCarty*, 21 Wash. 314.

Subscription to the justification is sufficient execution of bond when: See *Yakima Water, L. & P. Co. v. Hathaway*, 18 Wash. 377.

The board of state land commissioners have no authority to pass upon a bond on appeal to the superior court nor upon the sufficiency of sureties, and an appeal will not be dismissed because the bond was rejected to them: *Oliver v. Dupee*, 16 Wash. 634.

As to amount or penalty of bond or undertaking in appeals from money judgments, see 1 Remington's Digest, pp. 150, 151, § 236; *State ex rel. Washington Bridge Co. v. Superior Court*, 11 Wash. 366; *State ex rel. Commercial Nat. Bank v. Superior Court*, 14 Wash. 365; *Beezley v. Sessions*, 22 Wash. 125; *Title Guarantee & Trust Co. v. McDonnell*, 28 Wash. 359; *Young v. Borzone*, 26 Wash. 4; *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 25 Wash. 627; *Lacaff v. Dutch Miller Min. & Smelt Co.*, 31 Wash. 566; *Barton v. Wickizer*, 41 Wash. 293; *Russell v. Graumann*, 40 Wash. 667; *Horrell v. California & Oregon Assn.*, 40 Wash. 531; *State ex rel. Grass v. White*, 40 Wash. 560; *Douglas v. Badger State Mine*, 41 Wash. 266.

Where the bond on appeal conditioned also as a supersedeas bond is in less than double the amount of a money judgment and \$200 additional, the same is ineffectual for any purpose and the appeal will be dismissed: *Tibbitts v. Henry*, 46 Wash. 306.

As to fixing the amount of the penalty in such cases, see 1 Remington's Digest, p. 151, § 238; *Rockford Watch Co. v. Rumpf*, 12 Wash. 647; *Kirby v. Collins*, 5 Wash. 682; *Ewing v. Van Wagenen*, 6 Wash. 39; *State ex rel. Baldwin v. Seavey*, 7 Wash. 562; *Guarantee & Trust Co. v. McDonnell*, 28 Wash. 359; *State ex rel. Sprague v. Superior Court*, 32 Wash. 693; *Lazier v. Cady*, 43 Wash. 82.

In an appeal from an order in supplemental proceedings entered after judgment appointing a receiver, a supersedeas bond given for the purpose of staying payment on the judgment by the receiver is sufficient when given in the amount fixed by the court, although less than the amount of the judgment, no appeal having been taken therefrom: *Johnson v. Joslyn*, 45 Wash. 310.

An appeal from a judgment quieting title and for costs will be dismissed where the bond on appeal is conditioned also as a supersedeas bond, without the amount thereof having been fixed by order of the trial court: *Tibbitts v. Henry*, 46 Wash. 300.

An appeal from a judgment quieting title, in which the court, at appellant's request, fixed the amount of a supersedeas bond at \$200, will be dismissed when the bond on appeal, conditioned also as a supersedeas bond, was in the sum of only \$200; since it should have been \$400: *Washington Water Power Co. v. Abacus Assn.*, 49 Wash. 261.

Where, in an action of replevin, the appellant having erroneously assumed that it had possession of the property, the court on application fixed the amount of the supersedeas bond in the sum of \$—, a bond given in the sum of \$1,000 both as a cost and supersedeas bond is sufficient to give jurisdiction of the appeal, where the only judgment to be superseded was one for \$43 in the registry of the court and for costs taxed: *Gilbert Co. v. Husted*, 50 Wash. 61.

Penalty of supersedeas bond on appeal from judgments affecting property or rights: See 1 Remington's Digest, p. 151, § 237; *State ex rel. Smith v. Sachs*, 3 Wash. 96; *State ex rel. Orth v. Benson*, 21 Wash. 580; *In re Drasdo's Estate*, 35 Wash. 412; *Macy v. Sullivan*, 41 Wash. 564; *Pierson v. Peirce*, 37 Wash. 443 (overruled on rehearing), 42 Wash. 164; *Title Guarantee & Trust Co. v. McDonnell*, 28 Wash. 359.

That an appeal and supersedeas bond is not large enough to cover interest accruing is not ground for dismissal of the appeal: *Woelflen v. Lewiston-Clarkston Co.*, 49 Wash. 405.

An appeal and supersedeas bond by defendants need not be large enough to cover the costs of a codefendant dismissed from the action and not joining in the appeal: *Woelflen v. Lewiston-Clarkston Co.*, 49 Wash. 405.

Scope and effect as stay: See 1 Remington's Digest, p. 151, § 239; *State ex rel. Schloss v. Superior Court*, 3 Wash. 696; *Anderson v. Tingley*, 20 Wash. 592; *State ex rel. Barnard v. Board of Education of Seattle*, 19 Wash. 8; *Fawcett v. Superior Court*, 15 Wash. 342.

Where the custody of minor children is awarded to their mother upon a hearing of habeas corpus proceedings, the filing of a supersedeas bond, upon appeal by adoptive parents does not entitle them to resume custody of the children; since the welfare of the children is the primary consideration, and the supreme court acquires jurisdiction over that subject by virtue of the appeal: *State ex rel. Davenport v. Poindexter*, 45 Wash. 37.

The giving of a bond to stay execution of a judgment does not operate to prevent an appeal from the judgment, and the

stay bond only creates an obligation to pay the judgment at the end of the period fixed for the stay, which assumes a valid judgment existing at that time: *Hampton v. Buchanan*, 50 Wash. 39.

As affecting injunction: See 1 Remington's Digest, p. 153, § 240; *State ex rel. Miller v. Lichtenberg*, 4 Wash. 407; *Coleman v. Columbia & P. S. R. Co.*, 8 Wash. 227; *State ex rel. Commercial El. L. & P. Co. v. Stalleup*, 15 Wash. 263; *State ex rel. Ashmore v. Hunter*, 4 Wash. 637; *State ex rel. Nooksack R. Boom Co. v. Superior Court*, 2 Wash. 9; *State ex rel. Byers v. Superior Court*, 28 Wash. 403; *State ex rel. Quandt v. Superior Court*, 30 Wash. 197; *State ex rel. Norris Safe etc. Co. v. Superior Court*, 20 Wash. 117; *State ex rel. Flaherty v. Superior Court*, 35 Wash. 200; *State ex rel. Gibson v. Superior Court*, 39 Wash. 115; *State ex rel. Burrows v. Superior Court*, 43 Wash. 225.

Effect of supersedeas on appointment of receiver and other proceedings: See 1 Remington's Digest, pp. 153, 154, §§ 241, 242; *Anderson v. Tingley*, 20 Wash. 592; *State ex rel. German-American Safe Dep. etc. Bank v. Superior Court*, 12 Wash. 677; *State ex rel. Sanglin v. Superior Court*, 30 Wash. 232; *State ex rel. Washington Match Co. v. Superior Court*, 34 Wash. 123; *State ex rel. Anderson v. Bell*, 36 Wash. 196; *State ex rel. Sprague v. Superior Court*, 32 Wash. 693; *Fawcett v. Superior Court*, 15 Wash. 342; *State ex rel. Mullen v. Superior Court*, 15 Wash. 376; *State ex rel. Mullen v. Doherty*, 15 Wash. 699 (mem.); *State ex rel. Nooksack R. B. Co. v. Superior Court*, 2 Wash. 9; *State ex rel. Smith v. Sachs*, 3 Wash. 96; *State ex rel. Orth v. Benson*, 21 Wash. 580; *State ex rel. Byers v. Superior Court*, 28 Wash. 403; *State ex rel. Denham v. Superior Court*, 28 Wash. 590.

Proceedings in violation of supersedeas or stay—Compelling lower court's compliance and supersedeas by the supreme court: See 1 Remington's Digest, pp. 154, 155, §§ 243, 244; *German-American Safe Dep. etc. Bank v. Superior Court*, 12 Wash. 677; *State ex rel. Quandt v. Superior Court*, 30 Wash. 197; *State ex rel. Washington Match Co. v. Superior Court*, 34 Wash. 123; *State ex rel. Norris Safe Co. v. Superior Court*, 30 Wash. 177; see *State ex rel. Barnard v. Board of Education of Seattle*, 19 Wash. 8; *State ex rel. Bringgold v. Burns*, 21 Wash. 227; *State ex rel. Richardson v. Superior Court*, 28 Wash. 677; *State ex rel. Cawley v. Bremerton*, 32 Wash. 508.

After an appeal has been perfected from a prohibitory injunction, the supreme court has jurisdiction to issue an order of supersedeas, where the appeal is being prosecuted in good faith and the suspension of the judgment can be granted without depriving respondents of ultimate relief; and an injunction against the operation of a railroad by a common carrier

in a street abutting on respondent's lots will be suspended upon the filing of a suitable bond conditioned upon the payment of any damages sustained by reason of the suspension: *Lund v. Idaho etc. Northern R. R.*, 48 Wash. 453.

§ 1723. (6507.) Temporary Injunction to Remain in Force, When.

In all cases where a final judgment shall be rendered by any superior court of this state in a cause wherein a temporary injunction has been granted, and the party at whose instance such injunction was granted shall appeal from such judgment, such injunction shall remain in force during the pendency of such appeal, if, within five days after service on him of notice of the entry of the final judgment, such appellant shall file with the clerk of the superior court a bond, with one or more sufficient sureties, in a penalty to be fixed by said court, conditioned that the appellant shall pay to the respondent all costs and damages that may be adjudged against the appellant on the appeal, and all costs and damages that may accrue to the respondent by reason of the injunction remaining in force. [L. '93, p. 123, § 8.]

See notes to previous section.

Cited in 15 Wash. 269; 30 Wash. 202; 43 Wash. 229.

A restraining order issued without notice to defendants, on the ground of a temporary emergency, cannot be kept in

force by the plaintiff pending an appeal: *Coleman v. Railway Co.*, 8 Wash. 227. See *State ex rel. Quandt v. Superior Court*, 30 Wash. 197.

§ 1724. (6508.) Injunction Where Appeal to United States Supreme Court.

In all cases where a final judgment shall be rendered by the supreme court of this state in a cause wherein a temporary or final injunction has been granted and the party at whose instance such injunction was granted shall appeal from such judgment to the supreme court of the United States, such injunction shall remain in force during the pendency of such appeal, if, within sixty days after the rendition of such judgment of the supreme court of this state, such appellant shall file with the clerk of the supreme court a bond, with one or more sufficient sureties, in a penalty to be fixed by said court, conditioned that the appellant shall pay to the respondent all costs and damages that may be adjudged against the appellant on appeal, and all costs and damages that may accrue to the respondent by reason of the injunction remaining in force. [L. '93, p. 124, § 9.]

§ 1725. (6509.) Justification of Sureties.

An appeal bond, whether conditioned so as to effect a stay of proceedings or not, shall be of no force unless accompanied by the affidavit of the surety or sureties therein attached thereto, in which each surety shall state that he is a resident of this state and is worth a certain sum mentioned in such affidavit, over and above all debts and liabilities, in property within this state, exclusive of property exempt from execution, and which sums so sworn to by the surety or sureties, shall be at least equal to the penalty named in the bond if there be but one surety, or shall amount in all to at least twice such penalty if there be more than one surety. [L. '93, p. 124, § 10.]

See *infra*, § 6240, bonds by surety companies.

See notes to § 1722.

Cited in 12 Wash. 563; 18 Wash. 658; 33 Wash. 88.

See 1 Remington's Digest, pp. 136, 137, §§ 199, 200.

Where the appeal bond is not accompanied by the affidavit of the sureties required by the statute, the appeal will be dismissed: *Investment Trust v. Hender*, 12 Wash. 559.

An appeal will not be dismissed for the reason that the affidavit of the surety in the appeal bond fails to state that such surety is worth the required amount over and above all debts and liabilities: *Horton v. Donohue Co.*, 15 Wash. 399.

Under this section one surety is sufficient: *Murray v. Moynahan*, 27 Wash. 379.

Appeal will be dismissed where sureties on appeal fail to justify: *McFadden v.*

Mountain View Min. etc. Co., 27 Wash. 729 (mem.); *Starling v. Burdette*, 28 Wash. 261.

But not where the surety is a guaranty company: See *De Roberts v. Stiles*, 24 Wash. 611.

Sufficiency of affidavits: See *Spokane & Idaho Lum. Co. v. Loy*, 21 Wash. 501; *McLean v. Roller*, 33 Wash. 166; *Murray v. Moynahan*, 27 Wash. 379.

§ 1726. (6510.) Exception to Surety—Certificate—New Bond.

Any respondent may except to the sufficiency of the surety or sureties in an appeal bond, within ten days after the service on him of the notice of appeal or within five days after the service on him of the bond or written notice of the filing thereof, by serving on the appellant a notice stating that he so excepts, and specifying a place at the county seat, and a time, not less than three nor more than ten days distant, at which the surety or sureties are required to attend before the superior court in which the judgment or order appealed from was rendered or made, or before a judge thereof, and to justify their sufficiency as sureties. At the time and place named in such notice, or to which the proceedings may be thence adjourned by the court or judge, the surety or sureties must attend before the court or judge, and may be then and there examined in detail, under oath, as to their property and other qualifications as sureties, by any respondent or by the judge, or by both. If the judge upon such examination is satisfied that the surety or sureties are qualified as such, to the extent to which they are required by section 1723 of this title to make affidavit, then he shall make a certificate to that effect indorsed upon or attached to the bond, which shall thereupon stand as a sufficient appeal bond to the effect expressed in the condition thereof; but if he is not so satisfied, or if the sureties fail to attend and justify, then the judge shall in like manner certify to that effect, and thereupon the bond shall become void: Provided, that in such case the appellant may, within five days after the making of such certificate, file a new appeal bond, in conformity with the requirements of this title, and subject to the requirement of justification of the sureties therein, as hereinabove provided; but in case such new appeal bond be found insufficient, no new bond can thereafter be filed in lieu thereof. In case the original or new appeal bond be not conditioned so as to effect a stay of proceedings, however, an additional appeal bond may be filed at any time thereafter when the appellant desires to effect a stay as provided in this title, during the pendency of the appeal. The examination of the sureties taken upon their justification shall be reduced to writing and subscribed by the sureties, if either party so requires, and attached to the certificate made thereon. [L. '93, p. 125, § 11.]

Cited in 11 Wash. 70; 12 Wash. 23. 683; 17 Wash. 110; 18 Wash. 668; 20 Wash. 304; 21 Wash. 433; 24 Wash. 613; 25 Wash. 146; 27 Wash. 381; 28 Wash. 262; 33 Wash. 198; 34 Wash. 511.

See 1 Remington's Digest, pp. 139, 140, §§ 205-208.

Failure to object to the sufficiency of an appeal bond before the lower court will preclude the consideration of such objection upon appeal: *Warburton v. Ralph*, 9 Wash. 537; *Miller v. Vermurie*, 7 Wash. 386; *McEachern v. Brackett*, 8 Wash.

652; *Railway Co. v. Johnson*, 7 Wash. 97; *Cook v. Tibballs*, 12 Wash. 207; *Oliver v. Dupee*, 16 Wash. 634; *Jenkins v. Jenkins' University*, 17 Wash. 160; *Weiser v. Holzman*, 33 Wash. 87. Also, failure to object to the form of the justification of the sureties: *Frew v. Clark*, 34 Wash. 561; or for failure to state the amount over and above debts and liabilities: *Horton v. Donohoe-Kelly Banking Co.*, 15 Wash. 399; or in stating that the property was not subject to execution as the use of the word "not" was evidently a clerical

error: *Jones v. Herrick*, 33 Wash. 197; or to state the residence of the surety and ownership of property in the state: *Sligh v. Shelton S. W. R. Co.*, 20 Wash. 16.

An objection that a surety company is not qualified to become surety is waived if not raised below: *Roberts v. Shelton S. W. R. Co.*, 21 Wash. 427.

An objection that the surety was not qualified must be first raised in the court below: *Noble v. Whitten*, 34 Wash. 507. See, also, *First Nat. Bank v. Coles*, 40 Wash. 528.

Where the sufficiency of sureties is objected to, the appellant may file a new bond within the time required by the statute, instead of presenting his sureties for examination: *Spurlock v. Railway Co.*, 12 Wash. 34; *Maney v. Hart*, 11 Wash. 67.

The failure of a surety to appear and justify when the sufficiency of the bond has been attacked will not disqualify him as a surety upon a new bond given after the abandonment of the old one: *State v. Superior Court*, 12 Wash. 677.

Where the bond first filed has been found insufficient and a new bond filed

in its stead, the latter can be attacked only in the manner provided by statute, and the court cannot of its own motion certify such bond as invalid: *Id.*

If an appeal is dismissed because the sureties upon the bond are found to be insufficient, no judgment can be rendered against them: *Railway Co. v. Brailard*, 12 Wash. 22.

The sufficiency of a bond is not triable in the supreme court upon affidavits: *Jenkins v. Jenkins' University*, 17 Wash. 160.

Testimony of sureties as to their qualifications need not be reduced to writing, when: See *Hyatt v. Lewis*, 20 Wash. 303.

Amendment of bond and defects incapable of amendment: See 1 *Remington's Digest*, p. 140, §§ 207, 208; *David v. Guich*, 30 Wash. 266; *Smith v. Beard*, 21 Wash. 204; *State ex rel. Brewer v. Chapman*, 17 Wash. 109; *Galloway v. Tjossem*, 22 Wash. 103; *Northern Counties Investment Trust v. Hender*, 12 Wash. 559; *McFadden v. Mountain View etc. Co.*, 27 Wash. 729; *Pennsylvania Mtg. Inv. Co. v. Gilbert*, 18 Wash. 667; *Wallace v. Oceanic Packing Co.*, 25 Wash. 143; *Starling v. Burdette*, 28 Wash. 261.

§ 1727. (6511.) Execution Countermanded, When.

When an appeal bond is conditioned so as to effect a stay of proceedings if execution has issued the clerk shall on demand of the appellant, issue to the sheriff a certificate that proceedings have been stayed, which shall countermand the execution; and thereupon the sheriff shall release any property levied on and not already sold, and return the execution into court. [L. '93, p. 126, § 12.]

A pending appeal will not prevent action upon the judgment in the lower court in the absence of a supersedeas bond: *Gilmore v. H. W. Baker Co.*, 14 Wash. 52.

A supersedeas bond is sufficient without the giving of an appeal bond: *State v. Seavey*, 7 Wash. 562. See, also, *Title Guaranty & Trust Co. v. McDonnell*, 28 Wash. 359.

§ 1728. (6512.) Application for New Bond.

If any respondent shall have cause to believe, after any appeal bond shall have been filed and the sureties therein have justified or the time for requiring their justification has expired, that the sureties have since become disqualified as such, so that the bond is no longer an adequate security, he may apply by motion to the supreme court to require a new or additional bond; and upon the hearing of such motion the court may receive evidence in support of and in opposition to the motion in such manner, and may make such order thereon, as it shall deem proper. [L. '93, p. 126, § 13.]

Cited in 48 Wash. 428.

§ 1729. (6313.*) Record—What Constitutes—Duties of Clerk.

Within ninety days after an appeal shall have been taken by notice as provided in this title, the clerk of the superior court shall prepare, certify and file in his office, at the expense of the appellant (except in criminal appeals prosecuted in forma pauperis, and in such cases at the expense of the county), a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced

within the appeal, said transcript to be so prepared, certified and filed, in the office of the clerk, at or before the time when the appellant shall serve and file his opening brief, as hereinafter provided. Within four months after said appeal shall have been taken by notice as aforesaid, the clerk of the superior court shall at the expense of appellant, send up to the supreme court said transcript together with the original briefs on appeal filed in his office. The papers and copies so sent up together with any thereafter sent up as hereinbelow provided, shall constitute the record on appeal. Any bill of exceptions or statement of facts on file when the record is so sent up shall be sent up as a part thereof, unless the superior court or a judge thereof has not yet passed on an application for the settlement and certifying of such bill or statement. In case any bill of exceptions or statement of facts shall be filed or certified, or any other addition to the records or files shall be made after the record on appeal shall have been sent up, a supplementary record on appeal embracing so much thereof as the appellant deems material, or a copy thereof may be prepared, certified and sent up at any time prior to the hearing of the appeal. And in case the respondent deems any part of the files or record not already sent up to be material to the review of the matters embraced within the appeal, he may cause the clerk, in like manner, at his expense, to prepare, certify and send up a supplementary record on appeal embracing such omitted files or records, or copies thereof, at any time prior to the hearing of the appeal. Any such supplementary record or records, if filed in the supreme court prior to the hearing of the appeal, shall be considered by the court as part of the record on appeal, so far as the same may be material to a review of the matters embraced within the appeal. When the review of an original paper in the cause may be important to a correct decision of the appeal, the court or judge may order the clerk to transmit the same to the clerk of the supreme court and the same shall be transmitted accordingly, and shall be under the control of the supreme court. [L. '93, p. 126, § 14; L. '01, p. 29, § 2.]

Form of certificate: Rule V, 51 Wash. xxxiv.

Cited in 8 Wash. 393; 11 Wash. 142; 16 Wash. 274; 20 Wash. 407; 23 Wash. 261; 26 Wash. 494; 30 Wash. 159; 31 Wash. 537; 32 Wash. 695; 34 Wash. 529, 531; 38 Wash. 575; 48 Wash. 7.

Record in general: See 1 Remington's Digest, pp. 155-190, §§ 245-336.

The notes taken by a stenographer are not a part of the record in a cause, and an appellant cannot be compelled to furnish a copy of them: *State v. Superior Court*, 13 Wash. 514.

The minutes of the clerk of the superior court and affidavits will not be considered by the supreme court for the purpose of showing the alleged misconduct of the trial judge, but the facts must be accepted as certified by the judge in the statement of facts: *State v. Wroth*, 15 Wash. 621.

The failure of appellant to bring up more of the instructions than the paragraph complained of will not raise a presumption that the error was subsequently obviated by the court in its further instructions to the jury: *Payne v. Railway Co.*, 15 Wash. 522.

The supreme court must take cognizance of matters brought before it by a supplemental record, which supplies the deficiencies of the original record: *Curry v. Catlin*, 12 Wash. 322.

The transcript on appeal cannot be corrected in the appellate court by affidavits or other extrinsic evidence: *Ward v. Insurance Co.*, 12 Wash. 631.

The fact that the appellant has failed to except to the findings and conclusions of the trial court does not furnish grounds for striking the statement of facts from the files: *Hannegan v. Roth*, 12 Wash. 65.

Leave to file a supplemental transcript for the purpose of disclosing a want of jurisdiction will not be given, where the supreme court has already taken action upon the original record: *Watson v. Sawyer*, 12 Wash. 35.

A statement will not be stricken because additional matter was incorporated therein after service, where the additional matter is such as the clerk was required to make part of the record, or which has no effect upon, or application to, the rights

of the respondent: *Building Co. v. Jones*, 9 Wash. 434.

FURTHER MATTERS TO BE SHOWN BY RECORD, IN GENERAL: See 1 Remington's Digest, pp. 155, 156, §§ 245-249; *Hall v. Union Life Ins. Co.*, 23 Wash. 610; *Hall v. Woolery*, 20 Wash. 440; *Smith v. Dow*, 43 Wash. 407; *Smith v. Michigan Lum. Co.*, 43 Wash. 402.

Upon the failure of a party to answer interrogatories filed, where the interrogatories go to all the issues in the case, and where the refusal to answer may be taken as an admission of the facts at issue, the entry of a judgment thereunder will not be disturbed on appeal when the interrogatories are not brought up, but the presumption will arise that the interrogatories extend to all the issues and that the refusal to answer is an admission of the facts sought to be determined: *Capps v. Frederick*, 44 Wash. 38.

SCOPE AND CONTENTS OF RECORD IN GENERAL: See 1 Remington's Digest, pp. 157-159, §§ 250-261; *Chase Nat. Bank of New York v. Hastings*, 20 Wash. 433; *Huggins v. Sutherland*, 39 Wash. 552; *Yakima Water L. & P. Co. v. Hathaway*, 18 Wash. 377; *Townsend Gas & Elec. Light Co. v. Hill*, 24 Wash. 469; *Buckley v. Conley*, 16 Wash. 338.

The supreme court cannot take cognizance of an oral stipulation sought to be shown by an affidavit which is controverted by the other party: *Costello v. Drainage District*, 44 Wash. 344.

An instruction requested in writing and filed with the clerk is properly made part of the record on appeal without being included in the bill of exceptions or statement of facts: *Tergeson v. Robinson Manufacturing Co.*, 48 Wash. 294.

The order calling for the issuance of a special jury venire, and records showing the issuance of a venire and selection of a jury from the jurors summoned, are properly part of the record to be certified by the clerk as part of the transcript on appeal without any bill of exceptions or statement of facts: *Oregon R. & Nav. Co. v. McCormick*, 46 Wash. 45.

Immaterial documents need not be included: See, *Seattle Trust Co. v. Pitner*, 17 Wash. 365; *Seavey v. Seattle*, 17 Wash. 361.

Papers referred to in the record: See *Roberts v. Shelton S. W. R. Co.*, 21 Wash. 427; *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288.

Transmission and filing of transcript on appeal: See 1 Remington's Digest, pp. 184-187, §§ 325-330.

FAILURE TO FILE TRANSCRIPT.—A motion to dismiss an appeal because the transcript and brief were not filed within the time required by law will not be granted when the facts shown establish a sufficient excuse for the delay: *Benn v. Chehalis County*, 10 Wash. 294; *State v. Willson*, 7 Wash. 502; but the failure of an appellant for four months after taking

an appeal to have the transcript and statement of facts filed in the supreme court will work a dismissal of the appeal: *Cochrane v. Gunderson*, 11 Wash. 141; *Baker v. Iron Works Co.*, 11 Wash. 535.

Under this section the appellant has four months after the appeal is taken within which to file the transcript in the supreme court: *Griffith v. Maxwell*, 20 Wash. 403.

An appeal will be dismissed where the only excuse for failing to file the transcript within the time required by law is the certificate of the clerk "that owing to the press of other business in my office I have been unable to sooner make up this transcript": *Chehalis County v. Pearson*, 10 Wash. 216.

A motion to dismiss an appeal for failing to send up the record and to diligently prosecute the appeal will not be entertained, when the motion is not made until after the appellant has furnished the record: *Gustin v. Jose*, 10 Wash. 217.

In order to procure a dismissal of an appeal for a failure to file the transcript within the time required by law, the respondent must move therefor on a short record, giving ten days' notice of the motion to the appellant: *Cochrane v. Gunderson*, 10 Wash. 326.

For further cases on failure to file in time, see 1 Remington's Digest, pp. 185, 186, §§ 326-329; *Ellis v. Bardin*, 36 Wash. 122; *Humes v. Hillman*, 39 Wash. 107; *Richardson v. Spangle*, 22 Wash. 14; *Dean v. Oregon R. & Nav. Co.*, 38 Wash. 565.

An appeal will not be dismissed for failure to file the transcript with the clerk of the superior court, before serving the briefs, in violation of Laws of 1901, page 29, section 2, when the transcript is filed before the motion is made: *Raymond v. Bales*, 26 Wash. 493; *Prescott v. Puget Sound Bridge & D. Co.*, 30 Wash. 158; *Johnson v. San Juan Fish etc. Co.*, 30 Wash. 162. See, also, *Chaplin v. Port Angeles*, 31 Wash. 535; *McNamara v. Crystal Min. Co.*, 23 Wash. 26; *McAvoy v. Jennings*, 39 Wash. 109.

An appeal should not be dismissed for failure to file the transcript within the time fixed by statute, where the inconvenience to respondent was not serious, but the motion will be denied upon payment of \$25 costs: *Driscoll v. Dufur*, 45 Wash. 494.

As to supplemental record to cure defects, see 1 Remington's Digest, p. 187, § 330; *Ranahan v. Gibbons*, 23 Wash. 255; *Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176; *Johnston v. Gerry*, 34 Wash. 524; *Spring Hill Irr. Co. v. Lake Irr. Co.*, 42 Wash. 379; *State ex rel. Krutz v. Washington Irr. Co.*, 39 Wash. 11; *Ogden v. Chehalis County*, 41 Wash. 45; *Ames v. Kinnear*, 40 Wash. 646; *Powell v. Nolan*, 27 Wash. 318.

When, by a supplemental record, the clerk of the lower court certifies to a new copy of the judgment appealed from, showing a personal judgment against only one

of the defendants, and that there was an inadvertent mistake in certifying the first copy on appeal, which showed personal judgment against both defendants, there is in fact but one judgment as indicated by the corrected transcript; but if, as claimed, there are two inconsistent judgments, the erroneous one should be vacated without costs to appellants, the point not having been urged below: *Hopkins v. Crane*, 50 Wash. 636.

As to the conclusiveness of the record on appeal, see 1 Remington's Digest, pp. 189, 190, § 336; *Fox v. Territory*, 2 W. T. 297; *State v. Hinchey*, 5 Wash. 326; *Ward v. Springfield Fire & M. Ins. Co.*, 12 Wash. 631; *State v. Wroth*, 15 Wash. 621; *Puckett v. Moody*, 17 Wash. 609; *Seattle etc. R. Co. v. Simpson*, 19 Wash. 628; *Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176; *Winsor v. McLachlan*, 12 Wash. 154; *Main Inv. Co. v. Olsen*, 43 Wash. 480.

§ 1730. (6514.*) Time for Filing and Serving Briefs.

Within ninety days after an appeal shall have been taken by notice as provided in this title, the appellant shall serve on the respondent three copies and shall file with the clerk of the superior court fifteen copies, together with proof or written admission of service, as aforesaid, of a printed brief on the appeal upon his part, which brief shall clearly point out each error that the appellant relies on for a reversal, and shall conform to such regulations of its contents in other respects, and its form and size, as the supreme court by its rules may have prescribed. Within thirty days after the service of the appellant's brief, the respondent shall likewise serve and file with the clerk of the superior court, with like proof of service, the like numbers of copies of a printed brief on the appeal upon his part which shall likewise conform to the rules of the supreme court. Not less than ten days prior to the hearing the appellant may also serve and file either with the clerk of the superior court or in the supreme court like printed brief or briefs, strictly in reply to respondent's brief. The time for service and filing of briefs, as in this section prescribed, may be extended by order of the superior court for good cause shown, or by stipulation of the parties concerned; and if the time for filing any statement of facts shall be extended by order or stipulation, the time herein prescribed for serving and filing the appellant's opening brief shall thereby be correspondingly extended. Either party may after the filing of his briefs and not less than one day prior to the hearing of the appeal submit to the supreme court and to the adverse party a written or printed statement of any additional authorities, with suitable comment thereon strictly in support of the position taken in his brief hereinabove required to be filed. But the appellant shall not be permitted to urge in any such reply brief or statement of additional authorities, or on the hearing, any grounds for reversal not clearly pointed out in his original brief. [L. '93, p. 127, § 15; L. '01, p. 30, § 3.]

Twenty-five copies of all printed briefs to be filed: Rule VIII, subd. 6, 51 Wash. xxxvi. See *supra*, § 13, power of supreme court to make rules.

Cited in 12 Wash. 387, 390; 16 Wash. 321; 30 Wash. 58; 34 Wash. 532; 38 Wash. 575; 39 Wash. 33; 42 Wash. 604.

See 1 Remington's Digest, pp. 190-194, §§ 337-347.

Where the appellant files a typewritten brief it will, upon motion, be stricken from the record and the judgment affirmed: *State v. Oleson*, 9 Wash. 186.

Where no substantial rights have been prejudiced by the delay in filing briefs, they will not be ordered stricken because not filed within the prescribed time: *In re Hill's Heirs*, 7 Wash. 421.

Failure to file the brief within the time prescribed without any excuse therefor is ground for the dismissal of the appeal, or affirmance of the judgment: *Lewis v. Host*, 2 W. T. 402; *Fountain v. Leckie*, 3 W. T. 407; *Higgins v. Burns*, 2 Wash. 372; *Chelalis Flume & Aqueduct Co. v. Reinhart*, 3 Wash. 428; *Cady v. Case*, 10 Wash. 140; *Blair v. Cassin*, 19 Wash. 127; *Sullivan's Estate, In re*, 25 Wash. 430; *Northwestern & Pac. etc. Bank v. Griffiths*, 18 Wash. 69; *Anderson v. Northern Pac. R. Co.*, 19 Wash. 340; *Ambrose v. Gwinnup*, 16 Wash. 333.

Excuses: See 1 Remington's Digest, pp. 190, 191, § 338; *State v. Williams*, 18 Wash.

47; Griffith v. Maxwell, 20 Wash. 403; Gay v. New Whatcom, 26 Wash. 389; Raymond v. Bales, 26 Wash. 493; Prescott v. Puget Sound Bridge etc. Co., 30 Wash. 158; Johnson v. San Juan Fish etc. Co., 30 Wash. 162; Spokane & Idaho Lum. Co. v. Loy, 21 Wash. 501; Jefferson County v. Trumbull, 31 Wash. 217; Ambrose v. Gwinup, 16 Wash. 333; Lacey v. North Olympia Land Co., 4 Wash. 261; Tustin v. McFarland, 4 Wash. 103; Sheperd v. Sheperd, 4 Wash. 615.

An oral stipulation made out of court between the parties to an appeal, extending the time for filing the briefs, will not be recognized by the supreme court as binding: Livesley v. Pier, 9 Wash. 658.

As to extending time for filing briefs, see 1 Remington's Digest, p. 191, § 340; Carlson Bros. & Co. v. Van De Vanter, 19 Wash. 32; National Christian Assn. v. Simpson, 21 Wash. 16; Chapin v. Port Angeles, 31 Wash. 535; Livesley v. Pier, 9 Wash. 658.

Form and requisites of briefs in general: See 1 Remington's Digest, p. 192, § 341; Sheehan v. Levy, 1 Wash. 149; Puget Sound Iron Co. v. Worthington, 2 W. T. 472; State ex rel. Tremblay v. McQuade, 12 Wash. 554; Luce v. Luce, 15 Wash. 608; First Nat. Bank of Aberdeen v. Carter, 10 Wash. 11; Hall v. Skavdale, 21 Wash. 203; Warburton v. Ralph, 9 Wash. 537; Peltysgrove v. Rothschild, 2 Wash. 6; Donohoe-Kelly Banking Co. v. Puget Sound Sav. Bank, 13 Wash. 407.

DEFECTIVE BRIEF.—The fact that appellant's brief does not designate all the defendants as respondents is not a ground for dismissing the appeal, if the notice of appeal was properly entitled and was served upon all the parties appearing in the action: Warburton v. Ralph, 9 Wash. 537.

Where many of the points argued in appellant's brief purport to be based upon parts of the record, without indicating the pages thereof, the court will not hear the appeal until after an amendment of the brief upon terms imposed: State v. Carter, 8 Wash. 272; Froelich v. Morse, 15 Wash. 636.

Where the insufficiency of the complaint to sustain the judgment has not been questioned in the appellant's brief, the point will not be considered: State v. Rohde, 8 Wash. 362.

As to printing and size of briefs, see 1 Remington's Digest, p. 192, § 342; Carroll v. Anderson, 2 W. T. 366; State v. Oleson, 9 Wash. 186; Bernier v. Bernier, 17 Wash. 689; Von Schrader v. Welcher, 19 Wash. 349; State v. Lewis, 35 Wash. 261; Rule VIII, 51 Wash. xxxv.

As to references in the brief to the record: See 1 Remington's Digest, p. 192, § 343; Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165; Hyatt v. Lewis, 20 Wash. 303; Sligh v. Shelton S. W. R. Co., 20 Wash. 16; Anderson v. White, 18 Wash. 658; State v. Brown, 37 Wash. 97; Kel-

logg v. Scheuerman, 18 Wash. 293; Jones v. Herrick, 33 Wash. 197; Dunsmuir v. Port Angeles Gas etc. Co., 24 Wash. 104; Murphy v. Currie, 21 Wash. 232; Drumheller v. American Surety Co., 30 Wash. 530; Graton & Knight Mfg. Co. v. Redelsheimer, 28 Wash. 370.

As to printing findings of lower court in the brief, see 1 Remington's Digest, p. 193, § 344; Fares v. Gleason, 14 Wash. 657; Seattle, In re, 26 Wash. 602; Lewis v. McDougall, 19 Wash. 388; Interstate Savings & L. Assn. v. Benson, 28 Wash. 578; Young v. Borzone, 26 Wash. 4; Timm v. Timm, 34 Wash. 228; Thompson v. Benson, 41 Wash. 70; Corbett v. Civil Service Com. of Seattle, 33 Wash. 190; Cathcart v. Bryant, 28 Wash. 31; Alfstad's Estate, In re, 27 Wash. 175; Parish v. Collins, 43 Wash. 392.

A motion to strike a brief because appellant failed to print the findings or exceptions thereto will be denied where the answer brief made no mention of the fact and the point was not raised until the hearing: Bybee v. Bybee, 45 Wash. 187.

As to improper language in the briefs, see 1 Remington's Digest, p. 194, § 345; Littlejohn v. Miller, 5 Wash. 399; Plummer v. Weil, 15 Wash. 427; Sawdey v. Spokane Falls & N. R. Co., 27 Wash. 536; Coates v. Seattle Elec. Co., 37 Wash. 8.

Respondent's brief containing ten pages of abusive criticism of attorneys who testified in favor of the appellant, the same having no connection with the case, will be struck out on motion, with leave to file a proper brief: Stern v. Daniel, 45 Wash. 611.

Defective reply briefs: See Stickler v. Giles, 9 Wash. 147; Vestal v. Morris, 11 Wash. 451; Sawyer v. Vermont Loan etc. Co., 41 Wash. 524.

ASSIGNMENT OF ERRORS: See 1 Remington's Digest, pp. 194-198, §§ 348-352. Where an appellant fails to clearly point out the errors relied on for a reversal in his brief, the brief will be stricken and the judgment affirmed: Haugh v. Tacoma, 12 Wash. 386; Colton Co. v. Duff, 11 Wash. 35; Perkins v. Mitchell, 15 Wash. 470; State v. Zettler, 15 Wash. 625.

An appellant will not be permitted to urge grounds of reversal in his reply brief not assigned or discussed in his opening brief: Peek v. Stanfield, 12 Wash. 101; Vestal v. Morris, 11 Wash. 451.

Errors not pointed out and relied upon in the original brief of a party to an appeal cannot be availed of for the first time on a petition for a rehearing: State v. Moss, 13 Wash. 42.

General objections to the statement of facts will not be considered, when no specific error has been called to the court's attention, either in the brief or by reference to the transcript: Payne v. Railway Co., 15 Wash. 522.

Although the errors relied on are not specifically assigned, an appeal will not be

dismissed where reference is made in the appellant's brief to objections in the record which were passed upon by the court when making the order appealed from: *Chandler v. Shingle Co.*, 13 Wash. 89.

An assignment of error that the court erred in overruling a demurrer to an answer is sufficiently definite, especially when the court in so ruling does not disclose its reasons therefor: *Phelps v. Tacoma*, 15 Wash. 367.

Form and requisites in general: See 1 Remington's Digest, p. 195, § 349; *Watson v. Gray's Harbor Brick Co.*, 3 Wash. 283; *McReavy v. Eshelman*, 4 Wash. 757; *Crowley v. McDonough*, 30 Wash. 57; *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89; *Ranahan v. Gibbons*, 23 Wash. 255; *Wilson v. Aberdeen*, 25 Wash. 614; *State v. Milby*, 26 Wash. 661; *Goetzinger v. Rosenfeld*, 16 Wash. 392; *Rhode Island Mtg. & T. Co. v. Spokane*, 19 Wash. 616; *James v. James*, 35 Wash. 655; *McKenzie v. Royal Dairy*, 35 Wash. 390; *State ex rel. McClaine v. Reed*, 29 Wash. 383; *Johnston v. Gerry*, 34 Wash. 524; *Brown v. Calloway*, 34 Wash. 175; *Hawkins v. Casey*, 38 Wash. 625; Rule VIII, 51 Wash., p. xxxv.

A brief on appeal sufficiently assigns as error that the verdict was excessive where that was one of the grounds of a motion for a new trial, and the brief assigned as error the overruling of such motion, although the excessiveness of the verdict was not argued in the brief: *Williams v. Spokane Falls & N. R. Co.*, 44 Wash. 363.

Argument in a brief against the correctness of admitting testimony or errors tending to excite the jury to passion and prejudice, and to bring in a large verdict, sufficiently points out error assigned as to the excessiveness of the verdict: *Id.*

Error in refusing a new trial on the ground of misconduct of a party is sufficiently assigned where that was one of the grounds of the motion, the brief assigns error on overruling the motion, and a subdivision of the argument is devoted to the subject of such misconduct: *Spencer v. Arlington*, 49 Wash. 121.

For insufficient assignments of error, see 1 Remington's Digest, p. 196, § 350; *Seattle v. Pearson*, 15 Wash. 575; *Haugh v. Ta-*

coma, 12 Wash. 386; *Doran v. Brown*, 16 Wash. 703; *Perkins v. Mitchell, Lewis & Staver Co.*, 15 Wash. 470; *Crane Co. v. Pacific Heat & Power Co.*, 36 Wash. 95; *Stein v. Waddell*, 37 Wash. 634.

An assignment of error that the court failed to charge the jury on the law of the case is too general to raise any question on appeal: *Duteau v. Seattle Electric Co.*, 45 Wash. 418.

A general assignment of error as to the admission of evidence is insufficient, where no reference is made to any particular evidence and no argument made thereon: *State v. Johnson*, 47 Wash. 227.

Necessity of specifying errors: See 1 Remington's Digest, p. 196, § 351; *McAlmond v. Adams*, 1 W. T. 230; *Blumenthal v. Pacific Meat Co.*, 12 Wash. 331; *Phelps v. Tacoma*, 15 Wash. 367; *Interstate Savings & Loan Assn. v. Benson*, 28 Wash. 578; *Peck v. Stansfield*, 12 Wash. 101; *Stickler v. Giles*, 9 Wash. 147; *State ex rel. Abernethy v. Moss*, 13 Wash. 42; *State v. Harding*, 20 Wash. 556; *State v. Zettler*, 15 Wash. 625; *Shumway v. Orchard*, 12 Wash. 104; *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244; *Payne v. Spokane St. R. Co.*, 15 Wash. 522; *Wilson v. Aberdeen*, 25 Wash. 614; *Carter v. Seattle*, 21 Wash. 585; *State v. Ilomaki*, 40 Wash. 629.

Errors not assigned in the brief will not be considered: See 1 Remington's Digest, p. 197, § 352; *Brown v. Hazard*, 2 W. T. 464; *Kellogg v. Sessions*, 4 Wash. 814; *State v. Devine*, 6 Wash. 587; *Sligh v. Shelton S. W. R. Co.*, 20 Wash. 16; *Blanton v. State*, 1 Wash. 265; *Northern Pac. R. Co. v. Hess*, 2 Wash. 383; *Francioli v. Brue*, 4 Wash. 124; *Colton Mercantile Co. v. Duff*, 11 Wash. 35; *State ex rel. Bud-dress v. Rohde*, 8 Wash. 362; *Ogle v. Jones*, 16 Wash. 319; *Lacey v. North Olym-pia Land Co.*, 4 Wash. 261; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67; *State v. Owens*, 15 Wash. 468; *Sweeney v. Pacific Coast Elevator Co.*, 14 Wash. 562; *Sengfelder v. Hill*, 21 Wash. 371; *Branscheid v. Branscheid*, 27 Wash. 368; *Harris v. Halverson*, 23 Wash. 779; *Murphy v. Currie*, 21 Wash. 232; *McKenzie v. Royal Dairy*, 35 Wash. 390.

§ 1731. (6515.) Jurisdiction, Effect of Appeal upon.

Upon the taking of an appeal by notice as provided in this title, and the filing of a bond to render the appeal effectual, the supreme court shall acquire jurisdiction of the appeal for all necessary purposes, and shall have control of the superior court and of all inferior officers in all matters pertaining thereto, and may enforce such control by a mandate or otherwise, and, if necessary, by fine and imprisonment, which imprisonment may be continued until obedience shall be rendered to the mandate of the supreme court. But the superior court shall, nevertheless, retain jurisdiction for the purpose of all proceedings by this act provided to be had in such court, and for the purpose of settlement and certifying the bills of exceptions and state-

ments of facts, and for all purposes in so far as the cause is not affected by the appeal. [L. '93, p. 128, § 16.]

Cited in 12 Wash. 565; 29 Wash. 621; 26 Wash. 124; 29 Wash. 621.

Where an appeal has been perfected, the superior court no longer has jurisdiction for the purpose of any action except such as is especially provided for in the appeal act: *State ex rel. Mullin v. Superior Court*, 15 Wash. 376.

Effect of transfer of cause or proceedings therefor: See 1 Remington's Digest, p. 148 §§ 224-228; *Gilmore v. Baker Co.*, 14 Wash. 52; *State ex rel. Roberts v. Superior Court*, 32 Wash. 143; *Canada Settlers L. & T. Co. v. Murray*, 20 Wash. 656; *Aetna Ins. Co. v. Thompson*, 34 Wash. 610; *Brundage v. Home Savings & Loan Assn.*, 11 Wash. 288; *State ex rel. Sanglin v. Superior Court*, 30 Wash. 232.

Jurisdiction of the supreme court: See 1 Remington's Digest, pp. 148, 149, §§ 229-231; *De Mers v. Sandy Spit Fish Co.*, 24 Wash. 582; *Irving v. Irving*, 26 Wash. 122; *State v. Tugwell*, 19 Wash. 228; *Hinchman v. Point Defiance R. Co.*, 17 Wash. 399.

MODIFICATION OF JUDGMENT.—Neither the trial court nor the supreme court has power to modify a judgment after the

time therefor has expired: *Wolferman v. Bell*, 8 Wash. 140.

After an appeal has been taken, the appellant's right to a reversal will not be affected by an offer of the respondent to consent to a modification of the judgment for the purpose of correcting error therein: *Leake v. Hayes*, 13 Wash. 213.

A judgment in the supreme court for costs against defendants who have not been served nor appeared in the action is absolutely void, and may be properly attacked by a proceeding in that court to have the judgment modified: *Bell v. Waudby*, 7 Wash. 203.

The judgment of the supreme court upon appeal in an equity case cannot be modified by the superior court after the cause has been remanded: *State v. Superior Court*, 7 Wash. 234.

A stipulation pending appeal, providing for a distribution of a portion of the fund in a controversy, will not deprive appellants of the benefit of their appeal, when the stipulation shows that it was not intended as an abandonment of their appeal: *Seattle v. Liberman*, 9 Wash. 276.

§ 1732. (6516.) Calendar, How Prepared.

All appeals in which the record shall have [been] filed in the supreme court at least ten days before the beginning of any stated session of the court, shall be placed on the calendar of the court for hearing at such session; and the subsequent filing of a supplementary record shall not affect the position of the appeal on the calendar. But the hearing of an appeal may at any time be postponed by the court or continued for the session, of its own motion or for good cause shown, and on such terms as may be just. [L. '93, p. 128, § 17.]

See Rules IX and X, 51 Wash. p. xxxvii et seq.

Cases on appeal will not be heard out of their regular order, except where grave public considerations justify such a course: *Olympia v. Moore*, 7 Wash. 236.

See 1 Remington's Digest, p. 201, § 362; *Griffith v. Maxwell*, 22 Wash. 624.

An appellant's brief must be on file or the cause cannot be put on the calendar: *Lacey v. North Olympia Land Co.*, 4 Wash. 261.

§ 1733. (6517.) Motion to Dismiss.

Any respondent may move the supreme court, at such time and in such manner as the court by its rules may have prescribed, to dismiss an appeal either on the ground that the court has no jurisdiction of an appeal from the judgment or order from which the appeal was taken, or that the notice of appeal was not served or filed within the time limited by law, or is insufficient, or that the appeal bond was not filed within the time limited by law, or is not in form or substance such as to render the appeal effectual, or that the appellant's brief has not been served or filed, or that the record on appeal has not been sent up, or that the appeal has not been diligently prosecuted or on any ground going to the merits of the further prosecution of the appeal, or on any two or more of the grounds hereinabove mentioned; and there may

be combined with a motion to dismiss a motion to affirm the judgment or order appealed from, or a motion for damages on the ground that the appeal was taken merely for delay, or was manifestly unauthorized by law, or both such motions. A general appearance in the supreme court shall not be a waiver of the right to make any motion herein authorized. [L. '93, p. 129, § 18.]

Motions how made and heard: Rule XVII, 51 Wash., p. xl.

Cited in 9 Wash. 657; 11 Wash. 78, 480; 27 Wash. 178; 29 Wash. 621.

See 1 Remington's Digest, pp. 198-200, §§ 353-360.

A motion to dismiss an appeal, which is not set out in respondent's brief, will not be considered, when it involves no jurisdictional question: *Luce v. Luce*, 15 Wash. 608; but a motion addressed to the jurisdiction of the appellate court will be entertained at any time, although not incorporated in the brief of the moving party: *First Nat. Bank v. Carter*, 10 Wash. 11.

An appeal by the state from a judgment sustaining a demurrer will be dismissed, when the attorney general, who appears for the state, concedes that the demurrer was properly sustained: *State v. Smith*, 7 Wash. 194.

An appeal from a judgment refusing an injunction to prevent a county treasurer from paying a warrant is not subject to dismissal because of the act of the treasurer in making payment subsequent to the appeal: *Hartson v. Dale*, 9 Wash. 379.

The dismissal of an appeal on motion will not oust the supreme court of jurisdiction to enter judgment against the appellant and his sureties in the appeal bond: *Allen v. Catlin*, 9 Wash. 603.

Laws of 1893, page 372, § 106, providing for the deposit of sufficient money to pay the judgment and costs upon appeal from a judgment for the sale of lands for taxes, does not apply where the assessment was

absolutely void: *In re Lockwood's Application*, 11 Wash. 704.

Failure to observe rules of court: See, also, *State v. Pearson*, 37 Wash. 405.

Voluntary dismissals: See 1 Remington's Digest, pp. 188, 199, § 355; *Post v. Spokane*, 28 Wash. 71; *Taake v. Seattle*, 16 Wash. 90; *Seattle, In re*, 40 Wash. 450.

Time and mode of making motion for dismissal: See 1 Remington's Digest, p. 199, § 356; *Luce v. Luce*, 15 Wash. 608; *First Nat. Bank of Aberdeen v. Carter*, 10 Wash. 11; *Rogers v. Trumbull*, 31 Wash. 656; *Lamona's Estate, In re*, 29 Wash. 394; *First Nat. Bank of Seattle v. Gordon Hardware Co.*, 30 Wash. 127; *Healy v. Seward*, 5 Wash. 319; *State v. Blanck*, 10 Wash. 292; *Ellis v. Moon*, 40 Wash. 114; *Kubillus v. Ewert*, 40 Wash. 38.

Where a motion to dismiss an appeal was filed before briefs were served, calling attention thereto in the briefs, in a conspicuous place, is sufficient notice that the motion will be urged at the hearing, without setting the same out in the brief: *Kelso v. American Investment & Improvement Co.*, 48 Wash. 5.

Motion for dismissal in absence of record: See 1 Remington's Digest, pp. 199, 200, § 357; *O'Hare v. Wilson*, 3 W. T. 251; *Hesford v. Doud*, 3 Wash. 430; *Tinkham v. Timble*, 2 Wash. 683; *Chehalis Flume & Aqueduct Co. v. Reinhart*, 3 Wash. 428; *Haas v. Gaddis*, 1 Wash. 89; *Cochrane v. Gunderson*, 10 Wash. 326.

§ 1734. (6518.*) Hearing and Disposition of Motion.

If the supreme court on the hearing of any such motion or motions shall find the grounds or any thereof alleged, for the same, to be well taken and true in effect, the court may grant the same in whole or in part, but when any such motion does not go to the substance of the appeal, or to the right of appeal, and the court shall be of the opinion that the moving party can be compensated in costs, or by the imposition of other terms for any delay of the appellant which is made the ground of any such motion (except a failure to take the appeal within the time limited by law) the court, in its discretion, may deny the motion on such terms as may be just. The court shall upon like terms allow all amendments in matters of form, curative of defects in proceedings to the end that substantial justice be secured to the parties, and no appeal shall be dismissed for any informality or defect in the notice of appeal, the appeal bond, or the service of either thereof, or for any defect of parties to the appeal if the appellant shall forthwith, upon order of the supreme court, perfect the appeal. [L. '93, p. 129, § 19; L. '99, p. 79, § 1.]

Cited in 12 Wash. 565; 20 Wash. 691; 26 Wash. 224; 27 Wash. 178.

Practice on motion to dismiss: See 1 Remington's Digest, p. 200, § 358; Skagit R. & Lum. Co. v. Cole, 1 Wash. 330; Spokane & Idaho Lumber Co. v. Loy, 21 Wash. 501; State v. Nordstrom, 21 Wash. 403; Jenkins v. Jenkins University, 17 Wash. 160; Rogers v. Trumbull, 31 Wash. 656.

An appeal will not be dismissed on the ground that the matters were determined in a former appeal where it is patent on the face of the motion that, if granted, the appellant could not enforce the orders made by the appellate court: Johnson v. Joslyn, 47 Wash. 531.

An appeal will not be dismissed because taken from a judgment against only one of two defendants, when the other defendant had not appeared in the action at the time of the appeal: Andrews v. Uncle Joe Diamond Broker, 44 Wash. 668.

An appeal will not be dismissed because of the filing of a notice of appeal before service thereof, or because of failure to file proof of service within five days, where the proof was substantially made and no delay or injury results: Reynolds v. Reynolds, 42 Wash. 107.

An appeal from a judgment dismissing an action for failure to file a bill of particulars will not be dismissed for the reason that no abuse of discretion appears; since that is a question to be determined on the merits of the appeal and not on motion to

dismiss: Moore v. Scharnikow, 48 Wash. 564.

Where judgment is entered in a personal injury case upon a verdict in favor of plaintiff, against one defendant for damages, and in favor of a codefendant for costs, and appeal is taken by the unsuccessful defendant, failure to serve the notice of appeal upon the codefendant as required by section 1720 does not deprive the supreme court of jurisdiction or work a dismissal of the appeal; since section 1719 provides that service of the notice upon the prevailing party shall effect the appeal; and since such coparty has no right to appeal and no interest in the appeal taken, and the same does not go to the substance, or to the right to appeal, under this section: Sipes v. Puget Sound Electric R. Co., 50 Wash. 585; Wilson v. Puget Sound Electric R. Co., 50 Wash. 596.

Upon a motion to dismiss an appeal for failure of the appellant to serve notice upon a coparty in whose favor judgment had been given, an affidavit showing that the coparty was represented by the same attorneys as the appellant, that they prepared the notice of appeal and at all times had a copy in their possession as attorneys for the coparty, and had notice of the appeal, and the coparty had no intention to join therein, cures any defect, and shows sufficient service and proof thereof, under this section: Sipes v. Puget Sound Electric R. Co., 50 Wash. 585.

§ 1735. (6519.) Second Appeal.

No withdrawal of an appeal, and no dismissal which does not go to the substance of or the right to the appeal, shall preclude any party from taking another appeal in the same cause, within the time limited by law. [L. '93, p. 130, § 20.]

Cited in 9 Wash. 658; 28 Wash. 702; 40 Wash. 451, 580.

Although an appellant has the right to dismiss his appeal with a view to a second appeal, such dismissal will not be granted him without prejudice, but the supreme court will retain jurisdiction for the purpose of affirming the judgment in case the appellant fails to prosecute a second appeal within the time allowed by law: Agassiz v. Kelleher, 9 Wash. 656.

As to second appeals, see 1 Remington's Digest, p. 80, § 8; Robert v. Tucker, 1 W.

T. 179; Spokane Falls v. Browne, 3 Wash. 84; Callahan v. Houghton, 2 Wash. 539; Griffith v. Maxwell, 20 Wash. 403; Tacoma Lumber etc. Co. v. Wolff, 5 Wash. 264; State ex rel. Baldwin v. Seavey, 7 Wash. 562; Watterson v. Masterson, 15 Wash. 511; Embree v. McLennan, 18 Wash. 651; Sligh v. Shelton S. W. R. Co., 20 Wash. 16; Reichenbach v. Lewis, 5 Wash. 577; Noble v. Whitten, 34 Wash. 507; Tatum v. Geist, 40 Wash. 575.

§ 1736. (6520.) What may be Reviewed.

Upon an appeal from a judgment, the supreme court may review any intermediate order or determination of the court below which involves the merits and materially affects the judgment, appearing upon the record sent up from the superior court. Any questions of fact or of law, decided upon trials by the court or by referees, in either legal or equitable causes, may be reviewed, when exceptions to the findings of fact or to the conclusions of law, or both, have been duly taken, by either party and sent up in the record

on appeal; and in actions legal or equitable, tried by the court below without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the supreme court de novo, so far as the findings of fact or a refusal to make findings based thereon shall have been excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement. [L. '93, p. 130, § 21.]

See supra, §§ 381-397, exceptions, and bills of exceptions.

Cited in 9 Wash. 300; 10 Wash. 154; 11 Wash. 395, 403, 553; 12 Wash. 68, 113, 188, 252; 13 Wash. 35; 22 Wash. 293; 24 Wash. 610; 28 Wash. 615; 29 Wash. 42; 33 Wash. 195, 655; 34 Wash. 94.

EXTENT OF REVIEW.—Matters not appearing in the record on appeal will not be considered by the supreme court: *State v. McQuade*, 12 Wash. 554; *State v. Rohde*, 8 Wash. 362.

Error prejudicial to a respondent will not be noticed in an appellate court when he has taken no appeal from the judgment of the trial court: *Langert v. David*, 14 Wash. 389; *Glenn v. Hill*, 11 Wash. 541.

Where an appeal has been taken from only a portion of a judgment, the appellant cannot challenge the sufficiency of the complaint: *Le May v. Baxter*, 11 Wash. 649; *Doremus v. Root*, 23 Wash. 710.

After reversal and a retrial, an objection to the sufficiency of the original complaint cannot be raised for the first time upon a second appeal: *Dennis v. Kass*, 13 Wash. 137.

The fact that an order is irregular or void for want of jurisdiction on the part of the court to make it will not prevent its reversal on appeal: *Sheppard v. Guisler*, 10 Wash. 41.

Failure of the court to make special findings cannot be urged on appeal, where no requests therefor appear in the record: *Davis v. Ford*, 15 Wash. 107.

An appellant may urge as error the fact that judgment was taken against his codefendant before the expiration of the time allowed by law for answer, although said defendant failed to appeal therefrom, when plaintiff's right to judgment against appellant is dependent upon his right to judgment against his codefendant: *Murray v. Guse*, 10 Wash. 25.

Where a case has been fairly and fully tried upon the evidence or the action of the lower court complained of is substantially correct, the appellate court will not consider erroneous rulings upon technical questions of practice of sufficient importance to warrant a reversal: *Clein v. Wandschneider*, 14 Wash. 257; *Delamater v. Smith*, 14 Wash. 261; *Mason v. McGee*, 15 Wash. 272.

Upon an appeal from an order incident to a receiver's suit, the appellate court is not authorized to inquire into the regularity of the proceedings leading up to the appointment of the receiver: *Radebaugh v. Railway Co.*, 8 Wash. 570.

On an appeal from an order appointing a receiver, the appellate court is authorized to examine fully into the matter, and determine whether the discretion reposed in the lower court has been abused: *Roberts v. Bank*, 9 Wash. 12.

Review on appeals from specific orders: See 1 Remington's Digest, pp. 206, 207, § 380; *Jones v. North Pacific Fish etc. Co.*, 42 Wash. 332; *Roberts v. Washington Nat. Bank*, 9 Wash. 12; *Belding v. Washington Cornice Co.*, 36 Wash. 549; *Peterson v. Dillon*, 27 Wash. 78; *State ex rel. Dutch Miller etc. Co. v. Superior Court*, 30 Wash. 43; *Norris v. Campbell*, 27 Wash. 654; *Hunter v. Wenatchee Land Co.*, 36 Wash. 541; *Sturgiss v. Dart*, 23 Wash. 244.

Abstract propositions of law will not be considered where there is nothing to show their bearing on the case: *Yelm Jim v. Territory*, 1 W. T. 63; *Doran v. Brown*, 16 Wash. 703.

Where validity of statute is in issue: See *Henry v. Thurston County*, 31 Wash. 638; *Gies v. Broad*, 41 Wash. 448.

The invalidity of a statute may be declared upon appeal, although not raised by either party to the appeal, where a question is raised that might disturb friendly relations with a sister state: *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248.

Where facts are not undisputed: See 1 Remington's Digest, p. 202, § 366; *Id.*, p. 221, §§ 408-421; *Northern Pac. R. Co. v. Miller*, 20 Wash. 21; *Phillips v. Port Townsend Lodge etc.*, 8 Wash. 529.

Trial in equitable actions: See 1 Remington's Digest, p. 203, § 369; *Kilroy v. Mitchell*, 2 Wash. 407; *Enos v. Wilcox*, 3 Wash. 44; *Cadwell v. First Nat. Bank*, 3 Wash. 188; *McKinnon v. Kingston Land & Imp. Co.*, 4 Wash. 535; *Bartlett v. Reichenbecker*, 6 Wash. 168; *Roberts v. Washington Nat. Bank*, 11 Wash. 550.

Theory and grounds of decision of lower court—Scope and theory of case: See 1 Remington's Digest, p. 203, § 370; *Walker v. McNeill*, 17 Wash. 582; *State ex rel. Holgate v. Superior Court*, 19 Wash. 114; *Meals v. De Soto Placer Min. Co.*, 33 Wash. 302; *Riverside Land Co. v. Pietsch*, 35 Wash. 210; *Sherman v. Sweeney*, 29 Wash. 321; *Shoemaker v. Stimson*, 16 Wash. 1; *Pepperall v. City Park Transit Co.*, 15 Wash. 176; *Nielsen v. Northeastern Siberian Co.*, 40 Wash. 194; *Shook v. Sexton*, 37 Wash. 509; *Yarwood v. Billings*, 31 Wash. 542; *Standard Furniture Co. v. An-*

derson, 38 Wash. 582; Normile v. Thompson, 37 Wash. 465.

An action to quiet title, tried in the court below as if upon sufficient pleadings, must be tried upon the same theory on appeal: *Sylvester v. State*, 46 Wash. 585.

The appellant has a right to appeal on the judgment-roll and question the sufficiency of the complaint and findings to support the judgment: *Ramsdell v. Ramsdell*, 47 Wash. 444.

Where, in an action brought by a city to determine the damages to abutting property by a regrade, the defendant moved to dismiss the action for the reason that the city had failed to show any damage, the defendant cannot urge error in the direction of a verdict of no damages for the plaintiff because the jury viewed the premises and the question of damages should have been submitted to it: *Seattle v. Buty*, 50 Wash. 139.

Correct decision based upon erroneous grounds: See 1 Remington's Digest, p. 204, § 371; *Dillon v. Spokane County*, 3 W. T. 498; *Thompson v. Huron Lum. Co.*, 4 Wash. 600; *Tullis v. Shannon*, 3 Wash. 716; *Lyts v. Keevey*, 5 Wash. 606; *Brennan v. Front St. Cable R. Co.*, 8 Wash. 363; *Chezum v. Parker*, 19 Wash. 645; *Birmingham v. Cheetam*, 19 Wash. 657; *Sanders v. Bartelt*, 24 Wash. 244; *Gerhard v. Worrell*, 20 Wash. 492; *Marble Savings Bank v. Williams*, 23 Wash. 766.

Decision on motion for new trial or after grant of new trial: See 1 Remington's Digest, p. 204, § 371; *Trumbull v. Jackman*, 9 Wash. 524; *Dennis v. Montesano Nat. Bank*, 38 Wash. 435; *Rotting v. Cleman*, 12 Wash. 615; *Griggs v. MacLean*, 33 Wash. 244; *Colvin v. Northern Pac. R. Co.*, 42 Wash. 5; *Gray v. Washington Water P. Co.*, 27 Wash. 713; *Armstrong v. Musser Lum. & Mfg. Co.*, 43 Wash. 584; *Gray v. Washington Water Power Co.*, 30 Wash. 154; *Cook v. Skinner*, 46 Wash. 246; *Angus v. Wamba*, 50 Wash. 353; *Best v. Seattle*, 50 Wash. 533.

As to trial de novo, see 1 Remington's Digest, p. 204, § 373½; *Wolferman v. Bell*, 6 Wash. 84; *James v. James*, 35 Wash. 650; *Squire v. Sidney*, 37 Wash. 1; *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132.

WHAT MAY BE REVIEWED, IN GENERAL: See 1 Remington's Digest, pp. 205, 208, §§ 375-383.

As to interlocutory orders—On appeal from final judgment: See 1 Remington's Digest, p. 206, § 379; *Thompson v. Sines*, 18 Wash. 359; *Bingham v. Keylor*, 25 Wash. 156; *Windt v. Banniza*, 2 Wash. 147; *Maxwell v. Griffith*, 20 Wash. 106; *Jones v. St. Paul M. & M. R. Co.*, 16 Wash. 25; *Scott v. Hallock*, 16 Wash. 439; *Griffith v. Seattle Nat. Bank Bldg. Co.*, 16 Wash. 329; *State ex rel. Vincent v. Benson*, 21 Wash. 571; *State ex rel. Washington Dredging etc. Co. v. Moore*, 21 Wash. 629; *Bingham v. Keylor*, 25 Wash. 156; *Watkins v. Dorris*,

24 Wash. 636; *Dane v. Daniel*, 28 Wash. 155.

An order dissolving an attachment issued on the ground of a conveyance of property with intent to defraud creditors, heard upon affidavits filed by each party, will not be disturbed on appeal unless clearly erroneous: *Hendelman v. Kahan*, 48 Wash. 549.

As to review of previous similar orders or proceedings, see 1 Remington's Digest, p. 207, § 381; *Deming Inv. Co. v. Ely*, 21 Wash. 102; *Clein v. Wandschneider*, 14 Wash. 257; *State ex rel. Rucker v. Superior Court*, 18 Wash. 227 (disapproving *Burnham v. Spokane Mer. Co.*, 18 Wash. 207); *Wilson v. Seattle Dry Dock etc. Co.*, 26 Wash. 297; *Gibson v. Gibson*, 18 Wash. 489; *Cannon's Estate, In re*, 18 Wash. 101.

Appeals from subsequent orders after bar as to prior orders: See 1 Remington's Digest, p. 208, § 382; *Nicol v. Skagit Boom Co.*, 12 Wash. 230; *Sturgiss v. Dart*, 23 Wash. 244; *Wilson v. Seattle Dry Dock etc. Co.*, 26 Wash. 297; *State v. Bringgold*, 40 Wash. 12; *Ellis v. Moon*, 40 Wash. 114.

PARTIES ENTITLED TO ALLEGE ERROR.—Estoppel to allege error—Committed or invited by party complaining, or acquiesced in: See 1 Remington's Digest, pp. 208, 209, §§ 385, 386; *Gilmore v. H. W. Baker Co.*, 12 Wash. 468; *Reiner v. Crawford*, 23 Wash. 669; *North Yakima v. Seudder*, 41 Wash. 15; *State ex rel. Bickford v. Benson*, 21 Wash. 365; *Hodges v. Price*, 38 Wash. 1; *Dawson v. Dawson*, 40 Wash. 656; *Corbin v. McDermott*, 33 Wash. 212; *Bates v. Drake*, 28 Wash. 447; *State v. Shelton*, 16 Wash. 590.

Where a defense of usury was waived at the trial, the supreme court cannot, upon appeal by plaintiff and a reversal, permit the defendants a new trial as to such defense: *Mantle v. Dabney*, 44 Wash. 193.

Appellant cannot complain of a judgment reducing an excessive verdict, entered at appellant's request, and accepted by respondent in lieu of a new trial: *Hodge v. Hodge*, 47 Wash. 196.

Error in refusing to grant a nonsuit is waived by proceeding with the trial: *Adams v. Peterman Mfg. Co.*, 47 Wash. 484; *Mooney v. Seattle, Renton & Southern R. Co.*, 47 Wash. 540.

Where defendant introduces evidence after denial of a motion for nonsuit, and makes motion for judgment on appeal, the supreme court will only consider the motion for judgment: *Wees v. Page*, 47 Wash. 213.

Appellant cannot raise the objection that there was no evidence to warrant a verdict upon an issue which was submitted to the jury by an instruction given at appellant's request: *Meyers v. Syndicate Heat & Power Co.*, 47 Wash. 48.

Error in overruling a motion for a nonsuit is waived by proceeding with the trial and introducing evidence: *Curtin v. Clear Lake Lumber Co.*, 47 Wash. 260.

The waiver of a nonsuit by proceeding with the trial, after exception taken, only

allows the plaintiff the benefit of evidence thereafter introduced; and where the defects in plaintiff's case are not cured thereby, the nonsuit may, on proper assignment of error, be granted on appeal: *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633.

Error in overruling a demurrer to a complaint which failed to show jurisdictional facts as to venue is waived by answering over and trial on the merits, where the defendant was not misled and had full opportunity to present the merits of his case, and the jurisdictional facts were established, so far as the record discloses: *Peterson v. Barry*, 50 Wash. 361.

Where defendant submitted its case without evidence, solely upon a question of pleadings and the burden of proof, it is not in a position to allege prejudicial error in the previous denial of motion for a continuance asked for on the ground of the absence of a material witness: *Port Blakely Mill Co. v. Hartford Fire Insurance Co.*, 50 Wash. 657.

Appellant cannot complain of error in sustaining an objection, where it forced respondent to make the objection and gained all it sought in the court below, since it thereby invited the ruling: *Ranous v. Seattle Electric Co.*, 47 Wash. 544.

Appellants cannot allege error in findings which are substantially identical with the findings requested by them; and that being the only error urged, the appeal will be dismissed: *Jensen v. Sheard*, 49 Wash. 593.

Proceeding with the trial, after the overruling of a motion for nonsuit, does not preclude the defendants from insisting upon a motion for a directed verdict at the end of the case, upon which the sufficiency of the whole of the evidence comes up for review: *Gardner v. Porter*, 45 Wash. 158.

Estoppel by appellant's motions or proceedings: See 1 Remington's Digest, pp. 209, 210, § 387; *Dixon v. Bausman*, 17 Wash. 304; *Mitchell v. Matheson*, 23 Wash. 723; *Mosher v. Bruhn*, 15 Wash. 332; *Hardin v. Mullen*, 16 Wash. 647; *Maggs v. Morgan*, 30 Wash. 604; *Dawson v. Dawson*, 40 Wash. 656; *Seal v. Cameron*, 24 Wash. 62; *O'Brien v. Allen*, 42 Wash. 393, and notes to last section.

Error urged by respondent, and cross-appeals: See 1 Remington's Digest, p. 210, § 388; *Jenkins v. Jenkins University*, 17 Wash. 160; *Ablott v. Thorne*, 34 Wash. 692; *Isaacs v. Barber*, 10 Wash. 124; *Glenn v. Hill*, 11 Wash. 541; *Langert v. David*, 14 Wash. 389; *Tacoma v. Tacoma Light etc. Co.*, 16 Wash. 288; *Sitton v. Dubois*, 14 Wash. 624; *Pepperall v. City Park Transit Co.*, 15 Wash. 176; *Phillips v. Reynolds*, 20 Wash. 374; *Tacoma v. Tacoma L. & W. Co.*, 17 Wash. 458; *State v. Symes*, 17 Wash. 596; *State ex rel. Ledger Pub. Co. v. Gloyd*, 14 Wash. 5; *Gray v. Washington Water Power Co.*, 27 Wash. 713; *Id.*, 30 Wash. 154; *Whiting v. Doughton*, 31 Wash. 327; *Watson v. Sawyer*, 12 Wash.

35; *Lawyer Land Co. v. Steel*, 41 Wash. 411.

PRESUMPTIONS IN GENERAL: See 1 Remington's Digest, pp. 212-215, §§ 390-399; *Byers v. Rothschild*, 11 Wash. 296; *Wilson v. Aberdeen*, 25 Wash. 614; *Gay v. Havermale*, 27 Wash. 390; *Seattle v. Whitworth*, 18 Wash. 126; *State ex rel. Sander v. Jones*, 20 Wash. 576.

Where the evidence is not brought up, it will be presumed on appeal that the court did not refuse to admit evidence on the issues made: *Shaw v. O'Neill*, 45 Wash. 98.

Burden of showing error: See 1 Remington's Digest, p. 212, § 391; *Spokane & Vancouver Gold & C. Co. v. Colfelt*, 24 Wash. 568; *Carpenter v. Barry*, 26 Wash. 255; *Collett v. Northern Pacific R. Co.*, 23 Wash. 600; *Gray v. Washington Water Power Co.*, 30 Wash. 665; *Gay v. Havermale*, 27 Wash. 390.

The burden is upon appellants to show that errors alleged operated to their prejudice: *Collins v. Huffman*, 48 Wash. 184.

Presumptions as to pleadings: See 1 Remington's Digest, p. 213, § 394; *Bishop v. Averill*, 17 Wash. 209; *Hall v. Woolery*, 20 Wash. 440. The sufficiency of the complaint cannot be first raised on appeal where, supplemented by evidence admitted, a cause of action is disclosed: *Budlong v. Budlong*, 48 Wash. 645. Where there is a demurrer upon two grounds, and an order sustaining the demurrer upon one ground, it will be presumed that it was overruled as to the other ground stated: *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127.

Presumptions as to admissibility of evidence: See 1 Remington's Digest, p. 213, § 395; *Thompson v. Territory*, 1 W. T. 547; *Francioli v. Brue*, 4 Wash. 124; *Wilson v. Aberdeen*, 25 Wash. 614.

Presumptions as to instructions: See 1 Remington's Digest, p. 214, § 396; *Bay View Brewing Co. v. Tecklenberg*, 19 Wash. 469; *Griffith v. Ridpath*, 38 Wash. 540.

Presumptions as to verdicts and findings: See 1 Remington's Digest, p. 214, § 397; *Gay v. Havermale*, 27 Wash. 390; *Peterson v. Johnson*, 20 Wash. 497; *State v. Strode-mier*, 41 Wash. 159; *Slyfield v. Willard*, 43 Wash. 179.

Presumptions as to judgments and orders: See 1 Remington's Digest, p. 214, § 398; *Byers v. Rothschild*, 11 Wash. 296; *Noerdlinger v. Huff*, 31 Wash. 360.

Presumptions as to taking and perfecting appeal or other proceeding for review: See 1 Remington's Digest, p. 215, § 299; *Elma v. Carney*, 4 Wash. 418; *Thompson v. Sines*, 18 Wash. 359; *Ranahan v. Gibbons*, 23 Wash. 255; *State ex rel. Roberts v. Superior Court*, 32 Wash. 143.

JUDICIAL NOTICE OF RECORDS.—The supreme court will take judicial notice of its own records and of what issues were presented for determination by the record in a given cause: *Stallenp v. Tacoma*, 13 Wash. 141. See *Sweeney v. Waterhouse & Co.*, 43 Wash. 613.

EVIDENCE, SUFFICIENCY OF.—Where there was sufficient competent evidence before the jury to support the verdict, it will not be disturbed upon appeal: *Moore v. Palmer*, 14 Wash. 134; *Bucklin v. Miller*, 12 Wash. 152; *Robertson v. Woolley*, 12 Wash. 326; *Aultman v. Mills*, 9 Wash. 68; *Moore v. Brownfield*, 7 Wash. 23; *Burden v. Cropp*, 7 Wash. 198.

The verdict of a jury will not be set aside upon appeal where there is any substantial conflict in the testimony: *Miller v. Bean*, 13 Wash. 516; *Mitchell v. Railway Co.*, 13 Wash. 560; *Klepsch v. Donald*, 8 Wash. 162; *State v. Manville*, 8 Wash. 523.

Where there is a substantial conflict over the facts upon which a temporary injunction has been granted, the supreme court will not, on an appeal from such order, disturb the action of the lower court: *West Coast Co. v. Winsor*, 8 Wash. 490.

Where the testimony is presented in the shape of depositions the supreme court is warranted in setting aside the verdict of the jury when satisfied it is against the evidence: *Graetz v. McKenzie*, 9 Wash. 696.

When the insufficiency of the evidence to support the verdict is not specified as a ground for a new trial before the trial court, the objection cannot be urged on appeal: *Grocery Co. v. Barlow*, 12 Wash. 21; *Tingley v. Land Co.*, 9 Wash. 34.

Where the amount of damages found by the jury has been revised by the trial court, the appellate court will not interfere with the verdict so revised, in the absence of something in the record authorizing such interference: *Washington v. Railway Co.*, 13 Wash. 9.

If the jury finds a verdict for the principal and interest of a promissory note, it will not be disturbed on the ground that the note had been materially altered after execution, if the evidence on that point is conflicting, and the court's instructions are not in the record. In such a case the appellate court will presume that the trial court gave proper instructions and that the jury found the note had not been altered: *Hardy v. Hohl*, 11 Wash. 1.

QUESTIONS OF FACT, VERDICTS, AND FINDINGS: See 1 Remington's Digest, pp. 221-229, §§ 408-421; *East Spring Street, In re*, 41 Wash. 366; *Doyle v. Great Northern R. Co.*, 43 Wash. 558; *State ex rel. Olson v. Christopher*, 43 Wash. 72; *Hindle v. Holcomb*, 34 Wash. 336; *Weber v. Snohomish Shingle Co.*, 37 Wash. 576; *Selber v. Springbrook Trout Farm*, 19 Wash. 49; *McDougall v. Walling*, 19 Wash. 80; *State v. Coates*, 22 Wash. 601; *Lawson v. Seattle & Renton R. Co.*, 34 Wash. 500; *Stowe v. La Conner Trad. & Transp. Co.*, 39 Wash. 28.

Credibility of witnesses: See 1 Remington's Digest, p. 222, § 410; *Brasen v. Seattle etc. R. Co.*, 4 Wash. 754; *Bucklin v. Miller*, 12 Wash. 152; *Miller v. Bean*, 13 Wash. 516; *Hindle v. Holcomb*, 34 Wash. 336; *State v. Mann*, 39 Wash. 144.

A verdict approved by the trial judge will not be disturbed on appeal because against the testimony of a witness not directly contradicted, since his credibility was for the jury: *Johnson v. Great Northern R. Co.*, 48 Wash. 325.

Probative force of evidence: See 1 Remington's Digest, p. 222, § 411; *McNichol v. Collins*, 30 Wash. 318; *Furth v. Snell*, 6 Wash. 542; *Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458; *Aultman, Miller & Co. v. Mills*, 9 Wash. 68; *Bausman v. Cameron*, 26 Wash. 352.

The probative force of evidence is for the jury: *Sudden & Christenson v. Morse*, 48 Wash. 101.

Verdicts—When set aside: See 1 Remington's Digest, pp. 222, 223, § 412; *Tacoma v. Tacoma L. & W. Co.*, 16 Wash. 228; *Miller v. Dumon*, 24 Wash. 648; *Woolf v. Washington R. & Nav. Co.*, 37 Wash. 491; *Graetz v. McKenzie*, 9 Wash. 696.

The lower court is justified in taking a case from the jury where the clear weight is on one side, although there is conflicting evidence: *Guley v. N. W. Coal etc. Co.*, 7 Wash. 491; *Tacoma v. Tacoma Light & W. Co.*, 16 Wash. 288. Contra (overruling last two cases): *Tacoma v. Tacoma L. & W. Co.*, 17 Wash. 458; *Pronger v. Old Nat. Bank*, 20 Wash. 618; *Brown v. Seattle City R. Co.*, 16 Wash. 465.

The verdict of a jury is not binding on questions of fact, where it is not consistent with the special findings and such findings are not consistent with themselves: *Boucher v. Oregon R. & Nav. Co.*, 50 Wash. 627.

Where a verdict is clearly excessive and out of all reason, and the result of passion or prejudice, and the right of recovery is doubtful, the verdict should not be merely reduced and allowed to stand in any of its findings, but a new trial should be ordered: *Olson v. Northern Pac. R. Co.*, 49 Wash. 626.

Verdicts when not set aside: See 1 Remington's Digest, pp. 223, 224, § 413; *Ramage v. Littlejohn*, 17 Wash. 386; *Brown v. Seattle City R. Co.*, 16 Wash. 465; *Du Clos v. Batcheller*, 17 Wash. 389; *Mahrt Co. v. Hyman-Hall Co.*, 17 Wash. 415; *Tacoma v. Tacoma L. & W. Co.*, 17 Wash. 458; *Selber v. Springbrook Trout Farm*, 19 Wash. 49; *McDougall v. Walling*, 19 Wash. 80; *Swadling v. Barneson*, 21 Wash. 699; *Dow v. Dempsey*, 21 Wash. 86; *Bussanicz v. Myers*, 22 Wash. 369; *Smith v. Buckman*, 22 Wash. 299; *Graff v. Gottstein*, 22 Wash. 287; *Miller v. Dumon*, 24 Wash. 648; *Sievers v. Dalles etc. Nav. Co.*, 24 Wash. 302; *Herman v. Great Northern R. Co.*, 27 Wash. 472; *Stanley v. Stanley*, 27 Wash. 570; *Budlong v. Budlong*, 31 Wash. 228; *Schmitz v. Kirchan*, 32 Wash. 546; *State v. Detherage*, 35 Wash. 326; *State v. Druxinman*, 34 Wash. 257; *Lawson v. Seattle & Renton R. Co.*, 34 Wash. 500; *Go Fun v. Fidalgo Island etc. Co.*, 37 Wash. 238; *Collins v. Bacon*, 38 Wash. 80; *Snyder v. Parker*, 19 Wash. 276; *Horst v. Silverman*, 20 Wash. 233; *Morris v. Frye-Bruhn*

Co., 20 Wash. 257; *State v. Maldonado*, 21 Wash. 653; *State v. Coates*, 22 Wash. 601; *Reiner v. Crawford*, 23 Wash. 669; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261; *Packer v. Third St. & Sub. R. Co.*, 24 Wash. 646; *Bausman v. Cameron*, 26 Wash. 352; *State v. Norris*, 27 Wash. 453; *State v. Roller*, 30 Wash. 692; *State v. Bailey*, 31 Wash. 89; *Bertelson v. Hoffman*, 35 Wash. 459; *Dodds v. Gregson*, 35 Wash. 402; *Hays v. Ray*, 37 Wash. 58; *Hawkins v. Casey*, 38 Wash. 625; *Dean v. Oregon R. & Nav. Co.*, 38 Wash. 565; *Irby v. Phillips*, 40 Wash. 618; *Anderson v. White*, 18 Wash. 658; *Pronger v. Old Nat. Bank*, 20 Wash. 618; *Friedman v. Manley*, 21 Wash. 43; *Johnston v. McCart*, 24 Wash. 19; *Wulf v. Sullivan*, 24 Wash. 306; *Ingram v. Wishkah Boom Co.*, 35 Wash. 191; *Moynahan v. Interstate Mining etc. Co.*, 31 Wash. 417; *State v. Van Waters*, 36 Wash. 358; *Morton v. Moran Bros. Co.*, 30 Wash. 362; *Goupille v. Chaput*, 43 Wash. 702; *Ottomeier v. Hornburg*, 50 Wash. 316; *Abby v. Wood*, 43 Wash. 379; *Shepard v. Minneapolis Threshing Machine Co.*, 50 Wash. 242; *Hageness v. Tacoma R. & Power Co.*, 49 Wash. 590; *Smith v. Michigan Lum. Co.*, 43 Wash. 402; *Ball v. McGrath*, 43 Wash. 107; *Bogard v. Bartruff*, 48 Wash. 15; *Warwick v. Hitchings*, 50 Wash. 140; *Suell v. Jones*, 49 Wash. 582; *Brennan v. Seattle*, 46 Wash. 427; *Waldron v. Lynn*, 46 Wash. 69; *Belch v. Big Store Co.*, 46 Wash. 1; *Richardson v. Agnew*, 46 Wash. 117; *Pachko v. Wilkeson Coal and Coke Co.*, 46 Wash. 422; *Schultz v. Simmons Fur Co.*, 46 Wash. 555; *Norman v. Bellingham*, 46 Wash. 205; *Larson v. Lorer*, 48 Wash. 551; *Strandell v. Moran*, 49 Wash. 533.

ACTIONS WITHOUT JURY—REVIEW OF EVIDENCE.—The judgment or the findings of the lower court in an action tried without a jury will not be disturbed on an appeal where the evidence is conflicting: *Doonan v. Morrison*, 12 Wash. 45; *Riddell v. Prichard*, 12 Wash. 601; *Plaster Co. v. Johnson*, 10 Wash. 445; *Fisher v. Quigley*, 8 Wash. 327; *Dougan v. Abbott*, 7 Wash. 370.

The supreme court will not hesitate to substitute its judgment for that of the lower court upon questions of fact in a case tried by the lower court on testimony reported by a referee: *Seattle v. Parker*, 13 Wash. 450.

In all cases tried by the lower court without a jury, the appellate court will examine the evidence de novo, and may set aside the findings and conclusions of the trial court, even though the evidence be conflicting: *Allen v. Swerdiger*, 14 Wash. 461; *Furth v. Baxter*, 24 Wash. 608. See *Wolferman v. Bell*, 6 Wash. 84.

Findings—Form and sufficiency in general: See 1 Remington's Digest, p. 225, § 415; *Hadevis v. Nutting*, 43 Wash. 40; *Palmer v. Washington Securities Inv. Co.*, 43 Wash. 451; *Hardwick v. Gettier*, 43 Wash. 644.

As to review of findings in actions at law tried without a jury, see 1 Remington's Digest, pp. 227, 228, § 418; *Second Nat. Bank v. Hatch*, 24 Wash. 421; *Ryan v. Northern Pac. R. Co.*, 19 Wash. 533; *Title Guaranty etc. Co. v. Seattle Theatre Co.*, 23 Wash. 517; *Cantwell v. Nunn*, 45 Wash. 536; *Shead v. Moore*, 31 Wash. 283; *Riddell v. Prichard*, 12 Wash. 601; *State ex rel. Grinsfelder v. Spokane St. R. Co.*, 19 Wash. 518; *Furth v. Baxter*, 24 Wash. 608; *Knapp v. Crawford*, 16 Wash. 524; *Furth v. Kraft*, 25 Wash. 590; *Jordan v. Coulter*, 30 Wash. 116; *Lilly v. Lilly, Bogardus & Co.*, 39 Wash. 337; *Carstens & Earles v. Hine*, 39 Wash. 498; *Brooks v. McCabe*, 39 Wash. 62; *Anthes v. Erickson*, 43 Wash. 491; *Galbraith v. Carmode*, 43 Wash. 456; *Lerch v. Wonder Department Store*, 45 Wash. 367; *Graham v. Bell-Irving*, 46 Wash. 607; *Kane v. Jones*, 46 Wash. 631; *Seigmund v. Seigmund*, 46 Wash. 572; *Erickson v. Hochbrune*, 47 Wash. 33; *Merrill v. O'Bryan*, 48 Wash. 415; *Duteau v. Barto*, 48 Wash. 207; *Ulrich v. Stephens*, 48 Wash. 199; *Wilcox v. Watson*, 49 Wash. 215; *Moylan v. Moylan*, 49 Wash. 341.

Effect of findings in equitable actions: See 1 Remington's Digest, pp. 225, 226, § 416; *Skeel v. Christensen*, 17 Wash. 649; *Golden v. Bullion Min. Co.*, 18 Wash. 183; *Law v. Seeley*, 37 Wash. 166; *Criswell v. Directors School Dist. No. 24*, 34 Wash. 420; *Van Behren v. Rettkowski*, 37 Wash. 247; *Reid v. Slocum*, 34 Wash. 173; *Hill v. Gardner*, 35 Wash. 529; *O'Sullivan v. O'Sullivan*, 35 Wash. 481; *Esmond v. Gillies Log etc. Co.*, 36 Wash. 499; *Sherlock v. Van Asselt*, 34 Wash. 141; *Minder v. Mot-taz*, 37 Wash. 474; *Ford v. Jones*, 22 Wash. 111; *Reed v. Parker*, 33 Wash. 107; *Bounds v. Bounds*, 23 Wash. 593; *Rowland v. Eskelund*, 49 Wash. 679; *Wainwright v. Wainwright*, 40 Wash. 117; *Swift v. Swift*, 39 Wash. 600; *Gould v. Fredenburg*, 16 Wash. 699; *Washington Dredging etc. Co. v. Part-ridge*, 19 Wash. 62; *Noyes v. King County*, 18 Wash. 417; *Riddell v. Brown*, 25 Wash. 514; *Funk v. Hensler*, 31 Wash. 528; *Gray's Harbor Boom Co. v. Lytle L. & M. Co.*, 36 Wash. 151; *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478; *Kirschberg v. Marymont*, 21 Wash. 705; *Boardman v. Hager*, 24 Wash. 487; *Van Brocklin v. Queen City Printing Co.*, 19 Wash. 552; *Peck v. Stansfield*, 12 Wash. 101; *Skeel v. Christensen*, 17 Wash. 649; *National Bank of Commerce v. Cook*, 31 Wash. 477; *Poler v. Poler*, 32 Wash. 400; *Prospectors Development Co. v. Brook*, 32 Wash. 315; *Borrow v. Borrow*, 34 Wash. 684; *Cullen v. Whitham*, 33 Wash. 366; *Chantler v. Hubbell*, 34 Wash. 211; *Cochran v. Yoho*, 34 Wash. 238; *Miller v. Miller*, 38 Wash. 605; *Long v. Long*, 38 Wash. 218; *Eno v. Sanders*, 39 Wash. 238; *Brill v. Hayford*, 41 Wash. 468.

Findings in equity, when reversed: See 1 Remington's Digest, p. 227, § 417; *Allen v. Swerdiger*, 14 Wash. 461; *Roberts v. Washington Nat. Bank*, 11 Wash. 550; *Cleveland v. Glover*, 13 Wash. 131; *Ranahan v. Gib-*

bons, 23 Wash. 255; Ordway v. Downey, 18 Wash. 412; Wyant v. Wyant, 14 Wash. 701; Garfinkle, In re, 37 Wash. 650; Tacoma Gas and Electric Light Co. v. Pauley, 49 Wash. 562.

Rulings in equitable suits and cases tried without a jury: See 1 Remington's Digest, p. 239, § 451; New Whatcom v. Bellingham Bay Imp. Co., 16 Wash. 131; Washougal etc. Transportation Co. v. Dalles etc. Nav. Co., 27 Wash. 490; Ingram v. Golden Tunnel Min. Co., 25 Wash. 318; Rohrer v. Snyder, 29 Wash. 199.

Errors not affecting trial de novo in supreme court: See 1 Remington's Digest, pp. 239, 240, § 452; Rohrer v. Snyder, 29 Wash. 199; Davies v. Cheadle, 31 Wash. 168; Funk v. Hensler, 31 Wash. 528; Field's Estate, In re, 33 Wash. 63; Hankle v. Denison, 34 Wash. 51; Jefferson County v. Trumbull, 34 Wash. 276; Hunt v. Phillips, 34 Wash. 362; Muir v. Westcott, 34 Wash. 463; Cooke v. Cain, 35 Wash. 353; Bonne v. Security Savings Society, 35 Wash. 696; Law v. Seeley, 37 Wash. 166; Van Behren v. Rettkowski, 37 Wash. 247; Gilmer v. Holland Inv. Co., 37 Wash. 589; Krish v. Interstate Fisheries Co., 39 Wash. 381; Ekstrand v. Barth, 41 Wash. 321; Lewiston Water Power Co. v. Brown, 42 Wash. 555; Erickson v. Modern Woodmen, 43 Wash. 242; Hastings v. Anacortes Packing Co., 29 Wash. 224; Shank v. Wilson, 33 Wash. 612; Hodges v. Price, 38 Wash. 1; Spokane Traction Co. v. Granath, 42 Wash. 506; Hopkins v. International Lumber Co., 33 Wash. 181; Port Townsend v. Lewis, 34 Wash. 413; Theater v. King, 41 Wash. 134; Tilden v. Gordon & Co., 34 Wash. 92; Carstens & Earles v. Hine, 39 Wash. 498; Brown v. Baldwin, 46 Wash. 106.

OBJECTIONS NOT RAISED BELOW.—Objection which should properly be urged before the lower court in the first instance, if not so made, will not be considered by the appellate court: Cook v. Tibbals, 12 Wash. 207; Slater v. Bank, 12 Wash. 448; Grocery Co. v. Barlow, 12 Wash. 21; Bozzio v. Vaglio, 10 Wash. 270; Warburton v. Ralph, 9 Wash. 537; State v. Regan, 8 Wash. 506; McEachern v. Brackett, 8 Wash. 652; Railway Co. v. Johnson, 7 Wash. 97; Main v. Johnson, 7 Wash. 321; Earles v. Bigelow, 7 Wash. 581.

Review as to matters not before or investigated in the lower court: See 1 Remington's Digest, p. 205, §§ 375, 376; Hinchman v. Point Defiance R. Co., 17 Wash. 399; Smith v. Lamping, 27 Wash. 624; Gray v. Washington Water Power Co., 27 Wash. 713.

An appeal from an order refusing to strike an amended complaint and dismiss the action does not bring up the question whether the action is barred by the statute of limitations, or the sufficiency of the pleading: Albin v. Seattle Electric Co., 46 Wash. 420.

Objections to the introduction of evidence will not be considered on appeal,

unless the proper grounds of objection were called to the attention of the trial court: Bolster v. Stocks, 13 Wash. 460; Price v. Scott, 13 Wash. 574; Kohne v. White, 12 Wash. 199; Trust Co. v. Gallaher, 12 Wash. 507; Gustin v. Jose, 11 Wash. 348.

The alleged unconstitutionality of an act will not be considered on appeal when not raised in the court below or in the briefs in the supreme court: Boom Co. v. Smith, 15 Wash. 138.

A defect of parties plaintiff is not ground for reversal where there is nothing in the record to show that the objection was raised on the trial: Jenkins v. Land Co., 13 Wash. 502.

The appellate court will not pass upon the effect of admitting incompetent evidence on cross-examination where the record does not contain the direct evidence upon which the cross-examination was based: Maitland v. Zanga, 14 Wash. 92.

Objection to a statement of facts because it was served before the original was filed should first be made to the trial court: State v. Moss, 13 Wash. 42.

An objection that no findings of fact were made by the trial court cannot be urged on appeal unless there was a request for a general finding, or an objection raised for want of one when presented in the lower court: Remington v. Price, 13 Wash. 76; Plaster Co. v. Johnson, 10 Wash. 445.

On appeal, the appellant must confine himself to objections urged on the trial, nor will he be permitted, after having excepted specially to a ruling of the lower court, to urge a different ground for the objection before the appellate court: Sweeney v. Elevator Co., 14 Wash. 562.

Where there was no objection made to the introduction of testimony, and no motion for a nonsuit for a failure of proof, or any request for an instruction to the jury to find for the appellant for such failure, an objection to the form of the action can, at most, only raise the question as to whether the evidence was sufficient to sustain the verdict: Id.

EXCEPTIONS TO FINDINGS, ETC.—A general exception to all the findings of the lower court is sufficient on appeal to obtain a review of the evidence, or to raise any question as to the correctness of any particular findings: Ballard v. Keane, 13 Wash. 201; Hannegan v. Roth, 12 Wash. 65; Irwin v. Water Co., 12 Wash. 112; Moyer v. Van de Vanter, 12 Wash. 377; Cook v. Tibbals, 12 Wash. 207; Fremont Co. v. Denny, 12 Wash. 251; Schoonover v. Condon, 12 Wash. 475; Blackwell v. McLean, 9 Wash. 301.

In an equitable action, when the findings of fact of the trial court have been duly excepted to, the appellate court must review the evidence: Cleveland v. Glover, 13 Wash. 131; Roberts v. Bank, 11 Wash. 550.

An appeal will not be dismissed because the findings of fact of the trial court and the exceptions thereto are not printed in appellant's brief, where the decree appealed from is attacked on the ground that it is not supported by the evidence: *Fares v. Gleason*, 14 Wash. 657.

A finding of fact by the trial court, even in an equitable proceeding, will not be set aside upon appeal, unless there is a preponderance of evidence against it: *Scott v. Bourn*, 13 Wash. 471; *Harnay v. Peterson*, 9 Wash. 152; *Roy v. Scott*, 11 Wash. 399.

Where a bill of exceptions does not make a record of what actually happened upon the trial, but of what occurred on the hearing of the motion for a new trial, it is not entitled to consideration by the appellate court: *Waite v. Stroud*, 9 Wash. 333.

Errors arising upon a ruling of the court in regard to the right of argument cannot be urged upon appeal after waiver at the trial: *State v. Ackles*, 8 Wash. 462.

HARMLESS ERRORS: See 1 Remington's Digest, pp. 229-246, §§ 422-471. Errors committed by the trial court which are harmless will not be considered on appeal: *Lewis v. McReavy*, 7 Wash. 294.

The admission of incompetent evidence before a jury whose verdict is advisory only, or in an action tried without a jury, is a harmless error, where there is sufficient competent evidence to warrant the findings of the lower court: *Peck v. Stanfield*, 12 Wash. 101; *Benson v. Hart*, 10 Wash. 301; *Merchants' Bank v. Peet*, 9 Wash. 237.

The exclusion of impeaching testimony is not prejudicial error, where the facts to which the witness has testified are testified to by a number of other witnesses: *State v. Holmes*, 12 Wash. 169.

Error cannot be predicated upon an improper question asked upon cross-examination, to which objection is not made until after answer to it, and the answer as given is one alleging ignorance upon the subject matter of the question: *Harker v. Woolery*, 10 Wash. 484.

Taking the plaintiff's testimony, because of inability to attend court, at his residence, in the presence of the judge, jury and counsel, while an irregularity, is not prejudicial error: *Sutton v. Snohomish*, 11 Wash. 24.

Where it appears from the record and from the verdict of the jury that they were not misled by erroneous instructions of the court, the error is harmless and will not warrant a reversal: *Gustin v. Jose*, 11 Wash. 348.

Although an instruction to the jury may have been wrongfully given, it is binding and conclusive on the jury: *Pepperall v. Transit Co.*, 15 Wash. 176.

The refusal of the court to strike out improper remarks of counsel at the time of their utterance is harmless error, where

the court later instructs the jury to disregard them: *State v. Reagan*, 8 Wash. 506.

Although the refusal of the court to compel plaintiff, on motion, to elect between two causes of action pleaded in his complaint may be error, it is not prejudicial if an election be made by plaintiff at the opening of the trial: *Van Hook v. Burns*, 10 Wash. 22.

Presumption as to effect of error: See 1 Remington's Digest, p. 229, § 422; *Lillie v. Shaw*, 22 Wash. 234; *State v. Hawkins*, 23 Wash. 289; *Galbraith v. Carmode*, 43 Wash. 456; *Spokane & Idaho Lum. Co. v. Stanley*, 25 Wash. 653.

Error must affect substantial rights: See 1 Remington's Digest, p. 230, § 425; *Johnson v. Cook*, 24 Wash. 474; *Sievers v. Dalles, Portland etc. Co.*, 24 Wash. 302; *O'Brien v. Allen*, 42 Wash. 393; *Woodhouse v. Powles*, 43 Wash. 617; *Storseth v. Folsom*, 50 Wash. 456; *Veysey v. Thompson*, 49 Wash. 571.

Errors not affecting result: See 1 Remington's Digest, p. 230, § 426; *Seattle Trust Co. v. Kerry*, 19 Wash. 389; *Wilson v. Hubbard*, 39 Wash. 671; *Hunner v. Mulcahy*, 45 Wash. 365.

Objections that do not relate to right of appellant: See 1 Remington's Digest, p. 231, § 427; *Munroe v. Sedro Lum. etc. Co.*, 16 Wash. 694; *State v. McCann*, 16 Wash. 249; *Long v. Eisenbeis*, 23 Wash. 556; *Zilke v. Woodley*, 36 Wash. 84; *Fulton v. Methow Trading Co.*, 45 Wash. 136; *Graham v. Bell-Irving*, 46 Wash. 607.

Error on issues found in favor of appellant: See 1 Remington's Digest, p. 231, § 428; *Hart Lumber Co. v. Rucker*, 20 Wash. 383; *Lavanway v. Cannon*, 37 Wash. 593; *Allen v. Chamber*, 13 Wash. 341; *Bay View Brewing Co. v. Tecklenberg*, 19 Wash. 469; *Harris v. Halverson*, 23 Wash. 770; *Lownsdale v. Grays Harbor Boom Co.*, 36 Wash. 198.

Errors in cases of decisions correct on merits: See 1 Remington's Digest, p. 231, § 429; *Smith v. Taylor*, 2 Wash. 422; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67; *Seattle v. Columbia etc. Co.*, 6 Wash. 379; *Brygger v. Schweitzer*, 5 Wash. 564; *Dela-mater v. Smith*, 14 Wash. 261; *Baker v. Bicknell*, 14 Wash. 29; *Titlow v. Cascade Oatmeal Co.*, 15 Wash. 652; *Clein v. Wand-schneider*, 14 Wash. 257; *Budlong v. Bud-long*, 43 Wash. 359.

View that decision manifestly correct cures previous errors: See 1 Remington's Digest, p. 232, § 430; *Carroll v. Centralia Water Co.*, 5 Wash. 613, 32 Pac. 609, 33 Pac. 431; *Kellogg v. Cook*, 18 Wash. 516; *Martin v. Union Mut. Ins. Co.*, 13 Wash. 275; *Hardin v. Mullen*, 16 Wash. 647; *Kirkland Land & Imp. Co. v. Jones*, 18 Wash. 407; *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415.

View that prejudicial error is not cured by correct decision: See 1 Remington's Digest, p. 232, § 431; *McLeod v. Ellis*, 2 Wash. 117; *Marsh v. Wade*, 1 Wash. 358; *McNichol v. Collins*, 30 Wash. 318.

Errors as affecting party not entitled to succeed in any event: See 1 Remington's Digest, p. 232, § 432; Brunmet v. Campbell, 32 Wash. 358; Graves v. Smith, 7 Wash. 14; Steeples v. Panel etc. Box Co., 33 Wash. 359; Robe v. Snohomish County, 35 Wash. 475; Denham v. Washington Water P. Co., 38 Wash. 354.

Errors favorable to party complaining: See 1 Remington's Digest, p. 233, § 433; Seattle Brewing etc. Co. v. Donofrio, 34 Wash. 18; Shannon v. Tacoma, 41 Wash. 220; Wilson v. Aberdeen, 25 Wash. 614; Gardner v. Lovegren, 27 Wash. 356; Selby v. Vancouver Waterworks Co., 32 Wash. 522; Tham v. Steeb Shipping Co., 39 Wash. 271; Bellingham Bay Imp. Co. v. New Whatcom, 20 Wash. 231; Galbraith v. Shepard, 43 Wash. 698.

Harmless error as to pleading: See 1 Remington's Digest, pp. 234, 235, §§ 437-440; Moran Bros. Co. v. Northern Pac. R. Co., 19 Wash. 266; Clambey v. Corliss, 41 Wash. 327; Jones v. Herrick, 35 Wash. 434; Marvin v. Yates, 26 Wash. 50; Washington Nat. Bldg. etc. Assn. v. Saunders, 24 Wash. 321; Prescott v. Puget Sound Bridge etc. Co., 30 Wash. 158; Jones v. St. Paul etc. Co., 16 Wash. 25; Scott v. Hallock, 16 Wash. 439; Maris v. Clevenger, 29 Wash. 395; Soder v. Adams Hardware Co., 38 Wash. 607; McNeilly v. McNeilly, 38 Wash. 401; Price Baking Powder Co. v. Rinear, 17 Wash. 95; State v. Lorenz, 22 Wash. 289; Rattelmiller v. Stone, 28 Wash. 104; Boardman v. Hager, 24 Wash. 487; Waldron v. Canadian Pac. R. Co., 22 Wash. 253; Tyler v. North American T. & T. Co., 24 Wash. 252; Anderson v. Harper, 30 Wash. 378; McDannald v. Washington & Columbia R. R. Co., 31 Wash. 585; Rand, McNally & Co. v. Royal, 36 Wash. 420; Curtis v. Tenino Stone Quarries, 37 Wash. 355; Jamieson & McFarland v. Heim, 43 Wash. 153; Johnstone v. Seattle, Renton etc. R. Co., 45 Wash. 154; Chlopeck v. Chlopeck, 47 Wash. 256; Hopkins v. Crane, 50 Wash. 636; State ex rel. Atkinson v. Co-operative Homebuilders, 47 Wash. 235; Fishburne v. Robinson, 49 Wash. 271; Waight v. Lake Wash. Mill Co., 48 Wash. 402.

Selection and impaneling of jurors: See 1 Remington's Digest, p. 236, § 442; State v. McCann, 16 Wash. 249; State v. Champoux, 33 Wash. 339; State v. Gin Pon, 16 Wash. 425; State v. Rutten, 13 Wash. 203.

Conduct of trial or hearing in general: See 1 Remington's Digest, p. 336, § 443; Barnes v. Gerberg, 27 Wash. 126; Wyatt v. Heman, 26 Wash. 533; American Bridge Co. v. Robinson, 31 Wash. 407; Carstens & Earles v. Hine, 39 Wash. 498; Niemyer v. Washington Water Power Co., 45 Wash. 170; Shorno v. Doak, 45 Wash. 613.

Misconduct of judge: See 1 Remington's Digest, p. 236, § 444; Barnes v. German Savings & Loan Soc., 21 Wash. 448; Van Lehn v. Morse, 16 Wash. 219; Robertson v. King County, 20 Wash. 259; Halverson

v. Seattle El. Co., 35 Wash. 600; Irwin v. Buffalo Pitts Co., 39 Wash. 346.

Arguments and conduct of counsel: See 1 Remington's Digest, p. 237, § 445; Cluckey v. Seattle El. Co., 27 Wash. 70; State v. Van Waters, 36 Wash. 358; Taylor v. Modern Woodmen, 42 Wash. 304; Yakima Valley Bank v. McAllister, 37 Wash. 566; Hindle v. Holcomb, 34 Wash. 336; Gallagher v. Buckley, 31 Wash. 380; Williams v. Spokane Falls & N. R. Co., 39 Wash. 77; Thompson v. Issaquah Shingle Co., 43 Wash. 253; Abby v. Wood, 43 Wash. 379; Mooney v. Seattle, Renton & Southern R. Co., 47 Wash. 540; Jones v. Seattle, Renton & Southern R. Co., 47 Wash. 550.

Conduct and deliberations of jury: See 1 Remington's Digest, p. 237, § 446; Gilmore v. H. W. Baker Co., 12 Wash. 468; North River Boom Co. v. Smith, 15 Wash. 138; State v. Webster, 21 Wash. 63.

In rulings as to evidence in general: See 1 Remington's Digest, p. 237, § 447; Swadling v. Barneson, 21 Wash. 699; Knapp v. Order of Pendo, 36 Wash. 601; Jackson v. Mercantile Mutual Fire Ins. Co., 45 Wash. 244; Portland and Seattle R. Co., v. Ladd, 47 Wash. 88.

Harmless error in admission of evidence: See 1 Remington's Digest, p. 238, § 449; Schwede v. Hemrich, 29 Wash. 124; Powell v. Nolan, 27 Wash. 318; Herzog v. Palatine Ins. Co., 36 Wash. 611; Wright v. Stewart, 19 Wash. 179; Elster v. Seattle, 18 Wash. 304; Seattle v. Griffith Realty etc. Co., 28 Wash. 605; Turner v. Barneson, 22 Wash. 78; Ingram v. Wishkah Boom Co., 35 Wash. 191; Hodd v. Tacoma, 45 Wash. 436; Pachko v. Wilkeson Coal and Coke Co., 46 Wash. 422; Chlopeck v. Chlopeck, 47 Wash. 256; Mitchell v. Lidgerwood, 50 Wash. 290; Gault v. Bradshaw, 48 Wash. 364; Collins v. Huffman, 48 Wash. 184; French v. West Seattle Light & Water Co., 50 Wash. 257; Matthews v. Spokane, 50 Wash. 107.

Errors held not harmless: See 1 Remington's Digest, p. 238, § 450; Comegys v. American Lumber Co., 8 Wash. 661; State v. Thompson, 14 Wash. 285; State v. Moody, 18 Wash. 165; Collett v. Northern Pac. R. Co., 23 Wash. 600; Kline v. Stein, 30 Wash. 189.

Facts otherwise established: See 1 Remington's Digest, p. 240, § 454; Stanley v. Stanley, 27 Wash. 570; Kimball Co. v. Cockrell, 23 Wash. 529; Fitzgerald v. School Dist. No. 20, 5 Wash. 112; Carl v. Jones, 29 Wash. 78; Hart v. Cascade Timber Co., 39 Wash. 279; Schmitz v. Kirchan, 32 Wash. 546; Warwick v. Hitchings, 50 Wash. 140. It is not prejudicial error to allow a physician to testify that in his opinion, a femoral hernia resulted from a fall, when the other evidence was amply sufficient to warrant the jury in finding that the same resulted from such fall: Hodd v. Tacoma, 45 Wash. 436. It is harmless error to admit in evidence parts of the record in another case showing that the accused had been tried for

another offense, where that fact had already been established by other evidence admitted without objection: *State v. Frye*, 45 Wash. 645. It is harmless error to receive evidence tending to show notice by a city of the defective condition of a sidewalk after counsel had admitted that the city had notice: *Matthews v. Spokane*, 50 Wash. 107. See, also, *Schwede v. Hemrich*, 29 Wash. 124; *Seattle v. Griffith Realty etc. Co.*, 28 Wash. 605; *Morrison v. Northern Pac. R. Co.*, 34 Wash. 70; *Hankle v. Denison*, 34 Wash. 51; *Lownsdale v. Grays Harbor Boom Co.*, 36 Wash. 198; *Cummings v. Weir*, 37 Wash. 42; *United States Savings & L. Co. v. Cade*, 15 Wash. 38; *Spokane v. Costello*, 42 Wash. 182.

Defect supplied or objection removed subsequently: See 1 Remington's Digest, p. 241, § 455; *Loveday v. Anderson*, 18 Wash. 322; *Norman v. Hopper*, 38 Wash. 415; *Denny v. Kleeb*, 40 Wash. 634; *Sievers v. Dalles etc. Nav. Co.*, 24 Wash. 302; *Brown v. Blaine*, 41 Wash. 287. Error in twice taxing an attorney's fees as costs cannot be claimed where one fee was promptly remitted on attention being called thereto: *Ferdig v. Simpson*, 47 Wash. 475.

Error cured by withdrawal, striking out, or instructions to jury: See 1 Remington's Digest, pp. 241, 242, § 456; *Yakima Valley Bank v. McAllister*, 37 Wash. 566; *Smith v. Buckman*, 22 Wash. 299; *Hart v. Cascade Timber Co.*, 39 Wash. 279; *Wilson v. West & Slade Mill Co.*, 28 Wash. 312; *Dossett v. St. Paul etc. Lum. Co.*, 40 Wash. 276.

As to error not cured by withdrawal, striking out of instructions, see *Brown v. Pierce County*, 28 Wash. 345; *Berg v. Humtuls Boom etc. Co.*, 38 Wash. 342.

Exclusion of evidence—When not prejudicial: See 1 Remington's Digest, p. 242, § 457; *Ramage v. Littlejohn*, 17 Wash. 386; *Jordan v. Seattle*, 30 Wash. 298; *Seattle Trust Co. v. Kerry*, 19 Wash. 389; *Schmitz v. Kirchan*, 32 Wash. 546; *Lilly v. Eklund*, 37 Wash. 532; *State v. Bringgold*, 40 Wash. 13; *Smith v. Glenn*, 40 Wash. 262; *Norman v. Hopper*, 38 Wash. 415. It is not error to exclude the answer to a question that has already been answered: *State v. Gilluly*, 50 Wash. 1. The rejection of an immaterial exhibit is harmless error where it in no way corroborated the witness and practically the same evidence, offered by the adverse party, was excluded on objection by the appellant: *Wees v. Page*, 47 Wash. 213. It is not prejudicial error to refuse to allow an owner of a town lot to testify to its market value, where the testimony as to his knowledge and qualifications was extremely contradictory, and seven or eight other witnesses better qualified testified in his behalf: *Port Townsend Southern R. Co. v. Nolan*, 48 Wash. 382. It is not prejudicial error to exclude evidence of a witness as to a warning of danger given to deceased, where subsequently another witness testified fully to the transaction and the same was not disputed but became an admitted fact in the case: *Gau-*

thier v. Wood & Iverson, 49 Wash. 8. In an action to recover money lost in gambling, it is harmless error to exclude evidence that the defendants operated a large number of gambling games in the room in question, or that the defendant had pleaded guilty in a criminal prosecution, where the jury found for the plaintiffs and the appeal only involved the amount of the recovery, the appellants claiming that the same was too small: *Crowley v. Taylor*, 49 Wash. 511.

Error in excluding evidence of a witness to contradict evidence of the adverse party that she was present at a certain transaction, is not cured by testimony of the witness theretofore admitted enumerating the persons who were present without any mention of the party claimed to be present: *O'Connor v. Slatter*, 48 Wash. 493.

Facts otherwise established: See 1 Remington's Digest, p. 243, § 458; *Ramage v. Littlejohn*, 17 Wash. 386; *Charlton v. Markland*, 36 Wash. 40; *Knapp v. Order of Pendo*, 36 Wash. 601; *Lilly v. Eklund*, 37 Wash. 532; *State v. Mann*, 39 Wash. 144; *Taylor v. Modern Woodmen of America*, 42 Wash. 304. It is harmless to exclude a question on cross-examination as to the time a certain event had taken place, where it had been in substance answered many times by the witness: *Harris v. Washington Portland Cement Co.*, 49 Wash. 345.

Error cured by subsequent admission: See 1 Remington's Digest, p. 243, § 459; *McKenzie v. Oregon Imp. Co.*, 5 Wash. 409; *Quandt v. Smith*, 28 Wash. 664; *Russell v. Gay*, 33 Wash. 83; *Jordan v. Seattle*, 30 Wash. 298; *Port Townsend v. Lewis*, 34 Wash. 413; *Johnson v. Northport Smelting and Refining Co.*, 50 Wash. 567.

Instructions to jury—Prejudicial effect in general: See 1 Remington's Digest, p. 243, § 460; *State v. Wilson*, 9 Wash. 16; *State v. Krug*, 12 Wash. 288; *State v. Kyle*, 14 Wash. 550; *State v. Carter*, 15 Wash. 121; *State v. Horlacher*, 16 Wash. 325; *Benton v. Johncox*, 17 Wash. 277; *Rawson v. Ellsworth*, 13 Wash. 667; *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346; *Fireman's Fund Ins. Co. v. Northern Pac. R. Co.*, 46 Wash. 635.

Effect of determination: See 1 Remington's Digest, p. 244, §§ 461-465; *Gustin v. Jose*, 11 Wash. 348; *Carstens v. Stetson & Post Mill Co.*, 14 Wash. 643; *State v. Horlacher*, 16 Wash. 325; *Traver v. Spokane St. R. Co.*, 25 Wash. 225; *Collins v. Fidelity Trust Co.*, 23 Wash. 136; *Curtin v. Clear Lake Lumber Co.*, 47 Wash. 260; *Robinson v. Spokane Traction Co.*, 47 Wash. 303; *Huff v. Japanese-American Fertilizer & Fisheries Co.*, 48 Wash. 581; *O'Connor v. Slatter*, 48 Wash. 493; *Crowley v. Taylor*, 49 Wash. 511; *Robertson v. King County*, 20 Wash. 259; *Armstrong v. Musser Lum. & Mfg. Co.*, 43 Wash. 584; *Davis v. Atlas Assur. Co.*, 16 Wash. 232; *Anderson v. McDonald*, 31 Wash. 274; *Fidelity & Casualty Co. v. Seattle*, 16 Wash. 445; *Denny v. Kleeb*, 40 Wash. 634.

Findings by court or referee: See 1 Remington's Digest, p. 245, § 468; *Carstens*

& Earles v. Hine, 39 Wash. 498; Reynolds v. Great N. R. Co., 40 Wash. 163; Townsend Gas & Electric Light Co. v. Hill, 24 Wash. 469.

Judgment or order: See 1 Remington's Digest, pp. 245, 246, §§ 469, 470; Kinkade v. Witherop, 29 Wash. 10; Swanson v. Hoyle, 32 Wash. 169.

Entry of judgment prior to the expiration of the time for moving for a new trial is not ground for reversal, where the motion for new trial made preserved appellant's rights and the judgment entered was right: Gosline v. Dryfoos, 45 Wash. 396.

Error waived in supreme court: See 1 Remington's Digest, p. 246, § 471; Tacoma v. Dougan, 4 Wash. 796; McInnes v. Sutton, 35 Wash. 384.

DISCRETION OF COURT: See 1 Remington's Digest, pp. 215-220, §§ 400-407. Where a motion for default for failure to plead within the time ordered by the court has been denied, it must be presumed on appeal that sufficient was shown to justify the exercise of the court's discretion in that regard: Plummer v. Weil, 15 Wash. 427.

A motion for a new trial is addressed to the sound discretion of the trial court, and unless it appear that there was an abuse of discretion, the action of the court in granting or denying the motion will not be disturbed on appeal: Rotting v. Cleman, 12 Wash. 615; Rigney v. Water Co., 9 Wash. 245; State v. Owens, 15 Wash. 468; Trumbull v. Jackman, 9 Wash. 524; Kohler v. Railway Co., 8 Wash. 452; Rinehart v. Watson, 11 Wash. 526; Bailey v. Tacoma Traction Co., 16 Wash. 48; Walker v. McNeill, 17 Wash. 582; Hart Lum. Co. v. Rucker, 20 Wash. 383.

Where a new trial may have been granted on one of several grounds, the order will not be reversed if within the discretion of the court upon any grounds: Prosch v. Seattle, 46 Wash. 553.

An order granting a new trial, which does not show upon which one of several grounds it was based, will not be reversed on appeal in the absence of a showing of abuse of discretion: Hartley v. Ferguson, 46 Wash. 33.

An order granting a new trial on the ground of newly discovered evidence will not be disturbed on appeal except for abuse of discretion: Cook v. Skinner, 46 Wash. 246.

Matters entirely within discretion of court: See 1 Remington's Digest, pp. 215, 216, § 400; Greely v. Newcomb, 21 Wash. 357; Knapp v. Order of Pendo, 36 Wash. 601; Fleming v. Wilson, 39 Wash. 106; Hart v. Cascade Timber Co., 39 Wash. 279; State v. Nicoll, 40 Wash. 517; Griffith v. Seattle Nat. Bank etc. Co., 16 Wash. 329; McClaine v. Fairchild, 23 Wash. 758; State ex rel. McLeod v. Superior Court, 9 Wash. 366; Farnham's Estate, In re, 41 Wash. 570.

The submission of special interrogatories to the jury rests entirely with the trial court, and its refusal is not subject to review: Matthews v. Spokane, 50 Wash. 107.

The refusal of the court to disqualify a witness from testifying for disobedience to an order excluding witnesses from the courtroom will not be reviewed except for an abuse of discretion: Hendelman v. Kahan, 50 Wash. 247.

Matters reviewed only upon an abuse of discretion: See 1 Remington's Digest, pp. 216-218, § 401; State v. Lattin, 19 Wash. 57; State v. Farris, 26 Wash. 205; State v. Royse, 24 Wash. 440; State v. Stentz, 30 Wash. 134; Ogle v. Jones, 16 Wash. 319; West Seattle Land & Imp. Co. v. Herrin, 16 Wash. 665; McDonough v. Great Northern R. Co., 15 Wash. 244; Seattle v. Baxter, 20 Wash. 714; Price Baking Powder Co. v. Rinear, 17 Wash. 95; Van Lehn v. Morse, 16 Wash. 672; Chandler v. Cushing-Young Shingle Co., 13 Wash. 89; Ridpath v. Sans Poil etc. Co., 26 Wash. 427; Cameron v. Groveland Imp. Co., 20 Wash. 169; State v. Klein, 19 Wash. 368; State v. Nelson, 13 Wash. 523; Harris v. Halverson, 23 Wash. 779; State v. Elswood, 15 Wash. 453; State v. Symes, 17 Wash. 596; State ex rel. Sander v. Jones, 20 Wash. 576; State v. Mason, 19 Wash. 94; McCord v. McCord, 24 Wash. 529; Bozzio v. Vaglio, 10 Wash. 270; Kuhn v. Mason, 24 Wash. 94; Wilson v. Seattle Dry Dock etc. Co., 26 Wash. 297.

What amounts to an abuse of discretion: See 1 Remington's Digest, p. 218, § 402; Barnett v. Ashmore, 5 Wash. 163; Gould v. Gleason, 10 Wash. 476; Van Lehn v. Morse, 16 Wash. 672; Hull v. Vining, 17 Wash. 352.

What is not an abuse of discretion: See 1 Remington's Digest, p. 218, § 403; State v. Hunter, 18 Wash. 670; McClellan v. Gaston, 18 Wash. 472; Ross v. Howard, 25 Wash. 1; Wilson v. Seattle Dry Dock etc. Co., 26 Wash. 297; Swanson v. Hoyle, 32 Wash. 169; Hart Lumber Co. v. Rucker, 20 Wash. 383; Hull v. Vining, 17 Wash. 352; Dearborn Foundry Co. v. Augustine, 5 Wash. 67.

The denial of a motion for default, when there was an answer on file before the ruling was made, will not be reviewed on appeal in the absence of a clear showing of abuse of discretion: Bardon v. Hughes, 45 Wash. 627.

Where the parties stipulated that the court should fix the amount of attorney's fees on the foreclosure of a mechanics' lien, without the introduction of any evidence, the action of the court cannot be reviewed on appeal except for abuse of powers; and no such abuse appears from the allowance of \$150 in a sharply contested action involving \$340: Housekeeper v. Livingstone, 48 Wash. 209.

The granting of a new trial on the ground of insufficiency of the evidence will be reviewed only for abuse of discretion, and abuse of discretion will not be found where

the evidence was contradictory on all contested issues: *Angus v. Wamba*, 50 Wash. 353.

New trial or rehearing: See 1 Remington's Digest, p. 219, § 406; *State v. Buhmann*, 16 Wash. 700; *State v. Symes*, 17 Wash. 596; *McBroom & Wilson Co. v. Gandy*, 18 Wash. 79; *Holgate v. Parker*, 18 Wash. 206; *Langston v. Ephriam*, 21 Wash. 282; *Callihan v. Washington Water Power Co.*, 27 Wash. 154; *Welever v. Advance Shingle Co.*, 34 Wash. 331; *Griggs v. MacLean*, 33 Wash. 244; *Short v. Spokane*, 41 Wash. 257; *Best v. Seattle*, 50 Wash. 533; *Crowley v. Taylor*, 49 Wash. 511; *Goodrich v. Kimble*, 49 Wash. 516; *Nelson v. Carlson*, 48 Wash. 651; *Farrell Co. v. Ihrig*, 50 Wash. 281.

Where the court erroneously grants a new trial solely upon questions of law without passing upon the question of fact, the su-

preme court will review the decision independently of the action of the lower court, as that involves no question of discretion; *Dunkle v. Spokane Falls & N. R. Co.*, 20 Wash. 254; *Gardner v. Lovegren*, 27 Wash. 356; *Gray v. Washington Water Power Co.*, 27 Wash. 713; *La Bee v. Sultan Logging Co.*, 47 Wash. 57.

The record discloses that a new trial was granted on points of law which may be reviewed on appeal, when: See *Gregg v. Northern Pac. R. Co.*, 49 Wash. 183.

Grant of new trial for surprise, accident, inadvertence, or mistake: See 1 Remington's Digest, p. 220, § 407; *State v. Webb*, 20 Wash. 500; *Allen v. Chambers*, 18 Wash. 341; *Friedman v. Manley*, 21 Wash. 43; *Pincus v. Puget Sound Brewing Co.*, 18 Wash. 108; *Reeder v. Traders' Nat. Bank*, 28 Wash. 139.

§ 1737. (6521.) Powers of Supreme Court.

Upon an appeal from a judgment or order, or from two or more orders with or without the judgment, the supreme court may affirm, reverse or modify any such judgment or order appealed from, as to any or all of the parties, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had; and, if the appeal is from a part of a judgment or order, may affirm, reverse or modify as to the part appealed from. The decision of the court shall be given in writing, and no cause shall be deemed decided until the decision in writing is filed with the clerk. In giving its decision, if a new trial is granted, the court shall pass upon and determine all the questions of law involved in the cause presented upon such appeal and necessary to the final determination of the cause. [L. '93, p. 130, § 22.]

See Const., Art. IV, §§ 2, 4.

Cited in 23 Wash. 722; 43 Wash. 132; 44 Wash. 368; 49 Wash. 407.

SUBSEQUENT APPEALS—FORMER DECISION AS LAW OF THE CASE: See 1 Remington's Digest, p. 246, § 473; *Smith v. Seattle*, 20 Wash. 613; *Dennis v. Kass & Co.*, 13 Wash. 137; *State v. Boyce*, 25 Wash. 422; *Taake v. Seattle*, 18 Wash. 178; *Jancko v. West Coast Mfg. etc. Co.*, 40 Wash. 230; *Cook v. Stimson Mill Co.*, 41 Wash. 314. The decision of the supreme court construing a statute, whether proper or not, is the law of the case in another action between the same parties, upon the same subject matter: *Wilkes v. Davies*, 8 Wash. 112.

All questions which were, or which, if presented, might have been determined upon appeal, will not be considered by the appellate court upon a second appeal of the same case: *Dennis v. Kass*, 13 Wash. 137.

Where a case has been reversed upon the ground of the insufficiency of the evidence to sustain the verdict, such decision stands as the law of the case upon a retrial in which the evidence is substantially the same as that upon which the case was first tried: *Furth v. Snell*, 13 Wash. 660.

Where a cause has been reversed upon appeal and sent back for retrial, the failure of the lower court to comply with the directions for retrial is error: *Tacoma Assn. v. Clark*, 8 Wash. 289; *Soules v. McLean*, 15 Wash. 22.

Where a case has been remanded for a new trial, the decision of the appellate court is not binding upon the trial court if the facts developed on the second trial are entirely different: *Hughes v. Bravinder*, 14 Wash. 304; *Richardson v. Carbon Hill Coal Co.*, 18 Wash. 368; *Ward v. Huggins*, 16 Wash. 530.

Persons concluded by judgment: See 1 Remington's Digest, p. 246, § 474; *State ex rel. Holgate v. Superior Court*, 19 Wash. 114; *Gray v. Washington Water Power Co.*, 30 Wash. 154.

Questions concluded: See 1 Remington's Digest, p. 247, § 475; *Jancko v. West Coast Mfg. Co.*, 40 Wash. 230; *Furth v. Snell*, 13 Wash. 660; *Tibbals v. Mt. Olympus Water Co.*, 16 Wash. 480; *Taylor v. Gate*, 24 Wash. 336; *Payette v. Ferrier*, 31 Wash. 43; *Miller v. Lake Irr. Co.*, 33 Wash. 132; *Clark v. Eltinge*, 34 Wash. 323; *Hammock v. Tacoma*, 44 Wash. 623; *Starr v. Aetna*

Insurance Co., 45 Wash. 128; Canady v. Knox, 48 Wash. 685; Heinzerling v. Agen, 49 Wash. 647; Wheeler v. Aberdeen, 47 Wash. 405; Spokane Valley Land and Water Co. v. Madson, 46 Wash. 640; Crooker v. Pacific Lounge etc. Co., 34 Wash. 191; Prescott v. Puget Sound Bridge etc. Co., 40 Wash. 354; State v. Nicoll, 40 Wash. 517; Teater v. King, 41 Wash. 134; Norris Safe & Lock Co. v. Clark, 34 Wash. 104; Grant v. Walsh, 41 Wash. 542; Richardson v. Carbon Hill Coal Co., 18 Wash. 368; Moore v. National Accident Society, 49 Wash. 312.

As to scope and rule of decision, and extent of relief, see 1 Remington's Digest, p. 249, §§ 478, 479; Allen v. Catlin, 9 Wash. 603; Post v. Spokane, 28 Wash. 71; Northern Pac. R. Co. v. Miller, 20 Wash. 21; Hannon v. Millichamp, 40 Wash. 118; Mississippi Valley Trust Co. v. Hofius, 20 Wash. 272; Seattle v. Chin Let, 19 Wash. 38; Gove v. Tacoma, 34 Wash. 434; Manning v. Tacoma R. & Power Co., 34 Wash. 406; Brady v. Onffroy, 37 Wash. 482; Frye & Bruhn v. Phillips, 46 Wash. 190; Tekoa v. Reilly, 47 Wash. 202.

Extent of relief to respondent: See 1 Remington's Digest, p. 249, § 480; Doremus v. Root, 23 Wash. 710; Larson v. American Bridge Co., 40 Wash. 224.

Relief between coparties: See 1 Remington's Digest, p. 250, § 481; Commercial Nat. Bank v. Johnson, 17 Wash. 264; State ex rel. Holgate v. Superior Court, 19 Wash. 114; Spokane & Idaho Lumber Co. v. Loy, 21 Wash. 501.

Relief to parties not appealing or complaining: See 1 Remington's Digest, p. 250, § 482; Tacoma Lumber & Mfg. Co. v. Wolff, 5 Wash. 264; Littell v. Miller, 8 Wash. 566; Westlake Avenue, In re, 40 Wash. 144; Shreeder v. Davis, 43 Wash. 129.

Effect of decree upon strangers: See 1 Remington's Digest, p. 250, § 483; Renton v. St. Louis, 1 W. T. 215; Hinchman v. Point Defiance R. Co., 17 Wash. 399.

Rendition, form, and entry of judgment in general: See 1 Remington's Digest, pp. 250-255, §§ 484-491; State v. Denham, 30 Wash. 643; State ex rel. Barnard v. Board of Education, 19 Wash. 8; State ex rel. Bringgold v. Burns, 21 Wash. 227.

Matters which will not be determined: See 1 Remington's Digest, p. 251, § 486; Sether v. Clark, 24 Wash. 16; Hinchman v. Point Defiance R. Co., 17 Wash. 399; Wheeler v. Lager, 3 Wash. 732; Walton v. Hartman, 38 Wash. 34; Sullivan's Estate, In re, 40 Wash. 202; White v. McSorley, 47 Wash. 18.

Matters determined by modifying judgment without further proceedings below: See 1 Remington's Digest, pp. 251, 252, § 487; Willey v. Morrow, 1 W. T. 474; Parker v. Denny, 3 W. T. 598; Ankeny v. Clark, 1 Wash. 549; Bernhard v. Reeves, 6 Wash. 424; Winsor v. Johnson, 5 Wash. 429; Mason v. McLean, 6 Wash. 31; Boyer v. Boyer, 4 Wash. 80; Gaffney v. McGrath, 11 Wash. 456; Leake v. Hayes, 13 Wash. 213; Seattle

v. Parker, 13 Wash. 450; Spencer v. Commercial Co., 36 Wash. 374; Gose v. Blalock, 21 Wash. 75; Security Sav. Soc. v. Cohalan, 31 Wash. 266; Casety v. Jamison, 35 Wash. 478; Johnston v. Gerry, 34 Wash. 524; Seattle Lumber Co. v. Sweeney, 43 Wash. 1; Pelton v. Smith, 50 Wash. 459; Thornley v. Andrews, 45 Wash. 413.

When remanded for further action of lower court: See 1 Remington's Digest, pp. 252-254, § 488; Wilkeson Coal & Coke Co. v. Driver, 13 Wash. 610; Baker v. Prewett, 3 W. T. 595; Martin v. Whitman County, 1 Wash. 254; Seattle & M. R. Co. v. Claussen-Sweeney B. Co., 5 Wash. 462; Greer v. Squire, 9 Wash. 359; Ault v. Interstate Sav. etc. Assn., 15 Wash. 627; Richardson v. Carbon Hill Coal Co., 18 Wash. 368; Edmunds v. Black, 13 Wash. 490; Gose v. Blalock, 21 Wash. 75; Levy v. Sheehan, 3 Wash. 40; Libbey v. Packwood, 11 Wash. 176; Vermont Loan & Trust Co. v. Vaughn, 25 Wash. 219; Longmire v. Smith, 26 Wash. 439; Miller v. Lake Irr. Co., 27 Wash. 447; McKee v. McKee, 32 Wash. 247; Browder v. Phinney, 30 Wash. 74; Conner v. Clapp, 37 Wash. 299; Oudin & Bergman Fire Clay etc. Co. v. Conlan, 38 Wash. 134; Lohse v. Burch, 42 Wash. 156; Sproul v. Huston, 42 Wash. 106; Ahrens v. Seattle, 39 Wash. 168; Hindman v. Boyd, 42 Wash. 17; Andrews v. Uncle Joe Diamond Broker, 44 Wash. 668; State ex rel. Shores v. Ross, 44 Wash. 246; Jasper v. Bunker Hill & Sullivan Mining & Concentrating Co., 50 Wash. 570.

Decision on admitted errors: See 1 Remington's Digest, p. 254, § 489; Parker v. Denny, 3 W. T. 598; Tacoma v. Dougan, 4 Wash. 796; Leake v. Hayes, 13 Wash. 213; Bolster v. Stocks, 13 Wash. 460; Butler v. Carvin, 33 Wash. 621; Bain v. Thoms, 44 Wash. 382.

Permitting remission of excess: See 1 Remington's Digest, p. 254, § 490; King County v. Ferry, 5 Wash. 536; Nye v. Kelly, 19 Wash. 73; Kleeb v. Bard, 7 Wash. 41; McDannald v. Washington etc. R. Co., 31 Wash. 585; Stone v. Seattle, 33 Wash. 614; Gallamore v. Olympia, 34 Wash. 379; Morrison v. Northern Pac. R. Co., 34 Wash. 70; Halverson v. Seattle Electric Co., 35 Wash. 600; Kohler v. Fairhaven etc. Co., 8 Wash. 452; Nickelson v. Cameron Lumber Co., 39 Wash. 569; Stowe v. La Conner Transp. & Transp. Co., 39 Wash. 28; Irwin v. Buffalo Pitts Co., 39 Wash. 346; Williams v. Spokane Falls & N. R. Co., 44 Wash. 363.

ACTION UPON REVERSAL.—The judgment of the supreme court affirming a decision on appeal is final, and injunction will not lie to restrain its enforcement until the case can be retried at the suit of the losing party: Cochrane v. Van de Vanter, 13 Wash. 323.

The appellate court may, upon the reversal of a judgment, grant leave to the respondent to amend its complaint in accordance with the facts proven: Greer v. Squire, 9 Wash. 359; Interstate Savings & Loan Assn. v. Knapp, 20 Wash. 225. Upon

the reversal of a case and remand for a new trial, it is not error for the trial court to refuse to allow the answer to be amended, in a respect which would be inconsistent with the original answer and testimony of the defendants and the theory on which the case was first tried: *Mantle v. Dabney*, 47 Wash. 394. In an action on an insurance policy, where it appeared that the proofs of loss were not furnished in time and that defendant relied upon such fact for a defense, and no evidence of any waiver was offered, an application by plaintiffs to amend their complaint to show a waiver, made upon reversal of a judgment in their favor, comes too late: *Davis v. Northwestern Mutual Fire Assn.*, 48 Wash. 50.

The appellate court is justified, upon reversing a case, in directing the lower court to enter judgment in a smaller sum, where

it is satisfied that the evidence on a retrial would not differ from that given at the former hearing: *Seattle v. Parker*, 13 Wash. 450.

Powers and duties of lower court—Proceedings after remand: See 1 Remington's Digest, pp. 255, 256, § 493; *In re Sullivan's Estate*, 36 Wash. 217; *Jenkins v. Jenkins University*, 17 Wash. 160; *State ex rel. Manhattan Trust Co. v. Superior Court*, 17 Wash. 380; *Herrick v. Niesz*, 18 Wash. 132; *Spring Hill Irr. Co. v. Lake Irr. Co.*, 42 Wash. 379; *Kane v. Miller*, 43 Wash. 354.

An objection that a complaint does not state a cause of action cannot be first raised by objection to any testimony at the second trial of the case, after a reversal by the supreme court of the first judgment, entered under the same complaint: *Wheeler v. Aberdeen*, 47 Wash. 405.

§ 1738. (6522.) Damages may be Awarded, When.

Upon the affirmance of any judgment or order for the payment of money, the collection of which, in whole or in part, has been stayed by an appeal bond, as in this title provided, the court may award to the respondent damages upon the amount superseded; and, if satisfied by the record that the appeal was taken for delay only, the court must so award such damages not exceeding fifteen per cent of the sum by such judgment or order recovered or directed to be paid, as will effectually tend to prevent the taking of appeals for delay only. [L. '93, p. 131, § 23.]

Cited in 13 Wash. 140; 16 Wash. 679; 51 Wash. 447.

Awarding damages on reversal: See 1 Remington's Digest, p. 255, § 491; *Cady v. Case*, 10 Wash. 140; *Bailey v. Cascade Timber Co.*, 32 Wash. 319; *Dossett v. St. Paul & Tacoma Lumber Co.*, 28 Wash. 618.

Damages for delay or detention: See 1 Remington's Digest, p. 259, § 504; *Walter v. Maresch*, 3 Wash. 624; *Seattle & M. R.*

Co. v. Jorgenson, 3 Wash. 622; *Cady v. Case*, 10 Wash. 140; *Muzzy v. Tompkinson*, 2 Wash. 616; *Northwestern etc. Bank v. Griffiths*, 18 Wash. 69; *Commercial Inv. Co. v. National Bank of Commerce*, 36 Wash. 287; *Blair v. Cassin*, 19 Wash. 127; *Carmack v. Drum*, 28 Wash. 472; *Quandt v. Smith*, 29 Wash. 311; *Wheeler v. Commercial Investment Co.*, 22 Wash. 546.

§ 1739. (6523.) Judgment Against Appellant and Sureties.

Upon the affirmance of a judgment or [on] appeal for the payment of money, the supreme court shall render judgment against both the appellant and his sureties in the appeal bond for the amount of the judgment appealed from (in case the bond was conditioned so as to support such judgment) and for the damages and costs awarded on the appeal; and in any other case of affirmance the supreme court shall likewise render judgment against both the appellant and his sureties in the appeal bond for the amount recoverable according to the condition of the bond, in case such amount can be ascertained by the court without an issue and trial. [L. '93, p. 131, § 24.]

Cited in 9 Wash. 603, 657; 11 Wash. 480; 18 Wash. 70; 28 Wash. 196, 473; 29 Wash. 315, 258; 43 Wash. 385; 48 Wash. 23.

It is within the jurisdiction of the supreme court to enter judgment against the principals and sureties on a stay bond when affirming judgment against the appellants: *Hanna v. Savage*, 8 Wash. 432.

Dismissal or affirmance on short record: See 1 Remington's Digest, p. 499, § 499; *Bash v. Eisenbeis*, 16 Wash. 700; *Grunewald*

v. West Coast Grocery Co., 11 Wash. 478; *Henry v. Great Northern R. Co.*, 16 Wash. 417; *Tom v. Sayward*, 5 Wash. 383; *In re Holburte's Estate*, 38 Wash. 199.

Summary remedies: See 1 Remington's Digest, p. 259, § 501; *Davis v. Virges*, 39 Wash. 256.

Right of action on appeal bonds: See 1 Remington's Digest, p. 259, §§ 502, 503; *Lewis v. Third St. & Suburban R. Co.*, 26 Wash. 28; *Quandt v. Fidelity & Dep. Co.*,

38 Wash. 93; Davis v. Huth, 43 Wash. 383; Sears v. Seattle Cons. St. R. Co., 7 Wash. 286; Hanna v. Savage, 8 Wash. 432; Titlow v. Cascade Oatmeal Co., 16 Wash. 676.

An appeal by a lien claimant from a judgment declaring the priority of and foreclosing a mortgage, with an application for an order fixing the amount of the bond to supersede the judgment "and the whole

thereof," wherein the bond given showed on its face that it was given for that purpose and in terms stayed the whole judgment, is an appeal from the whole judgment and not merely from that part declaring the priority of the liens; and upon affirmance, the surety is liable for the full amount of the judgment: Rogers v. Minneapolis Threshing Machine Co., 48 Wash. 19.

§ 1740. (6524.) Rehearing, Limitation on—Remittitur.

If a petition for rehearing or an appeal be filed within thirty days after the filing of the decision of the supreme court, the remittitur upon the appeal shall not be sent down to the lower court till such petition shall have been acted upon by the supreme court. But at the expiration of thirty days after the filing of the decision of any cause on appeal in case no petition for rehearing shall be filed, or in case such a petition is filed and is denied by the court, then forthwith upon such denial the clerk of the supreme court shall send down to the superior court from which the appeal was taken a remittitur in the cause, which shall consist of the judgment of the supreme court, and a certified copy of the opinion of the court in case any judgment or order appealed from was reversed or modified thereby. [L. '93, p. 131, § 25.]

Rehearings, and hearings en banc: Rule XIII, 51 Wash. xxxviii.

See supra, §§ 9-11, rehearings and hearings en banc.

Rehearings: See 1 Remington's Digest, p. 201, §§ 363, 364; Ward v. Insurance Co., 12 Wash. 631; Lybarger v. State, 2 Wash. 552; State ex rel. Abernethy v. Moss, 13 Wash. 42; State v. Harding, 20 Wash. 556; Jones v. Waugh, 20 Wash. 711; Powell v. Nolan, 27 Wash. 318; Hale v. Stenger, 22 Wash. 699.

Amendment or modification of judgment: See 1 Remington's Digest, p. 257, § 497; State v. Tugwell, 19 Wash. 238; Wolferman

v. Bell, 8 Wash. 140; Ward v. Springfield Fire etc. Co., 12 Wash. 631; Wagner v. Law, 3 Wash. 500; Bell v. Wandby, 7 Wash. 203; Sears v. Seattle Cons. St. R. Co., 7 Wash. 286; Davis v. Ford, 15 Wash. 107.

Recall or return of cause from lower court: See 1 Remington's Digest, p. 257, § 498; Titlow v. Cascade Oatmeal Co., 16 Wash. 676; Post v. Spokane, 28 Wash. 771; Port Angeles Pac. R. Co. v. Cooke, 38 Wash. 184.

§ 1741. (6525.) Effect of Judgment—Execution Under.

If the supreme court affirm or modify any judgment or order appealed from, it may remand the cause to the court below with directions to carry the same into effect, or it may itself issue the necessary process for that purpose to the sheriff of the proper county, as it may deem advisable. If the cause is remanded to the court below to have such judgment or order carried into effect, the decision of the supreme court, and its order entered thereon, upon being certified to the court below and entered on its records, shall have the same force and effect therein as if made and entered by the court below during its session. Executions issued from the supreme court shall be similar to those from the superior court, and of like force and effect, and returnable in the same time. [L. '93, p. 131, § 26.]

See supra, § 10, finality of decisions.

See supra, § 14, effect of judgment.

Cited in 28 Wash. 196.

Enforcement of judgment or order affirmed: See 1 Remington's Digest, p. 256, § 495; State ex rel. Jefferson County v. Hatch, 36 Wash. 164.

After a cause has been remanded, the lower court may hear evidence and take such other proceedings as are necessary to

carry into effect the decision of the supreme court: Spinning v. Drake, 7 Wash. 1.

Where a case is remanded on appeal with directions to enter judgment in a specified amount, and no modification is requested in the appellate court, the judgment becomes the law of the case; and where the trial court is about to add in-

terest thereto, mandamus lies to compel entry of the judgment as directed: *German-American State Bank v. Sullivan*, 50 Wash. 42.

Money paid out by a receiver under order of court, after notice of appeal from

the order, but before the appeal was perfected, is paid out at the peril of the receiver, who, upon reversal of the order, must look to the parties to whom it was paid: *Johnson v. Joslyn*, 47 Wash. 531.

§ 1742. (6526.) Effect of Reversal—Writ of Restitution.

If by a decision of the supreme court the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of the judgment or order appealed from, either the supreme court or the court below may direct an execution or writ of restitution to issue for the purpose of restoring to the appellant his property, or the value thereof. But property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal. [L. '93, p. 132, § 27.]

Cited in 18 Wash. 437; 31 Wash. 503.

Upon the reversal of a judgment against a defendant, he is not entitled to judgment in the appellate court upon notes pleaded in his cross-complaint, when he has not urged his right thereto in the appellate court, and the evidence below on the subject was meager and unsatisfactory: *Libbey v. Packwood*, 11 Wash. 176.

Where a cause has been appealed and judgment rendered by the appellate court, no interference therewith will be tolerated on the part of the lower court by any proceeding in the cause other than such as is directed by the appellate court: *State v. Superior Court*, 8 Wash. 591.

§ 1743. (6527.) Death of Party not to Affect Appeal.

The death of a party after the rendition of a final judgment in the superior court shall not affect any appeal taken, or the right to take an appeal; but the proper representatives in personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the cause, or may be made parties at the instance of another party, as may be proper, as in case of death of a party pending an action in the superior court, and thereupon the appeal may proceed or be taken as in other cases; and the time necessary to enable such representatives to be admitted or brought in as parties shall not be computed as part of the time in this act limited for taking an appeal, or for taking any step in the progress thereof. [L. '93, p. 132, § 28.]

Where judgment has been rendered prior to the death of a party defendant, the jurisdiction of the supreme court is not affected by the failure to present the claim

upon which the action is founded to the administrator of such defendant's estate: *Strong v. Eldridge*, 8 Wash. 595.

§ 1744. (6528.) Costs of Appeal.

Costs shall be allowed in the supreme court, irrespective of any costs taxed in the case in the court below, to the prevailing party in the supreme court, on any appeal in any civil action or proceeding as follows: The fees of the clerk of the supreme court paid by the prevailing party, the fees of the clerk of the court below for preparing, certifying and sending up the records on appeal, or any supplementary record, paid by the prevailing party, and twenty-five dollars attorneys' fees, besides his necessary disbursements for the printing of briefs, and any sum actually paid or incurred by the prevailing party as stenographer's fees, not exceeding ten cents a folio, for making a transcript of the evidence or any part thereof included in the bill of exceptions or statement of facts; but when the judgment of the court

below shall be affirmed in part and reversed in part, or affirmed as to some of the parties and reversed as to others, or modified, the costs shall be in the discretion of the court, and when the judgment is reversed and a new trial ordered, the court may in its discretion direct that costs of the prevailing party shall abide the result of the action. When in the opinion of the supreme court a brief of the prevailing party shall be unnecessarily long, or improper in substance, the court may in its discretion order the disallowance as costs of any part or the whole of the disbursements for printing the same. [L. '93, p. 132, § 29.]

See supra, § 481, and notes.

Cited in 11 Wash. 480; 34 Wash. 182; 39 Wash. 693, 699, 700; 40 Wash. 10, 454.

Where an appeal is taken by the attorneys of a party to an action, contrary to

his wishes and directions, such party is entitled to a voluntary dismissal without the imposition of costs: *Grunewald v. Grocery Co.*, 11 Wash. 478.

§ 1745. (6529.) Effect of Appeal in Criminal Actions.

An appeal by a defendant in a criminal action shall stay the execution of the judgment of conviction. In case the defendant has been convicted of a felony, and has been unable to furnish the bail bond required by section 1747 pending the appeal, the time during which he remains in the jail of the county from which the appeal is taken shall be deducted from the term for which he was theretofore sentenced to the penitentiary, if judgment against him be affirmed. [L. '93, p. 133, § 30.]

See next section.

Cited in 2 Wash. 552; 7 Wash. 356; 26 Wash. 324; 30 Wash. 330.

A defendant who has been transported to the penitentiary and delivered to the warden under a judgment of conviction is entitled, where he gives notice of appeal subsequent to his imprisonment in the

penitentiary, to be returned to the jail of the county in which he was convicted, and there detained, or released on bail, if the offense be bailable, pending the determination of his appeal: *Norris, In re*, 26 Wash. 323.

§ 1746. Same—Date of Commencement of Sentence.

In the event no appeal be taken from the judgment of conviction of a felony, the term of sentence imposed upon such judgment shall commence to run from the date of the imposition thereof. In the event an appeal be taken from such judgment of conviction, and upon such appeal the judgment be affirmed, the term of sentence shall commence to run from the date upon which the remittitur shall be filed in the lower court. [L. '03, p. 39. § 1.]

This section was enacted with a repeal of all acts in conflict therewith. See last previous section.

§ 1747. (6530.) In What Cases Bail Authorized.

In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon an appeal being taken from a judgment of conviction, the court in which the judgment was rendered, or a judge thereof, must, by an order entered in the journal or filed with the clerk, fix and determine the amount of bail to be required of the appellant; and the appellant shall be committed until a bond to the state of Washington in the sum so fixed be executed on his behalf by at least two sureties possessing the qualifications required for sureties on appeal bonds by section 1725 of this title, such bond to be conditioned that the appellant shall appear whenever

required, and stand to and abide by the judgment or orders of the appellate court, and any judgment and order of the superior court that may be rendered or made in pursuance thereof. If the appellant be already at large on bail, his sureties shall be liable to the amount of their bond, in the same manner and upon the same conditions as if they had executed the bond prescribed by this section; but the court may by order require a new bond in a larger amount or with new sureties, and may commit the appellant until the order be complied with. [L. '93, p. 133, § 31.]

Cited in 2 Wash. 552; 37 Wash. 259. In re, 21 Wash. 250; State ex rel. Denham
Right to release pending appeal: See 1 v. Superior Court, 28 Wash. 590; Packen-
Remington's Digest, p. 329, §§ 1, 2; Foye, ham v. Reed, 37 Wash. 258.

§ 1748. (6531.) Personal Appearance not Necessary.

Personal appearance of any party in the supreme court shall not be necessary on appeal in either civil or criminal actions. In criminal actions the defendant shall be entitled to close the argument. [L. '93, p. 134, § 32.]

§ 1749. (6532.) Proceedings in Case of Reversal in Criminal Cases.

When in a criminal action the judgment against the defendant is reversed and it appears that no offense whatever has been committed, the supreme court must direct that the defendant be discharged; but if it appear that the defendant is guilty of an offense, although defectively charged in the indictment or information, the supreme court, if the defendant is in prison, must direct the keeper of the place of confinement to cause the prisoner to be returned to the sheriff of the proper county, there to abide the order of the superior court thereof; and such keeper shall be entitled to the usual fees therefor. [L. '93, p. 134, § 33.]

Cited in 36 Wash. 445. error at the trial, if any crime is charged:
The defendant is not entitled to a dis- State v. Riley, 36 Wash. 441.
charge upon the reversal of a case for

§ 1750. (6533.) Imprisonment Pending Appeal to be Deducted.

If a defendant who has been in prison during the pendency of an appeal, upon a new trial ordered by the supreme court, shall be again convicted, the period of his former imprisonment shall be deducted by the superior court from the period of imprisonment to be fixed on the last verdict of conviction. [L. '93, p. 134, § 34.]

§ 1751. (6534.) Transcript of Judgment, Effect of.

A transcript of any order or judgment, or both, of the supreme court, certified under the seal of the court, shall be sufficient authority to any court, or to any officer on whom it may be served, to proceed according to its mandate. [L. '93, p. 134, § 35.]

§ 1752. (6535.) Appeals to be Heard on Merits.

The supreme court shall hear and determine all causes removed thereto in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities, and shall upon the hearing consider all amendments which could have been made as made. [L. '93, p. 134, § 36.]

Cited in 21 Wash. 333; 22 Wash. 25, 293; See 1 Remington's Digest, p. 211, § 389;
24 Wash. 199, 221; 26 Wash. 342; 30 Wash. Pencil v. Home Ins. Co., 3 Wash. 485;
409, 626; 32 Wash. 372; 35 Wash. 267; 38 Helphrey v. Strobach, 13 Wash. 128; Al-
Wash. 612; 48 Wash. 240; 50 Wash. 363; lend v. Spokane Falls & N. R. Co., 21
51 Wash. 445. Wash. 324; State v. Lorenz, 22 Wash. 289;

Kinhead v. Holmes & Bull Fur. Co., 24 Wash. 216; Green v. Tidball, 26 Wash. 338; Gallamore v. Olympia, 34 Wash. 379; Woodhurst v. Cramer, 29 Wash. 40; Olson v. Seattle, 30 Wash. 687; Ellsworth v. Layton, 37 Wash. 340; State ex rel. Fogarty v. Everett Water Co., 38 Wash. 609; Collins v. Denny Clay Co., 41 Wash. 136; Richardson v. Moore, 30 Wash. 406; Scholey v. De Mattos, 18 Wash. 504; Thornley

v. Andrews, 45 Wash. 413; Vogler v. Anderson, 46 Wash. 202; Brown v. Baldwin, 46 Wash. 106; Hester v. Stine, 46 Wash. 469; Brummett v. Gleason, 47 Wash. 439; Ramsdell v. Ramsdell, 47 Wash. 444; Marbourg v. Seattle, Renton & Southern R. Co., 49 Wash. 51; Cunningham v. Lakin, 50 Wash. 394; Lang v. Crescent Coal Co., 44 Wash. 267.

§ 1753. (6536.) Rules and Regulations.

The supreme court is hereby authorized to make all needful rules and regulations not inconsistent with law concerning practice and procedure in cases appealed to the supreme court. [L. '93, p. 135, § 37.]

§ 1754. (6537.) Method Herein Provided Exclusive.

The mode provided by this title for appealing cases to the supreme court, and for securing a revision of the same therein, shall be exclusive and shall supersede all other methods heretofore provided. But no rights acquired under statutes which are abrogated by this title shall be lost by reason of the passage of this title, and all appeals pending when this title takes effect may be prosecuted to their determination as if this title had not been passed. [L. '93, p. 135, § 38.]

Cited in 14 Wash. 663.

TITLE XII.

ACTIONS AND PROCEEDINGS IN JUSTICES' COURTS AND BEFORE MAGISTRATES.

See supra, §§ 43-49, justices' courts.

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CHAPTER I.

COMMENCEMENT OF CIVIL ACTIONS IN JUSTICE'S COURT.

§ 1755. (6542.) Civil Actions, How Commenced.

Civil actions in the several justices' courts of this state may be instituted either by the voluntary appearance and agreement of the parties, by the service of a summons, or by the service upon the defendant of a true copy of the complaint and notice, which notice shall be attached to the copy of the complaint, and cite the defendant to be and appear before the justice at the time and place therein specified, which shall not be less than six nor more than

twenty days from the date of filing the complaint. [Cf. L. '60, p. 245; L. '73, p. 35, § 19; Cd. '81, § 1712; 2 H. C., § 1452.]

See supra, §§ 44, 45, and notes, jurisdiction of justices of the peace.

See supra, § 47, territorial extent of jurisdiction.

A complaint coming into the possession of a justice of the peace by reason of his succession to the office cannot be presumed to be filed by him on any other date than the day of his succession, though marked filed by him as of a later date; and defendant must be cited to appear within twenty days from the date of filing: *Nelson v. Campbell*, 1 Wash. 261.

Where jurisdiction of the person of defendant had not been acquired by a justice of the peace, the fact that, after a special appearance by defendant to object to the jurisdiction, which was overruled, the defendant submitted to trial, will not constitute a waiver of the want of jurisdiction: *Woodbury v. Henningsen*, 11 Wash. 12.

§ 1756. Venue of Actions—Precinct of Defendant's Residence.

All civil actions commenced in a justice court against a defendant or defendants residing in a city or town of more than three thousand inhabitants shall be brought in the justice court of the precinct in said city or town in which one or more of such defendants reside. [L. '99, p. 53, § 1; L. '01, p. 105, § 1.]

§ 1757. Jurisdiction—Coextensive with Limits of County.

The jurisdiction of justices of the peace in all civil actions, except as provided in the preceding section, shall be coextensive with the limits of the county in which they are elected or appointed, and no other or greater, but every justice of the peace shall continue to reside and perform all the duties of his office in the precinct for which he was elected or appointed during his continuance in office. [L. '01, p. 105, § 2.]

See supra, § 47, territorial extent of jurisdiction.

§ 1758. (6543.) Action by Summons, How Commenced—Form, etc.

A party desiring to commence an action before a justice of the peace for the recovery of a debt by summons shall file his claim with the justice of the peace, verified by his own oath, or that of his agent or attorney; and thereupon the justice of the peace shall, on payment of his fees, if demanded, issue a summons to the opposite party, which summons shall be in the following form, or as nearly as the case will admit, viz.:—

The State of Washington, } ss.
 — County, }

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are hereby commanded to summon —, if he (or they) be found in your county, to be and appear before me at — on — day of —, at — o'clock, P. M. (or A. M.), to answer the complaint of —, for a failure to pay him a certain demand, amounting to — dollars and — cents, upon (here state briefly the nature of the claim); and of this writ make due service and return.

Given under my hand this — day of —, 19—.

—, Justice of the Peace.

And the summons shall specify a certain place, day, and hour for the appearance and answer of the defendant, not less than six nor more than twenty days from the date of filing plaintiff's claim with the justice, which summons shall be served at least five days before the time of trial mentioned therein, and shall be served by the officer delivering to the defendant, or leaving at his

place of abode, with some person over twelve years of age, a true copy of such summons, certified by the officer to be such. [Cf. L. '60, p. 243, § 29; L. '73, p. 335, § 20; Cd. '81, § 1713; 2 H. C., § 1453.]

See Const., Art. IV, § 27, process to run in name of state.

See infra, § 1762, process to run in name of state.

§ 1759. (6544.) Action by Complaint and Notice—Form.

Any person desiring to commence an action before a justice of the peace by the service of a complaint and notice can do so by filing his complaint, verified by his own oath or that of his agent or attorney, with the justice, and when such complaint is so filed, upon payment of his fees, if demanded, the justice shall attach thereto a notice, which shall be substantially as follows:—

The State of Washington, } ss.
 — County, }
 To —.

In the name of the state of Washington, you are hereby notified to be and appear at my office in —, on the — day of —, 18—, at the hour of —, — M., to answer the foregoing complaint, or judgment will be taken against you as confessed, and the prayer of the plaintiff granted.

Dated —, 18—.

—, J. P.

[Cf. L. '60, p. 245, § 29; L. '73, p. 336, § 21; Cd. '81, § 1714; 2 H. C., § 1454.]

Cited in 11 Wash. 12.

§ 1760. Service of Process by Constable or Sheriff.

All process in actions and proceedings in justice courts, having a salaried constable, when served by an officer, shall be served by such constable or by the sheriff of the county or his duly appointed deputy; and all fees for such service shall be paid into the county treasury. [L. '09, p. 433, § 1.]

§ 1761. (6545.) How Served.

The complaint and notice shall be served at least five days before the time mentioned in the notice for the defendant to appear and answer the complaint, by delivering to the defendant, or leaving at his place of abode, with some person over twelve years of age, a true copy of the complaint and notice, certified by the officer or person making the service to be such. [L. '73, p. 337, § 22; Cd. '81, § 1715; 2 H. C., § 1455.]

Cited in 11 Wash. 12; 31 Wash. 362.

Under this section, if the notice and complaint are served on defendant by delivering a copy thereof to a child under

the age of twelve years no jurisdiction of the person of the defendant is thereby conferred on the justice: Woodbury v. Henningsen, 11 Wash. 12.

§ 1762. (6546.*) Style of Process.

All process issued by justices of the peace shall run in the name of the state of Washington, be dated the day issued and signed by the justice granting the same, and all executions and writs of attachment or of replevin shall be served by the sheriff or some constable of the county in which the justice resides, but a summons or notice and complaint may be served by any citizen of the state of Washington over the age of twenty-one years and not a party to the action. [L. '03, p. 18, § 1. Cf. L. '73, p. 337, § 23; Cd. '81, § 1716; 2 H. C., § 1456; L. '93, p. 264, § 1; L. '95, p. 95, § 1.]

See Const., Art. IV, § 27, style of process.

See note to § 1758, action by summons.

§ 1763. (6547.*) Return of Process.

Every constable or sheriff serving process or complaint and notice shall return in writing, the time, manner and place of service and indorse thereon the legal fees therefor and shall sign his name to such return, and any person other than one of said officers serving summons or complaint and notice shall file with the justice his affidavit, stating the time, place and manner of the service of such summons or notice and complaint: Provided, that no fee shall be allowed for the service of a summons or notice and complaint by a person other than an officer. [L. '03, p. 19, § 2. Cf. L. '54, p. 229, § 31; L. '60, p. 246, § 37; L. '73, p. 337, § 24; Cd. '81, § 1717; 2 H. C., § 1457; L. '93, p. 264, § 2; L. '95, p. 195, § 2.]

§ 1764. (6548.*) Service by Person Appointed by Justice—Return.

Any justice may, by appointment in writing, authorize any person other than the parties to the proceeding, or action, to serve any subpoena, summons, or notice and complaint issued by such justice; and any such person making such service shall return on such process or paper, in writing, the time and manner of service, and shall sign his name to such return, and be entitled to like fees for making such service as a sheriff or constable, and shall indorse his fees for service thereon: Provided, it shall not be lawful for any justice to issue process or papers to any person but a regularly qualified sheriff or constable, in any precinct where such officers reside, unless from sickness or some other cause said sheriff or constable is not able to serve the same: Provided further, that it shall be lawful for notice and complaint or summons in a civil action in the justice court to be served by any person over the age of twenty-one years and not a party to the action in which the summons or notice and complaint shall be issued without previous appointment by the justice. [L. '03, p. 19, § 3. Cf. L. '73, p. 337, § 25; Cd. '81, § 1718; 2 H. C., § 1458.]

§ 1765. (6549.) Proof of Service.

Proof of service in either of the above cases shall be as follows: When made by a constable or sheriff, his return signed by him and indorsed on the paper or process. When made by any person other than such officer, then by the affidavit of the person making the service. [L. '73, p. 337, § 26; Cd. '81, § 1719; 2 H. C., § 1459.]

§ 1766. (6550.) Service by Publication—Form.

In case personal service cannot be had by reason of the absence of the defendant from the county in which the action is sought to be commenced, it shall be proper to publish the summons or notice, with a brief statement of the object and prayer of the claim or complaint, in some weekly newspaper published in the county wherein the action is commenced; or if there is no paper published in such county then in some newspaper published in the nearest adjoining county, which notice shall be published not less than once a week for three weeks prior to the time fixed for the hearing of the cause, which shall not be less than four weeks from the first publication of said notice. Said notice may be substantially as follows:—

The State of Washington, }
County of —, } ss.

In Justice's Court, — Justice.

To —.

In the name of the state of Washington, you are hereby notified that — has filed a complaint (or claim, as the case may be) against you in said court, which will come on to be heard at my office in —, in — county, state of Washington, on the — day of —, A. D. 18—, at the hour of — o'clock, — M., and unless you appear and then and there answer, the same will be taken as confessed, and the demand of the plaintiff granted. The object and demand of said claim (or complaint, as the case may be), is (here insert a brief statement).

Complaint filed —, A. D. 18—.

—, J. P.

[L. '73, p. 337, § 27; Cd. '81, § 1720; 2 H. C., § 1460.]

§ 1767. (6551.) Proof of Service by Publication.

Proof of service, in case of publication, shall be the affidavit of the publisher, printer, foreman, or principal clerk, showing the same. [L. '73, p. 338, § 28; Cd. '81, § 1721; 2 H. C., § 1461.]

§ 1768. (6552.) Written Admission Equivalent to Proof of Service.

The written admission of the defendant, his agent or attorney, indorsed upon any summons, complaint, and notice, or other paper, shall be complete proof of service in any case. [L. '73, p. 338, § 29; Cd. '81, § 1722; 2 H. C., § 1462.]

§ 1769. (6553.) Jurisdiction, When Acquired.

The court shall be deemed to have obtained possession of the case from the time the complaint or claim is filed, after completion of service, whether by publication or otherwise, and shall have control of all subsequent proceedings. [L. '73, p. 338, § 30; Cd. '81, § 1723; 2 H. C., § 1463.]

See notes to § 44, supra, jurisdiction of justices.

§ 1770. (6554.) Justice's Docket, Entries in.

Every justice of the peace shall keep a docket in a well-bound book, in which he shall enter,—

1. The title of all actions commenced before him;
2. The object of the action or proceeding, and if a sum of money be claimed, the amount of the demand;
3. The date of the notice and the time of its return; and if an order to arrest the defendant be made, the statement of the facts on which the order is issued;
4. The time when the parties, or either of them, appear, or their non-appearance, if default be made;
5. A brief statement of the nature of the plaintiff's demand, and the amount claimed; and if any setoff be pleaded, a similar statement of the setoff and the amount estimated, and every motion, rule, order, and exception, with the decision of the court thereon;
6. Every continuance, stating at whose request, and for what time;

7. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the trial and return of the jury;

8. The names of the jury who appear and are sworn; the names of witnesses sworn, and at whose request;

9. The verdict of the jury, and when received; and if the jury disagree and are discharged, the fact of such disagreement and discharge;

10. The judgment of the court, and the time when rendered;

11. The time of issuing execution, and the name of the officer to whom delivered, and an account of the debt and costs, and the fees due to each person separately;

12. The fact of an appeal having been made and allowed, and the time when;

13. Satisfaction of the judgment, or any money paid thereon, and the time when;

14. And such other entries as may be material. [Cf. L. '54, p. 227, § 25; L. '73, p. 339, § 31; Cd. '81, § 1724; 2 H. C., § 1464.]

See supra, § 44, and notes.

See supra, § 452, transcript of justice's docket for judgment lien.

See note to § 1859, infra.

§ 1771. (6555.) Infant to Sue by Guardian or Next Friend.

No action shall be commenced by an infant plaintiff, except by his guardian or until a next friend for such infant shall have been appointed. Whenever requested, the justice shall appoint some suitable person, who shall consent thereto in writing, to be named by such plaintiff, to act as his next friend in such action, who shall be responsible for the costs therein. [L. '54, p. 230, § 40; Cd. '81, § 1753; 2 H. C., § 1465.]

Cited in 13 Wash. 165.

§ 1772. (6556.) Appointment of Guardian ad Litem.

After service and return of process against an infant defendant, the action shall not be further prosecuted until a guardian for such infant shall have been appointed. Upon the request of such defendant, the justice shall appoint some person, who shall consent thereto in writing, to be guardian of the defendant in defense of the action; and if the defendant shall not appear on the return day of the process, or if he neglect or refuse to nominate such guardian, the justice may, at the request of the plaintiff, appoint any discreet person as such guardian. The consent of the guardian or next friend shall be filed with the justice; and such guardian for the defendant shall not be liable for any costs in the action. [L. '54, p. 230, § 41; Cd. '81, § 1754; 2 H. C., § 1466.]

§ 1773. (6557.) Time for Appearance.

The parties shall be entitled to one hour in which to make their appearance after the time mentioned in the summons or notice for appearance, but shall not be required to remain longer than that time, unless both parties appear, and the justice, being present, is actually engaged in the trial of another action or proceeding; in such case he may postpone the time of appear-

ance until the close of such trial. [L. '54, p. 230, § 42; Cd. '81, § 1755; 2 H. C., § 1467.]

See supra, § 241, appearance in courts of record.

See infra, § 1858, judgment by default.

Cited in 1 Wash. 509.

Party to an action in a justice's court is entitled to one hour in which to appear, after the time mentioned in the notice. If defendant do not so appear, judgment shall be entered against him without

further proof or evidence. The mere corporal presence of defendant is not sufficient; he must answer, demur, or give the plaintiff written notice; or if by attorney, the attorney must give notice of appearance for him: McCoy v. Bell, 1 Wash. 505.

§ 1774. (6558.) Change of Venue.

If, previous to the commencement of any trial before a justice of the peace, the defendant, his attorney or agent, shall make and file with the justice an affidavit that the deponent believes that the defendant cannot have an impartial trial before such justice, it shall be the duty of the justice to forthwith transmit all papers and documents belonging to the case to the next nearest justice of the peace in the same county, who is not of kin to either party, sick, absent from the county, or interested in the result of the action, either as counsel or otherwise. The justice to whom such papers and documents are so transmitted shall proceed as if the suit had been instituted before him. Distance, as contemplated by this section, shall mean to be by the nearest traveled route. The costs of such change of venue shall abide the result of the suit. [Cf. L. '67, p. 88, §§ 2, 3; L. '81, p. 8, §§ 2, 3; Cd. '81, § 1938; 2 H. C., § 1468.]

Cited in 13 Wash. 573.

A change of venue will lie from a police justice of a city of the third class to the next nearest justice of the peace in the same county: Puyallup v. Snyder, 13 Wash. 572.

Where a change of venue is had to one who is admitted to be the next nearest justice of the peace, objection cannot be

made for the first time in the supreme court, on the ground that the jurisdiction of the last justice was not shown, where the properly certified records of the justices show the transfer was regularly made, since technical accuracy in that respect is not required: Kerstetter v. Thomas, 36 Wash. 620.

§ 1775. (6559.) Change of Venue as in Superior Court.

Change of venue may be allowed for the same causes for which they are allowed in the superior court. [Cf. L. '60, p. 252, § 68; L. '63, p. 369, § 162; Cd. '81, § 1881.]

This section is found in the Code of 1881 as a part of the chapter on witnesses and depositions.

See supra, § 209, change of venue in superior court.

§ 1776. (6560.) Penalty for False Return.

If any officer, without showing good cause therefor, fail to execute any process to him delivered, and make due return thereof, or make a false return, such officer, for every such offense, shall pay to the party injured ten dollars, and all damage such party may have sustained by reason thereof, to be recovered in a civil action. [Cf. L. '54, p. 230, § 39; L. '73, p. 343, § 51; Cd. '81, § 1752; 2 H. C., § 1469.]

§ 1777. (6561.*) Security of Nonresident for Costs.

Whenever the plaintiff is a nonresident of the county, the justice may require of him security for the costs in a sum not exceeding fifty dollars at the time of the commencement of the action. Provided, however, that after an

action has been commenced by a nonresident plaintiff and no security given for costs, the defendant may require such security by motion; when allowed all proceedings shall be stayed until such security has been given. [L. '05, p. 27, § 1. Cf. L. '54, p. 228, § 27; Cd. '81, § 1725; 2 H. C., § 1470.]

CHAPTER II.

PLEADINGS IN CIVIL ACTIONS IN JUSTICE'S COURT.

§ 1778. (6565.) Pleadings, When to Take Place.

The pleadings in justice's court shall take place upon the appearance of the parties, unless they shall have been previously filed, or unless the justice shall, for good cause shown, allow a longer time than the time of appearance. [L. '54, p. 231, § 43; Cd. '81, § 1756; 2 H. C., § 1471.]

§ 1779. (6566.) Pleadings, What Constitute.

The pleadings in the justice's court shall be,—

1. The complaint of the plaintiff, which shall state in a plain and direct manner the facts constituting the cause of action;

2. The answer of the defendant, which may contain a denial of the complaint, or any part thereof, and also a statement, in a plain and direct manner, of any facts constituting a defense;

3. When the answer sets up a setoff by way of defense, the reply of the plaintiff. [L. '54, p. 231, § 44; Cd. '81, § 1757; 2 H. C., § 1472.]

Cited in 1 Wash. 136, 510.

An action in a justice's court is properly entitled by naming the officer before whom the cause is heard, without designating the precinct in which the justice presides: *State v. Superior Court*, 7 Wash. 223.

There is no court apart from the officer designated by Article IV, § 1, of the Constitution, as a justice of the peace: *Id.*

The failure of plaintiff to reply to defendant's allegation of quiet possession for more than one year, in an action before a justice of the peace, cannot be regarded as an admission of its truth, as, under this

section, all new matters in the answer constituting a defense, except setoff, are presumed to be denied: *Bellingham Bay etc. Co. v. Strand*, 1 Wash. 133.

Under the Constitution, Article IV, § 6, the superior court has original jurisdiction in forcible entry and detainer.

A claim was filed in the justice's court against S. Baxter & Co. Summons issued to Sutcliff Baxter and A. M. Brooks. Defendant appeared and pleaded. Held, that defect of parties appearing on face of claim was thereby waived: *Baxter v. Scotland*, 2 W. T. 86.

§ 1780. (6567.) Pleadings may be Oral or Written.

The pleadings in justices' courts may be oral or in writing. [L. '54, p. 231, § 45; Cd. '81, § 1758; 2 H. C., § 1473.]

This section as it appeared in the Code of 1881 is not in conformity with the constitution, and only that which is in force is retained.

§ 1781. (6568.) Pleadings Docketed or Filed—Form Immaterial.

When the pleadings are oral, the substance of them shall be entered by the justice in his docket. When in writing, they shall be filed in his office, and a reference made to them in his docket. Pleadings shall not be required to be in any particular form, but shall be such as to enable a person of common understanding to know what is intended. [L. '54, p. 231, § 46; Cd. '81, § 1759; 2 H. C., § 1474.]

§ 1782. (6569.) Denial of Knowledge or Information.

A statement, in an answer or reply, that the party has not sufficient knowledge or information in respect to a particular allegation in the previous pleadings of the adverse party to form a belief shall be deemed equivalent to a denial. [L. '54, p. 231, § 47; Cd. '81, § 1760; 2 H. C., § 1475.]

§ 1783. (6570.) Pleading Account or Instrument.

When the cause of action or setoff arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver the account or instrument, or a copy thereof, to the court, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims to recover or set off. The court may, at the time of pleading, require that the original account or instrument be exhibited to the inspection of the adverse party, with liberty to copy the same; or if not so exhibited, may prohibit its being given in evidence. [L. '54, p. 231, § 48; Cd. '81, § 1761; 2 H. C., § 1476.]

§ 1784. (6571.) Pleadings to be Verified.

Every complaint, answer, or reply shall be verified by the oath of the party pleading; or if he be not present, by the oath of his attorney or agent, to the effect that he believes it to be true. The verification shall be oral or in writing, in conformity with the pleading verified. [L. '54, p. 232, § 49; Cd. '81, § 1762; 2 H. C., § 1477.]

§ 1785. (6572.) Uncontroverted Allegations Deemed Admitted.

Every material allegation in a complaint, or relating to a setoff in an answer, not denied by the pleading of the adverse party, shall, on the trial, be taken to be true, except that when a defendant who has not been served with a copy of the complaint fails to appear and answer, the plaintiff cannot recover without proving his case. [L. '54, p. 232, § 50; Cd. '81, § 1763, 2 H. C., § 1478.]

See *infra*, § 1858, judgment on default.

§ 1786. (6573.) Objections to Pleading, Amendment.

Either party may object to a pleading by his adversary, or to any part thereof, that is not sufficiently explicit for him to understand it, or that it contains no cause of action or defense, although it be taken as true. If the court deem the objection well founded, it shall order the pleading to be amended; and if the party refuse to amend, the defective pleading shall be disregarded. [L. '54, p. 232, § 51; Cd. '81, § 1764; 2 H. C., § 1479.]

See *infra*, § 1488, amendments.

§ 1787. (6574.) Variance Immaterial, When.

A variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court be satisfied that the adverse party has been misled to his prejudice thereby. [L. '54, p. 232, § 52; Cd. '81, § 1765; 2 H. C., § 1480.]

§ 1788. (6575.) Amendments.

The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, to supply any deficiency or omissions in the allegations

or denials necessary to support the action or defense, when by such amendment substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the court that a continuance is necessary to the adverse party in consequence of such amendment, a continuance shall be granted. The court may also, in its discretion, require as a condition of an amendment the payment of costs to the adverse party. [L. '54, p. 232, § 53; Cd. '81, § 1766; 2 H. C., § 1481.]

See supra, § 303, and notes, amendments in superior court.

See supra, § 1786, objections and amendments to pleadings.

See infra, § 1915, pleadings on appeal.

Cited in 3 Wash. 709.

If a case is appealed from a justice to the superior court, it is discretionary with the superior court, under this and § 1915,

infra, to allow amendments to pleadings used before the justice: State v. Superior Court, 3 Wash. 705.

§ 1789. (6576.) **Setoff, How Pleaded.**

To entitle a defendant to any setoff he may have against the plaintiff, he must allege the same in his answer; and the statutes regulating setoffs in the superior court shall in all respects be applicable to a setoff in a justice's court, if the amount claimed to be set off, after deducting the amount [found] due the plaintiff, be within the jurisdiction of the justice of the peace; judgment may, in like manner, be rendered by the justice, in favor of the defendant, for the balance found due the plaintiff. [L. '54, p. 232, § 54; Cd. '81, § 1767; 2 H. C., § 1482.]

See supra, § 266 et seq., setoff in superior court.

See infra, § 1861, action when setoff exceeds jurisdiction.

See infra, § 1873, setoff of mutual judgments.

CHAPTER III.

ARREST AND BAIL IN JUSTICE'S COURT.

§ 1790. (6580.) **Warrant may Issue, When.**

A justice of the peace shall issue a warrant of arrest in all such cases within his jurisdiction, and for such causes and upon such proof, as is provided for an order for a warrant in chapter VII of title 5, regulating civil actions. [L. '54, p. 229, § 32; Cd. '81, § 1746; 2 H. C., § 1484.]

See supra, § 748 et seq., arrest and bail.

§ 1791. (6581.) **Bond for Warrant.**

Before issuing the warrant of arrest, the justice shall require a bond on part of the plaintiff, with one or more sureties, to the effect that if the defendant recover judgment the plaintiff will pay all costs that may be awarded to the defendant, and all damages which may be sustained by reason of the arrest, not exceeding the sum specified in the bond, which shall be at least one hundred dollars. [L. '54, p. 229, § 33; Cd. '81, § 1747; 2 H. C., § 1485.]

§ 1792. (6582.) **Warrant, How Served.**

The warrant shall be served by arresting the defendant, and taking him before the justice of the peace who issued the same; but if such justice, at the return thereof, be absent or unable to try the action, the officer shall immediately take the defendant to the nearest justice of the same county, who shall

take cognizance of the action, and proceed thereon as if the warrant had been issued by himself. [L. '54, p. 229, § 34; Cd. '81, § 1748; 2 H. C., § 1486.]

§ 1793. (6583.) Notice of Arrest to Plaintiff, etc.

The officer making the arrest shall immediately give notice to the plaintiff, his agent or attorney, and indorse on the warrant the time of the arrest and the time of serving notice on the plaintiff. [L. '54, p. 229, § 35; Cd. '81, § 1749; 2 H. C., § 1487.],

§ 1794. (6584.) Detention not to Exceed Twenty-four Hours.

When a defendant is brought before a justice on a warrant, he shall be detained in the custody of the officer until he shall be discharged according to law; but in no case shall the defendant be detained longer than twenty-four hours from the time he shall be brought before the justice, unless within that time the trial of the action shall be commenced, or unless it has been delayed at the instance of the defendant. [L. '54, p. 229, § 36; Cd. '81, § 1750; 2 H. C., § 1488.],

§ 1795. (6585.) Continuance—Bond.

If the defendant, on his appearance, demand a continuance, the same may be granted on condition that he remain in custody or execute and file with the justice a bond, with one or more sufficient sureties, to be approved by the justice, to the effect that he will render himself amenable to the process of the court, or that the sureties will pay to plaintiff the amount of any judgment which he may recover in the action. On filing such bond, the justice shall order the defendant to be discharged from custody. [L. '54, p. 229, § 37; Cd. '81, § 1751; 2 H. C., § 1489.]

Sections 1790-1795 are not in harmony with the constitution unless the cases in which it may lie are confined by further enactment to absconding debtors: See Const., Art. I, § 17.

CHAPTER IV.

REPLEVIN IN JUSTICE'S COURT.

§ 1796. (6588.) Plaintiff may Claim Immediate Delivery.

The plaintiff in an action to recover the possession of personal property may, at the time of issuing such summons, or at any time before answer, claim the immediate delivery of such property as provided in this chapter. [L. '54, p. 242, § 109; Cd. '81, § 1809; 2 H. C., § 1490.]

See supra, §§ 707-717, and notes, claim and delivery in superior court.

See supra, §§ 573-577, adverse claims to property attached by sheriff.

See infra, § 1888, claim by third person of property levied upon.

§ 1797. (6589.) Affidavit Where Delivery Claimed, Contents of.

When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing,—

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth;
2. That the property is wrongfully detained by the defendant;
3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure; and

5. The actual value of the property. [L. '54, p. 242, § 110; Cd. '81, § 1810; 2 H. C., § 1491.]

§ 1798. (6590.) Order for Delivery.

The justice shall thereupon, by an indorsement in writing upon the affidavit, order the sheriff or any constable of the county to take the same from the defendant and deliver it to the plaintiff upon receiving a proper bond. [L. '54, p. 243, § 111; Cd. '81, § 1811; 2 H. C., § 1492.]

§ 1799. (6591.) Execution of Order—Bond.

Upon the receipt of the affidavit and order, with a bond, executed by two or more sufficient sureties, approved by the sheriff or constable, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff, the sheriff or constable shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, order, and bond, by delivering the same to him personally if he can be found within the county, or to his agent from whose possession the property is taken, or if neither can be found in the county, by leaving them at the usual abode of either within the county, with some person of suitable age and discretion; or if neither have any known place of abode in the county by putting them into the postoffice, directed to the defendant at the postoffice nearest to him. [L. '54, p. 243, § 112; Cd. '81, § 1810; 2 H. C., § 1493.]

§ 1800. (6592.) Exceptions to Sureties.

The defendant may, within two days after the service of a copy of the affidavit, order, and bond, give notice to the officer that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify upon one day's notice before the justice; and the officer shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify, or new sureties be substituted, and they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section. [L. '54, p. 243, § 113; Cd. '81, § 1813; 2 H. C., § 1494.]

Cited in 20 Wash. 544.

§ 1801. (6593.) Return of Property on Giving Bond, etc.

At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof upon giving to the officer a bond, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such

sum as may for any cause be recovered against the defendant. If a return of the property be not so required within two days after the taking and serving of notice to the defendant, it shall be delivered to the plaintiff, except as provided in this chapter. [L. '54, p. 243, § 114; Cd. '81, § 1814; 2 H. C., § 1495.]

§ 1802. (6594.) Justification of Sureties.

The defendant's sureties, upon one day's notice to the plaintiff or his attorney, shall justify before the justice, and upon such justification the officer shall deliver the property to the defendant. The officer shall be responsible for the defendant's sureties until they justify, or until the justification is complete or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time appointed, he shall deliver the property to the plaintiff. [L. '54, p. 244, § 115; Cd. '81, § 1815; 2 H. C., § 1496.]

§ 1803. (6595.) Officer may Break Open Building or Inclosure.

If the property, or any part thereof, be concealed in a building or inclosure, the officer shall publicly demand its delivery; and if it be not delivered, he shall cause the building or inclosure to be broken open and take the property into his possession. [L. '54, p. 244, § 116; Cd. '81, § 1816; 2 H. C., § 1497.]

§ 1804. (6596.) Officer to Keep and Deliver Property.

When the officer shall have taken property as in this chapter provided, he shall keep it in a secure place, and deliver [it] to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the same. [L. '54, p. 244, § 117; Cd. '81, § 1817; 2 H. C., § 1498.]

Cited in 49 Wash. 300.

§ 1805. (6597.) Proceedings Where Property Claimed by Third Party.

If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or his right to the possession thereof, stating the ground of such title or right, and serve the same upon the officer before the delivery of the property to the plaintiff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the officer against such claim by a bond executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property, as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and freeholders or householders of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the officer, unless made as aforesaid, and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity. [L. '54, p. 244, § 118; Cd. '81, § 1818; 2 H. C., § 1499.]

See supra, §§ 573-577, adverse claim to property levied on by sheriff.

§ 1806. (6598.) Return of Order and Affidavit.

The officer shall return the order and affidavit with his proceedings thereon to the justice within five days after taking the property mentioned therein. [L. '54, p. 244, § 119; Cd. '81, § 1819; 2 H. C., § 1500.]

CHAPTER V.

GARNISHEE PROCESS BY OFFICERS.

§ 1807. (6600.) Affidavit for Garnishment.

Whenever any action shall have been commenced by summons upon contract express or implied, or notice and complaint in a justice's court, if the plaintiff, or some one in his behalf, shall make and deliver to the officer having such summons, or notice and complaint, an affidavit stating that the affiant has good reason to believe that some person (naming him) is indebted to the defendant, or has personal property in his possession or under his control belonging to the defendant, or when there is more than one defendant, to any or either of them, not by law exempt from sale on execution, and demand that he shall summon such person as garnishee, such officer shall summon such person in writing to appear before the justice on the return day of such summons, or notice and complaint, to answer touching his liability as garnishee. [L. '88, p. 101, § 1; 2 H. C., § 1501.]

Writ of garnishment by justice: See § 1823, *infra*, and note.

See *infra*, § 1886, garnishment on execution.

§ 1808. (6601.) Garnishee Summons.

The summons to the garnishee may be substantially as follows:—

The State of Washington, }
 — County, } ss.

The State of Washington to —.

Whereas, a summons or notice and complaint has been issued by —, a justice of the peace of said county, returnable on the — day of —, A. D. 18—, in favor of —, plaintiff, and against —, defendant; and whereas, the plaintiff (or A B in his behalf) has made oath that you have property in your possession or under your control belonging to the defendant (or are indebted to him), now therefore, you are hereby summoned to be and appear before the said justice at his office in said county on the return day of said summons (or notice and complaint), at — o'clock in the —noon of said day, then and there to answer under oath, touching your liability as garnishee.

Given under my hand this — day of —, 18—.

—, Constable or Sheriff.

[L. '88, p. 101, § 2; 2 H. C., § 1502.]

§ 1809. (6602.) Service of.

The officer shall serve such summons on the garnishee personally, and return the same, with the affidavit, to the justice at the same time that he shall make return of the service of the summons or notice and complaint, and state the day such summons was served on the garnishee. [L. '88, p. 102, § 3; 2 H. C., § 1503.]

§ 1811. (6604.) Liability of Garnishee.

The garnishee, from the time of the service of such summons, shall stand liable to the plaintiff to the amount of the personal property, money, credits, and effects in his hands or under his control belonging to the defendant, and

the amount of his own indebtedness to the defendant, then due or to become due, and not by law exempt from sale on execution. [L. '88, p. 102, § 5; 2 H. C., § 1505.]

§ 1812. (6605.) Garnishee Action—When Deemed Commenced.

The service of the garnishee summons shall be deemed the commencement of an action against such garnishee; and upon the return of the constable that such summons has been duly served, the justice shall enter an action in his docket in which the plaintiff in the original action shall be plaintiff and the garnishee defendant. [L. '88, p. 102, § 6; 2 H. C., § 1506.]

§ 1813. (6606.*) Examination of Garnishee.

On the appearance of the garnishee before the justice, the affidavit aforesaid shall be deemed a sufficient complaint in this action, and the justice shall forthwith proceed to examine the said garnishee and his witnesses touching the matters alleged in the affidavit, and shall reduce the answers of said garnishee and his witnesses to writing, and file the same with the papers in the case; such examination may be adjourned by said garnishee as in case of adjournment in justice court in civil actions: Provided, that in lieu of the personal appearance of the garnishee and his examination by the justice, the garnishee may answer the affidavit and writ, in writing, in which case the answer shall be in writing, signed and verified by the garnishee, and make true answer to the several matters set up in the affidavit and such answer shall be filed with the justice of the peace, within the time required by the writ for the garnishee to appear. [L. '88, p. 103, § 7; 2 H. C., § 1507; L. '03, p. 82, § 2.]

§ 1814. (6607.) Trial, When.

If the plaintiff shall not be satisfied with the answers of the garnishee, or if either party shall desire a trial, the justice shall enter the fact in his docket, and the case shall be proceeded with and tried upon the issue formed by the affidavit and answer, as in other actions commenced by summons; and if, upon the trial of any such issue, property or effects shall be found in the hands of the garnishee, or it shall appear that such garnishee was indebted to the defendant, the justice or jury shall assess the value thereof, and the garnishee may hold the same subject to the further order of the justice. [L. '88, p. 103, § 8; 2 H. C., § 1508.]

§ 1815. (6608.) Defendant may Participate in Trial.

The defendant in the original action may appear and defend the proceedings against the garnishee, upon the ground that the indebtedness of the garnishee, or any property held by him, is exempt from execution against such defendant, or for any other reason is not liable to garnishment, or upon any grounds upon which a garnishee might defend the same, and may participate in the trial of any issue between the plaintiff and the garnishee for the protection of his interests. [L. '88, p. 103, § 9; 2 H. C., § 1509.]

§ 1816. (6609.) Costs.

If, in the action instituted against the garnishee, the plaintiff shall be nonsuited or discontinue his action; or if, upon the answer and trial of the issue between the plaintiff and garnishee, no property or effects shall be

found in the hands of the garnishee, or nothing shall be found due from the garnishee to the defendant; or if, in the action against the principal defendant, the plaintiff shall be nonsuited or discontinue his action; or if, on the trial in such action, nothing shall be found due from the defendant to the plaintiff,—then in each of these cases the garnishee shall recover costs against the plaintiff, and no such costs shall be paid by the defendant. [L. '88, p. 103, § 10; 2 H. C., § 1510.]

See *infra*, § 1818, costs against garnishee.

§ 1817. (6610.) Judgment Against Garnishee.

If the plaintiff recover against the defendant in the original action, and the answer of the garnishee, when no issue is made thereon, or the finding of the court or jury on an issue, show the garnishee, at the time of the service of the summons, had property in his possession belonging to the defendant, or that he was indebted to him, the justice shall enter an order in his docket requiring the garnishee, within ten days, to pay or deliver to the justice such property or the amount of such indebtedness, or so much thereof as may be necessary to satisfy such judgment, with costs thereof, and the costs of the garnishee proceedings; or if it appears, from such answer or finding, that the garnishee is to pay or deliver to the defendant any money or property in any other manner or at any other time than immediately, and at the time of service of the summons, the same belonging to the defendant, then the order of the justice shall be that such payment or delivery be so made to the justice for the benefit of the plaintiff. If such garnishee shall pay such indebtedness, and deliver such property as directed by such order, the costs of the garnishee shall be paid out of the money or property received by the justice, unless the garnishee, upon an issue joined with him by the plaintiff, shall have been held liable in a greater amount of property or indebtedness than was disclosed in his answer, in which case he shall not have costs. And all property and effects, except money, delivered to the justice shall be by him ordered to be sold on the execution against the defendant. [L. '88, p. 103, § 11; 2 H. C., § 1511.]

§ 1818. (6611.) Costs Against Garnishee.

If the garnishee do not deliver over the property or pay the money so found in his hands and belonging to the defendant, as provided in the preceding section, then judgment shall be given against him for the value of such property or money, and costs of suit in the cause in which he is garnishee, and no such costs shall be paid by the defendant. [L. '88, p. 104, § 12; 2 H. C., § 1512.]

See *supra*, § 1816, costs.

§ 1819. (6612.) Final Judgment—Negotiable Instrument.

No final judgment shall be rendered against the garnishee until final judgment be rendered against the defendant in the original action; but no judgment shall be rendered against a garnishee, or any money be required to be delivered by him to the justice, upon any liability arising out of a debt due [evidenced] by negotiable paper, unless such paper is delivered or the garnishee completely exonerated or indemnified from all liability thereon after he may have satisfied the judgment. [L. '88, p. 104, § 13; 2 H. C., § 1513.]

§ 1820. (6613.) Default, etc., by Garnishee.

When a garnishee shall fail to appear, or, appearing, shall fail to make full answers upon oath to the interrogatories of the justice touching his liabilities as garnishee, the justice shall enter such fact in his docket, and he shall be adjudged to be indebted to the defendant; and if judgment shall be rendered in favor of the plaintiff, against the defendant, judgment in favor of the plaintiff shall be entered against such garnishee for the amount of the judgment against the defendant, and for all costs in the garnishee proceedings, and no such costs shall be paid by the defendant. The justice may continue the cause to some other day, if necessary for further proceedings. [L. '88, p. 104, § 14; 2 H. C., § 1514.]

The last paragraph but one of this section as originally enacted is omitted as void under Art. I, § 17, of the Constitution.

§ 1821. (6614.) Appearance After Default.

If the garnishee shall have failed to appear at the proper time, he may afterwards appear and answer at any time before final judgment against him, if he shall first pay all costs in the garnishee suit which have accrued up to that time; and when he shall so appear, the justice shall cause the plaintiff to be notified thereof, so that he may be present at the examination. [L. '88, p. 105, § 15; 2 H. C., § 1515.]

§ 1822. (6615.) Judgment in Bar.

In all actions brought by the defendant against the garnishee for the recovery of any property, credits, money, or effects delivered up or paid by order of any judgment rendered under this chapter, except costs rendered against the garnishee, such judgment may be pleaded in bar, and the same shall be conclusive between such parties. [L. '88, p. 105, § 16; 2 H. C., § 1516.]

CHAPTER VI.

WRITS OF GARNISHMENT BY JUSTICES.

§ 1823. Writ of Garnishment—When may Issue.

The justice of the peace in the various precincts in the state may issue writs of garnishment, returnable to their respective courts, where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, and that the garnishment applied for is not sued out to injure either the defendant or the garnishee. [L. '09, p. 607, § 1.]

See supra, §§ 1807-1822, garnishee summons by officer. Formerly a justice of the peace could not issue a writ of garnishment. Since there is no reason why this act could not have been intended as a remedy concurrent with existing provisions for a summons by the officer, and as there is no repealing clause, it does not necessarily conflict with the older provisions, which are therefore retained.

§ 1824. Affidavit for Garnishment—Requisites.

Before the issuance of the writ of garnishment, the plaintiff, or someone in his behalf, shall make application therefor by affidavit, stating the facts authorizing the issuance of the writ, and that he has reason to believe and does believe that the garnishee is indebted to the defendant or that he has in his possession or under his control personal property or effects belonging to the defendant, or that the garnishee is a corporation and that the

defendant is the owner of shares of the capital stock thereof. [L. '09, p. 608, § 2.]

§ 1825. Issuance of Writ—Contents.

When the foregoing requisites have been complied with, the justice of the peace shall immediately issue a writ of garnishment directed to the garnishee, commanding him to appear before the court from which it is issued, on the return day of the summons and notice or notice and complaint in the main action, and to answer on oath in what amount, if any, he was indebted to the defendant when such writ was served upon him and what personal property or effects, if any, of the defendant he had in his possession or under his control when such writ was served upon him; and where it appears from the affidavit for the writ that the garnishee is a corporation in which the defendant is the owner of shares, the writ of garnishment shall further require the garnishee to answer what number of shares, if any, the defendant owned in such corporation when such writ was served upon it. [L. '09, p. 608, § 3.]

§ 1826. Form for Writ.

Said writ shall be substantially in the following form:

To — Greeting:

Whereas, in the justice court in and for — precinct, — county, state of Washington, in a certain cause wherein — is plaintiff and — is defendant, the plaintiff claiming an indebtedness against the said — of — dollars, besides interest and costs of suit, has applied for a writ of garnishment against you:

Now therefore, you are hereby summoned to be and appear before the said justice, at his office in said county, on the — day of —, 19—, at — o'clock in the — noon of said day, that being the return day of the summons (or notice and complaint) in the main action, then and there to answer upon oath in what amount, if any, you were indebted to the said — when this writ was served upon you, and what personal property or effects, if any, of the said — you had in your possession or under your control when this writ was served upon you (and if the garnishee be a corporation in which the defendant is alleged to be the owner of shares, then the writ shall proceed: And further to answer what number of shares, if any, the said — owned in — a corporation, when this writ was served upon you). [L. '09, p. 608, § 4.]

§ 1827. How Issued.

The writ of garnishment shall be dated and signed by the justice of the peace, and the name and office address of the attorney for the plaintiff shall be indorsed thereon, or in case the plaintiff has no attorney, then the name and address of the plaintiff shall be indorsed thereon. The writ, when so issued and indorsed, shall be delivered by the justice of the peace who issues it to the party applying therefor, or to his attorney. [L. '09, p. 609, § 5.]

§ 1828. Service of Writ.

The writ of garnishment may be served by the sheriff or any constable of the county in which the garnishee lives, or it may be served by any citizen of the state of Washington over the age of twenty-one years and not a

party to the action in which it is issued, in the same manner as a summons in an action is served. And in case such writ is served by an officer, such officer shall make his return thereon, showing the time, place and manner of service and noting thereon his fees for making such service and shall sign his name to such return. In case such service is made by any person other than an officer, such person shall attach to the original writ his affidavit showing his qualifications to make such service and the time, place and manner of making service, but no fee shall be allowed for the service of such writ unless the same is served by an officer. [L. '09, p. 609, § 6.]

§ 1829. Service upon Bank as Garnishee.

In cases where the writ of garnishment issued under the provisions of this act is directed to a corporation carrying on a general banking business in the state of Washington, the plaintiff, in addition to serving the writ of garnishment upon said garnishee, shall at the same time and as a part of said service deliver to said garnishee a statement in writing signed by the plaintiff or his attorney, stating the place of residence of the defendant and his business, occupation, trade or profession, and unless such statement is so delivered with said writ of garnishment, the service of said writ shall not be deemed complete and the garnishee shall not be held liable thereon. [L. '09, p. 610, § 7.]

§ 1830. Effect of Service—Payment of Debt.

From and after the service of such writ of garnishment, it shall not be lawful for the garnishee to pay to the defendant any debt owing to him at the time of such service, or to deliver to him any personal property or effects belonging to the defendant in his possession or under his control at the time of such service, nor shall the garnishee, if it be a corporation in which the defendant is alleged to be the owner of shares, permit or recognize any sale or transfer of any shares owned by said defendant at the time of such service; and any such payment, delivery, sale or transfer shall be void and of no effect as to so much of said debt, personal property or effects or shares as may be necessary to satisfy the plaintiff's demand. [L. '09, p. 610, § 8.]

§ 1831. Bond to Release Garnishee.

If the defendant in the principal action causes a bond to be executed to the plaintiff, with sureties, to be approved by the justice of the peace issuing the writ, conditioned that he will pay any judgment that may be rendered against him in favor of the plaintiff in said action, and shall file said bond with said justice of the peace, the writ of garnishment shall, upon the filing and approval of said bond, be immediately discharged, and all proceedings had thereunder shall be vacated and said justice shall issue and deliver to said defendant a certificate to the effect that said writ of garnishment has been discharged, and upon the delivery of said certificate to the garnishee he shall be discharged of any further liability under said writ: Provided, that the garnishee shall not be thereby deprived from recovery of costs in said proceeding to which he would otherwise be entitled under this act. [L. '09, p. 610, § 9.]

§ 1832. Answer of Garnishee.

The answer of the garnishee shall be in writing and signed and verified as other pleadings and shall make true answers to the several matters in-

quired of in the writ of garnishment and shall be served upon the plaintiff or his attorney and filed with the justice of the peace who issued said writ. [L. '09, p. 611, § 10.]

§ 1833. Discharge of Garnishee.

Should it appear from the answer of the garnishee that he was not indebted to the defendant when the writ of garnishment was served upon him and that he had not in his possession or under his control any personal property or effects of the defendant when the writ was served; and when the garnishee is a corporation in which the defendant is alleged to be the owner of shares of stock, if it shall further appear from such answer that the defendant was not the owner of any such shares when the writ was served, and should the answer of the garnishee not be controverted as hereinafter provided, the court shall enter judgment discharging the garnishee. [L. '09, p. 611, § 11.]

§ 1834. Default of Garnishee—Judgment—Dismissal of Action.

Should the garnishee fail to make answer to the writ within the time prescribed therein, the court shall, upon application of the plaintiff therefor, declare and enter the default of the garnishee and shall thereafter render judgment as follows:

In case judgment has not been rendered in the principal action at the time when the default of garnishee is declared and entered, final judgment shall not be rendered against said garnishee until the final judgment in the principal action is entered, and if the plaintiff recovers judgment against the principal defendant the court shall enter judgment against the garnishee for full amount of the judgment awarded to the plaintiff against the defendant; and if the plaintiff fails to recover judgment against the defendant, the garnishee shall be discharged without costs. [L. '09, p. 611, § 12.]

§ 1835. Judgment Against Garnishee—Satisfaction.

Should it appear from the answer of the garnishee, or should it be otherwise made to appear as hereinafter provided, that the garnishee was indebted to the defendant in any amount when the writ of garnishment was served upon him, the court shall render judgment for the plaintiff against such garnishee for the amount so admitted or found to be due from the garnishee, less the amount of the costs awarded to the garnishee, unless the amount so admitted or found to be due shall exceed the amount of the judgment rendered or thereafter rendered in favor of the plaintiff against the defendant, with interest and costs, in which case it shall be for the amount of such judgment rendered or thereafter to be rendered, with interest and costs: Provided, however, that judgment shall not be rendered against the garnishee until the final judgment in the principal action is entered, and if the plaintiff fails to recover judgment against the defendant the garnishee shall be discharged and shall have and recover his costs against plaintiff: Provided, however, if it shall appear from the answer of the garnishee and the same is not controverted, or if it shall appear from the trial hereinafter provided for that the garnishee was indebted to the defendant in any sum at the time of the service of said writ, but that said indebtedness is not matured and is not due and payable, the court shall make an order requiring the garnishee to pay such sum into court when the same becomes due, less

the amount of the costs awarded to the garnishee, the date when such payment is to be made to be specified in said order, and in default thereof that judgment shall be entered against the garnishee for the amount of such indebtedness so admitted or found to be due. In case the garnishee shall pay said sum at the time specified in said order, said payment shall operate as a discharge; otherwise judgment shall be entered against him as above provided: Provided further, that if judgment shall be rendered in favor of the principal defendant, or if any judgment rendered against him shall be satisfied prior to the date of payment specified in said order, the garnishee shall not be required to make the payment hereinbefore provided for, nor shall any judgment in such case be against him. [L. '09, p. 612, § 13.]

§ 1836. Execution Against Garnishee.

Execution may be issued on the judgment against the garnishee herein provided for in like manner as upon any other judgment. The amount made upon any such execution shall be paid by the officer executing the same to the justice of the peace from whom such execution was issued, and shall be applied to the satisfaction of such judgment, interest and costs, and also to the satisfaction of the judgment against the defendant, and the surplus, if any, shall be paid to the garnishee. [L. '09, p. 613, § 14.]

§ 1837. Garnishee in Possession of Property—Surrender—Custody.

Should it appear from the answer of the garnishee, or should it be made otherwise to appear, as hereinafter provided, that the garnishee had in his possession or under his control when the writ was served upon him, any personal property or effects of the defendant liable to execution, the court shall render a decree requiring the garnishee to deliver up to the justice on demand, such personal property or effects, or so much of them as may be necessary to satisfy the plaintiff's claim. In cases where a judgment has been rendered in the principal action, such personal property or effects may be sold in like manner as other property is sold upon execution on a judgment. In cases where judgment has not been rendered in the principal action, the justice of the peace shall retain such personal property or effects in his possession until the rendition of the judgment therein, and in case judgment is entered in such principal action in favor of the plaintiff, said goods, or effects, or sufficient of them to satisfy said judgment, may be sold in like manner as other property is sold upon an execution issued on a judgment. In case judgment shall be rendered in such action against the plaintiff and in favor of the defendant, such effects and personal property shall be by the justice returned to the defendant. [L. '09, p. 613, § 15.]

§ 1838. Attachment for Contempt.

Should the garnishee adjudged to have effects or personal property of the defendant in his possession or under his control, as provided in the preceding section, fail or refuse to deliver them to the justice on such demand, the garnishee shall, on motion of the plaintiff, be cited to show cause why he should not be attached for contempt of court for such failure or refusal, and should the garnishee fail to show some good and sufficient excuse for such failure and refusal he shall be fined for such contempt and imprisoned until he shall deliver such personal property or effects. [L. '09, p. 614, § 16.]

§ 1839. Corporation Garnishee—Shares of Stock Sold.

Where the garnishee is a corporation and it appears by the answer or otherwise that the defendant was, when the writ of garnishment was served upon it, the owner of any shares of stock in such corporation, the court shall render a decree ordering the sale under execution in favor of the plaintiff against the defendant of such shares of the defendant in such corporation, or so much thereof as may be necessary to satisfy such execution. [L. '09, p. 614, § 17.]

§ 1840. Sales, How Conducted.

The sale so ordered shall be conducted in all respects as other sales of personal property under execution, and the officer making such sale shall execute a transfer of such shares to the purchaser with a brief recital of the judgment of the court under which the same was sold. [L. '09, p. 614, § 18.]

§ 1841. Title on Sale.

Such sale shall be valid and effectual to pass to the purchaser all the right, title and interest which the defendant had in such shares of stock, and the proper officers of such company shall enter such sale and transfer on the books of the company in the same manner as if the sale had been made by the defendant himself. [L. '09, p. 614, § 19.]

§ 1842. Controverting the Answer of the Garnishee—Trial.

If the plaintiff should not be satisfied with the answer of the garnishee, he shall state such fact to the justice of the peace, who shall thereupon enter the fact in his docket, and an issue shall be formed under the direction of the court and tried as other cases: Provided, however, no pleading shall be necessary on such issue other than the affidavit of the plaintiff, the answer of the garnishee and the statement of the plaintiff that he is not satisfied with the answer. [L. '09, p. 614, § 20.]

§ 1843. Attorney's Fees—Costs.

Where the answer is controverted and the garnishee is subsequently discharged upon the trial thereof, his costs, including a reasonable attorney's fee to be fixed by the court, shall be taxed against the plaintiff; and if the garnishee upon his answer being controverted by the plaintiff is held liable to an extent greater than the liability admitted in his answer, the costs of the plaintiff upon such proceeding, including a reasonable attorney's fee to be fixed by the court, shall be taxed against the garnishee. [L. '09, p. 615, § 21.]

§ 1844. Garnishee's Defense Against Defendant.

It shall be a sufficient answer against any claim of the defendant against the garnishee founded on any indebtedness of such garnishee or upon the possession by him of any personal property or effects, or, where the garnishee is a corporation in which the defendant was the owner of shares of stock, for the garnishee to show that such indebtedness was paid or such shares of stock were sold under judgment of the court in accordance with the provisions of this act. [L. '09, p. 615, § 22.]

§ 1845. Garnishee's Answer—Identity of Names, How Determined—Trial.

Where the garnishee in his answer states that he was indebted or had personal property or effects in his possession under his control at the time

of the service of the writ of garnishment upon him to a person of the same or similar name to the defendant, and stating the place of business or residence of said person, and that he does not know whether or not such person is the same person as the defendant, and prays the court to determine whether or not the person to whom he was indebted or whose personal property or effects he had in his possession is the same person as the defendant, the court, before rendering judgment against the garnishee defendant as hereinbefore provided, shall take proof as to the identity of said persons, and if he should find therefrom that they are not one and the same individual, the garnishee shall be discharged and shall have and recover his costs against the plaintiff; and if he should find that said persons are one and the same individuals, he shall make a similar judgment as to the payment of the money or the delivery of personal property and effects and as to costs of the garnishee as is hereinbefore provided, where the garnishee is held upon his answer. Before any such hearing on the question of identity is had, the plaintiff shall cause the justice of the peace to issue a citation directed to the person to whom the garnishee answers he was indebted or whose personal property or effects the garnishee has answered he had in his possession or under his control, commanding him to appear before the justice of the peace from which it is issued within ten days after the service of the same upon him, and to answer on oath whether or not he is the same person as the defendant in said action. Said citation shall be dated and attested in like manner as a writ of garnishment and be delivered to the plaintiff or his attorney and shall be served in the same manner as a summons in an action is served. If upon the hearing in this section provided for, the court shall find that the defendant or judgment debtor is the same person as the person to whom the garnishee defendant was indebted, or whose personal property or effects said garnishee defendant had in his possession or under his control, it shall be sufficient answer to any claim of said person against the garnishee founded on any indebtedness of such garnishee or on the possession by him of any personal property or effects for the garnishee to show that such indebtedness was paid or such personal property or effects delivered under the judgment of the court in accordance with the provisions in this act. [L. '09, p. 615, § 23.]

§ 1846. Answer of Garnishee—Defenses of Defendant—Exemptions.

It shall not be necessary for the garnishee to plead or set forth in his answer any defense which the defendant might have to the cause of action against him, nor to plead or set forth in his answer any claim of exemption which may be available to the defendant, but this section shall not be construed to preclude the defendant from pleading, claiming or asserting any exemption which may be available to him under the laws of the state of Washington now in force or hereafter to be enacted. [L. '09, p. 616, § 24.]

CHAPTER VII.

TRIAL OF CIVIL ACTIONS IN JUSTICE'S COURT.

§ 1847. (6619.) Continuance—Not to Exceed Sixty Days.

When the pleadings of the parties shall have taken place, the justice shall, upon the application of either party if the defendant be not under arrest, and sufficient cause be shown on oath, continue the case for any time not exceeding sixty days. If the continuance be on account of absence of testimony, it shall be for such reasonable times as will enable the party to procure such testimony, and shall be at the cost of the party applying therefor, unless otherwise ordered by the justice; and in all other respects shall be governed by the law applicable to continuance in the superior court. [L. '54, p. 232, § 56; Cd. '81, § 1769; 2 H. C., § 1517.]

See *supra*, § 322, continuance in superior court, when allowed.

Cited in 1 Wash. 262, 263.

If a continuance is granted a defendant for one day, in an action before a justice of the peace, he may thereafter appear specially in order to object to the jurisdiction of the court: *Nelson v. Campbell*, 1 Wash. 261; and a continuance for more than sixty days will divest the justice of

jurisdiction, unless his docket shows that such continuance was by consent: *Id.*

If defendant fails to use due diligence to secure attendance or depositions of absent witnesses a continuance will be refused: *O. R. & N. Co. v. Dacres*, 1 Wash. 195.

§ 1848. (6620.) Justice to Try Cause Unless Jury Demanded.

Upon issued joined, if a jury trial be not demanded, the justice shall hear the evidence, and decide all questions of law and fact, and render judgment accordingly. [L. '54, p. 237, § 82; Cd. '81, § 1782; 2 H. C., § 1518.]

§ 1849. (6621.) Jury—Number—Qualifications—Fees.

After the appearance of the defendant, and before the justice shall proceed to inquire into the merits of the cause, either party may demand a jury to try the action, which jury shall be composed of six good and lawful men having the qualifications of jurors in the superior court of the same county, unless the parties shall agree upon a less number: Provided, That the party demanding the jury shall first pay to the justice the sum of six dollars, which shall be paid over by the justice to the jury before they are discharged, and said amount shall be taxed as costs against the losing party. [Cf. L. '54, p. 235, § 70; L. '62, p. 58, § 1; L. '63, p. 438, § 51; Cd. '81, § 1770; L. '88, p. 118, § 1; 2 H. C., § 1519.]

See Const., Art. I, § 21, juries may be less than twelve in courts not of record.

See *supra*, § 94 et seq., qualifications of jurors.

See *infra*, § 1927, juries in criminal cases in justice court.

§ 1850. (6622.) Time of Jury Trial.

When a jury is demanded, the trial of the case must be adjourned until the time fixed for the return of the jury; if neither party desire an adjournment, the time must be determined by the justice, and must be on the same day, or within the next two days. The jury must be immediately selected as herein provided. [Cf. L. '54, p. 235, § 71; L. '88, p. 118, § 2; 2 H. C., § 1520.]

§ 1851. (6623.) Selection of Jury.

The justice shall write in a panel the names of eighteen persons, citizens of the county, from which the defendant, his agent or attorney, must strike one name, the plaintiff, his agent or attorney, one, and so on alternately until each party shall have stricken six names, and the remaining six names shall constitute the jury to try such case; and if either party neglect or refuse to aid in striking the jury as aforesaid, the justice shall strike the name in behalf of such party. [Cf. L. '54, p. 235, § 72; Cd. '81, § 1772; L. '88, p. 119, § 3; 2 H. C., § 1521.]

See supra, § 92, distinction between jury in justices' and superior courts.

§ 1852. (6624.) Summons for Jurors.

The justice shall, thereupon issue a summons for the jury, in which the following form shall be observed in substance:—

The State of Washington, }
County of —, } ss.

The State of Washington to the Sheriff or [any] Constable of said County.

You are hereby commanded to summon — to appear before me, at my office in — precinct, said county, on the — day of —, A. D. 18—, at — o'clock in the —noon, to serve as jurors in a case pending before me, then and there to be tried. And this they shall in no wise omit. And have you then and there this writ, with your doings thereon.

Given under my hand this the — day of —, A. D. —.

A B, Justice of the Peace.

Which summons shall be personally served upon the persons named, and the same shall be returned, with the names of the persons summoned, at the time appointed for the trial of the cause. [Cf. L. '54, p. 236, § 73; Cd. '81, § 1773; L. '88, p. 119, § 4; 2 H. C., § 1522.]

Sections 1523, 1524 of 2 Hill's Code are omitted as being repealed by the provisions of the act of 1888.

See note to last section.

§ 1853. (6625.) Swearing Jury.

When the jury is selected, the justice shall administer to them an oath or affirmation well and truly to try the cause. [L. '54, p. 236, § 76; Cd. '81, § 1776; 2 H. C., § 1525.]

§ 1854. (6626.) Delivery of Verdict.

When the jury have agreed on their verdict, they shall deliver the same to the justice, publicly, who shall enter it on his docket. [L. '54, p. 236, § 77; Cd. '81, § 1777; 2 H. C., § 1526.]

§ 1855. (6627.) Justice may Discharge Jury, When.

Whenever a justice shall be satisfied that a jury, sworn in any civil cause before him, having been out a reasonable time, cannot agree on their verdict, he may discharge them, and issue a new venire unless the parties consent that the justice may render judgment on the evidence before him, or upon such other evidence as they may produce. [L. '54, p. 236, § 78; Cd. '81, § 1778; 2 H. C., § 1527.]

§ 1856. (6628.) Failure to Appear When Summoned—Penalty.

Every person who shall be duly summoned as a juror, and shall not appear nor render a reasonable excuse for his default, shall be subject to a fine not exceeding ten dollars. [L. '54, p. 236, § 79; Cd. '81, § 1779; 2 H. C., § 1528.]

CHAPTER VIII.

JUDGMENTS IN CIVIL ACTIONS IN JUSTICE'S COURT.

§ 1857. (6631.) Judgment of Dismissal.

Judgment that the action be dismissed, without prejudice to a new action, may be entered, with costs, in the following cases:—

1. When the plaintiff voluntarily dismisses the action before it is finally submitted;

2. When he fails to appear at the time specified in the notice, upon continuance, or within one hour thereafter;

3. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county; but if the objection be taken and overruled, it shall be cause only of reversal or appeal; if not taken at the trial, it shall be deemed waived, and shall not be cause of reversal. [Cf. L. '54, p. 236, § 80; L. '63, p. 349, § 61; Cd. '81, § 1780; 2 H. C., § 1529.]

See supra, § 47, territorial extent of jurisdiction confined to county limits, which appears to render the provisions of subdivision 3, relating to actions brought in the wrong county, obsolete. See, also, supra, § 1757.

See infra, § 1910, and notes, appeal.

Cited in 1 Wash. 61.

Where an action is brought against a corporation before a justice of the peace, and defendant shows that its principal of-

fice is in another county, it is prima facie entitled to a dismissal without prejudice: Knoff v. Puget Sound etc. Colony, 1 Wash. 57.

§ 1858. (6632.) Judgment by Default—Evidence.

When the defendant fails to appear and plead at the time specified in the notice, or within one hour thereafter, judgment shall be given as follows:—

1. When the defendant has been served with a true copy of the complaint, judgment shall be given without further evidence for the sum specified therein;

2. In other cases, the justice shall hear the evidence of the plaintiff, and render judgment for such sum only as shall appear by the evidence to be just, but in no case exceed the amount specified in the complaint. [Cf. L. '54, p. 237, § 81; L. '63, p. 349, § 62; Cd. '81, § 1781; 2 H. C., § 1530.]

See supra, § 411, judgment by default in superior court.

See supra, § 1773, time for appearance.

Cited in 1 Wash. 508, 511; 12 Wash. 549.

After the expiration of an hour from the time mentioned in the summons or notice in justice's court, defendant has no right to obtain a continuance if plaintiff demands judgment. If the justice grants a continuance on request of defendant's agent, but afterward enters judgment, as he should have done, at the request of plaintiff, it is good: McCoy v. Bell, 1 Wash. 504.

After rendering judgment, all control of the judgment is lost to the justice, except to enter it: Id.

If two or more defendants are sued, personal judgment can only be rendered against the one served with process, though complaint alleges they are partners; but judgment by default may be rendered against the joint property of all if they are jointly liable: Id.

Mandamus will not lie to compel a superior court to take cognizance of an appeal from a judgment by default entered by a justice upon complaint and notice personally served on defendant, to which he had failed to plead: State v. Superior Court, 12 Wash. 548.

§ 1859. (6633.) Judgment—Rendition—Entry.

Upon the verdict of a jury, the justice shall immediately render judgment thereon. When the trial is by the justice, judgment shall be entered immediately after the close of the trial, if the defendant has been arrested and is still in custody; in other cases it shall be entered within three days after the close of the trial. [L. '54, p. 237, § 83; Cd. '81, § 1783; 2 H. C., § 1531.]

The judgment rendered by a justice of the peace is not void for want of signing, when his docket shows that all of the proceedings were entered consecutively under

the title of the cause and that the justice signed the docket at the conclusion thereof: *State v. White*, 8 Wash. 230.

§ 1860. (6634.) Tender, Judgment in Case of.

If the defendant, at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with costs then accrued; but if he do not accept such offer before the trial, and fail to recover, on the trial of the action, a sum greater than the offer, such plaintiff shall not recover any costs that may accrue after he shall have been notified of the offer of the defendant, but such costs shall be adjudged against him, and if he recover, deducted from his recovery. But the offer and failure to accept it shall not be given in evidence to affect the recovery, otherwise than as to costs, as above provided. [Cf. L. '54, p. 237, § 84; L. '63, p. 350, § 65; Cd. '81, § 1784; 2 H. C., § 1532.]

§ 1861. (6635.) Setoff Allowed, to What Extent.

When the setoff of the defendant proved shall exceed the claim of the plaintiff, and such excess in amount exceed the jurisdiction of a justice of the peace, the court shall allow such amount as is necessary to cancel the plaintiff's claim, and give the defendant a judgment for costs; but in such case the court shall not render judgment for any further sum in favor of the defendant. [L. '54, p. 232, § 55; Cd. '81, § 1768; 2 H. C., § 1533.]

See supra, § 1789, pleading setoff.

See infra, § 1873, setoff of mutual judgments.

§ 1862. (6636.) Judgment for Costs—Attorneys' Fees.

When the prevailing party is entitled to recover costs in a civil action before a justice of the peace, the justice shall add the amount thereof to the judgment; in case of failure of the plaintiff to recover or of dismissal of the action, the justice shall enter up judgment in favor of the defendant for the amount of his costs; and in case any party so entitled to costs is represented in the action by an attorney, the justice shall include an attorney's fee of five dollars as part of the costs. [Cf. L. '54, p. 337, § 85; Cd. '81, § 1785; 2 H. C., § 1534; L. '93, p. 22, § 1.]

§ 1863. (6637.) Proceedings Where Title to Land is in Issue.

If it appear on the trial of any cause before a justice of the peace, from the evidence of either party, that the title to lands is in question, which title shall be disputed by the other [party], the justice shall immediately make an entry thereof in his docket, and cease all further proceedings in the cause, and shall certify and return to the superior court of the county a transcript of all the entries made in his docket, relating to the cause, together with all the

process and other papers relating to the action, in the same manner and within the same time as upon appeal, and thereupon the parties shall file their pleadings, and the superior court shall proceed in the cause to final judgment and execution, in the same manner as if the said action had been originally commenced therein, and the cost shall abide the event of the suit. [L. '54, p. 235, § 69; Cd. '81, § 1868; 2 H. C., § 1483.]

CHAPTER IX.

FEES AND COMPENSATION OF JUSTICES OF THE PEACE.

§ 1864. (1635.*) **Schedule of Justice Fees.**

The fees and compensation of justices of the peace shall be as follows, to wit:

| | |
|--|--------|
| For docketing each cause, issuing notice, filings and judgment, to be paid when case is filed..... | \$1.00 |
| For docketing, filings and order in garnishment..... | 1.00 |
| For trial of each cause..... | 1.00 |
| For issuing subpoena, any number of names..... | .25 |
| For approving bond, including justification..... | .50 |
| For order and filings for publication of summons..... | .50 |
| For order and filings for commission to take depositions..... | .50 |
| For each continuance or adjournment by consent or on motion of either party, except first continuance..... | .25 |
| For order, transcript and filings on change of venue..... | 1.00 |
| For transcript of judgment..... | .75 |
| For issuing writ of venire..... | .50 |
| [For solemnization of marriage and making return thereof..... | 2.50] |
| For taking affidavits and acknowledgments, each..... | .25 |
| For attending with clerk of county commissioners at the opening of polls, per diem..... | 3.00 |
| For taking depositions, each folio..... | .10 |
| For issuing warrant in criminal cases..... | .50 |
| For taking recognizance of bail, including justification..... | .75 |
| For committing to jail..... | .50 |

[L. '93, p. 143, § 1; L. '07, p. 220, § 1.]

See infra, § 7164, fee for solemnization of marriage.

Compensation and fees of justices of the peace: See 2 Remington's Digest, p. 1662, §§ 4, 5; State ex rel. Banks v. Board of County Commrs., 18 Wash. 160; State ex rel. Porter v. Headlee, 18 Wash. 220; State v. Headlee, 19 Wash. 477.

The constitutional prohibition against diminishing the compensation of any pub-

lic officer during his term of office does not apply to officers who receive fees for specific services, and accordingly the fees of justices and constables may be reduced by a law passed subsequently to their election and qualification: State v. Grimes, 7 Wash. 445.

§ 1865. (1636.) **Fees Where Justice Receives Salary.**

In any civil action commenced before or transferred to a justice of the peace receiving a salary, the plaintiff may, at the time of such commencement or transfer, pay to such justice the sum of two dollars, which sum shall be all the fees and charges which any party to such action shall be compelled to pay to such justice up to and including the rendition of judgment in such

action, unless process in replevin, attachment or garnishment shall issue therein, in which case the party procuring such process may pay to such justice the sum of one dollar as full payment for the fees and charges of such justice incident to the proceedings under such process; but in case said action is transferred from such justice before final judgment, such justice shall repay to any party making such payments any sum in excess of what said party would have been compelled to pay by the last section. [L. '93, p. 144, § 2.]

Cited in 8 Wash. 233.

§ 1866. (1637.) Compensation Limited to Schedule.

No justice of the peace in any civil action or proceeding shall be entitled to or receive any fees or compensations not provided for by this chapter. [L. '93, p. 144, § 3.]

CHAPTER X.

EXECUTIONS AND PROCEEDINGS THEREON.

§ 1867. (6640.) Stay of Execution.

The execution upon a judgment by a justice of the peace may be stayed in the manner hereinafter provided, upon reasonable notice to the opposite party, and for the following periods of time, to be calculated from the date of the judgment:—

1. If the judgment be for any sum not exceeding twenty-five dollars, exclusive of costs, one month;

2. If it be for more than twenty-five dollars, two months. [L. '54, p. 238, § 86; Cd. '81, § 1786; 2 H. C., § 1535.]

§ 1868. (6641.) Bond for Stay.

To entitle any person to such stay of execution, some responsible person, to be approved by the justice, and not being a party to the judgment, must, within five days after rendering of the judgment, enter into a bond before the justice, to the adverse party, in a sufficient sum to secure the payment of the judgment and costs, conditioned to be void upon such payment, at the expiration of the stay. [L. '54, p. 238, § 87; Cd. '81, § 1787; 2 H. C., § 1536.]

§ 1869. (6642.) Form of Bond.

Such bond shall be signed by the person entering into the same, and may be in the following form:—

Whereas, A B has obtained a judgment before J P, one of the justices of the peace in and for — county, on the — day of —, 18—, against C D, for — dollars, now, therefore, I, E F, acknowledge myself bound to A B in the sum of — dollars this bond to be void if such judgment shall be paid at the expiration of — month after the time it was rendered.

Dated the — day of —, 18—.

—, E. F.

[L. 54, p. 238, § 88; Cd. '81, § 1788; 2 H. C., § 1537.]

§ 1870. (6643.) Levy Against Property of Principal or Bail.

If, at the expiration of such stay, the judgment be not paid, the execution shall issue against both the principal and bail. If the principal do not satisfy the execution, and the officer cannot find sufficient property belonging to him upon which to levy, he shall levy upon the property of the bail, and in his

return shall state what amount of money collected by him on the execution was collected from the bail, and the time when the same was received. [L. '54, p. 238, § 90; Cd. '81, § 1790; 2 H. C., § 1539.]

§ 1871. (6644.) Bail may Collect from Defendant.

After the return of such execution, the bail shall be entitled, on application to the justice, to have the judgment, or so much thereof as may have been collected from him in satisfaction of the execution, transferred to his use; and he may collect the same from the defendant by execution, together with the interest at the rate of twelve per cent per annum. [L. '54, p. 238, § 90; Cd. '81, § 1790; 2 H. C., § 1539.]

See supra, § 457, legal rate of interest on judgments.

§ 1872. (6645.) Execution Revoked Where Judgment Stayed.

If judgment be stayed in the manner above provided after an execution has been issued thereon, the justice shall revoke such execution, in the same manner and with like effect as he is hereinafter directed to revoke an execution after an appeal has been allowed; and if the defendant have been committed, shall order him to be discharged from custody. [L. '54, p. 238, § 91; Cd. '81, § 1791; 2 H. C., § 1540.]

§ 1873. (6646.) Setoff of Mutual Judgments.

If there be mutual justices' judgments between the same parties, upon which the time for appealing has elapsed on judgment, on the application of either party and reasonable notice given to the adverse party, one may be set off against the other by the justice before whom the judgment against which the setoff is proposed may be. [L. '54, p. 239, § 92; Cd. '81, § 1792; 2 H. C., § 1541.]

See supra, § 1789, pleading setoff.

See supra, § 1861, setoff allowed, to what extent.

§ 1874. (6647.) Procedure as to Setoff Rendered Before Another Justice.

If the judgment proposed as a setoff was rendered before another justice, the party proposing such setoff shall produce before such justice a transcript of such judgment, upon which there is a certificate of the justice before whom such may be, that it is unsatisfied in whole or in part, and that there is no appeal, and that such transcript was obtained for the purpose of being set off against the judgment to which it is offered as a setoff. The justice granting such transcript shall make an entry thereof on his docket, and all further proceedings on such judgment shall be stayed, unless such transcript be returned with the proper justice's certificate thereon, that it has not been allowed in setoff. [L. '54, p. 239, § 93; Cd. '81, § 1793; 2 H. C., § 1542.]

§ 1875. (6648.) Execution for Balance After Setoff.

If any justice shall set off one judgment against another, he shall make an entry thereof on his docket, and execution shall issue only for the balance which may be due after such setoff. If a justice shall allow a transcript of a judgment rendered by another justice to be set off, he shall file such transcript among the papers relating to the judgment in which it was allowed in setoff. If he shall refuse such transcript as a setoff, he shall so certify on the tran-

§§ 1876-1880 ACTIONS AND PROCEEDINGS IN JUSTICES' COURTS. [TITLE XII

script, and return the same to the party who offered it. [L. '54, p. 239, § 94; Cd. '81, § 1794; 2 H. C., § 1543.]

§ 1876. (6649.) No Execution After Five Years.

Execution for the enforcement of a judgment in a justice's court may be issued on the application of the party entitled thereto, in the manner hereinbefore described; but after the lapse of five years from the date of the judgment no execution shall issue except by leave of the justice before whom such judgment may be, upon reasonable notice to the defendant. [L. '54, p. 240, § 95; Cd. '81, § 1795; 2 H. C., § 1544.]

§ 1877. (6650.) Execution from Succeeding Justice.

When any judgment shall have been rendered by any justice of the peace, and the same [shall] not be satisfied during his continuance in office, and the docket of such justice shall have been transferred to another justice, or to the successor of the justice rendering such judgment, the justice to whom the docket shall be delivered shall issue execution upon such unsatisfied judgment, in the same manner and with like effect as if he himself had rendered the judgment. [L. '54, p. 240, § 96; Cd. '81, § 1796; 2 H. C., § 1545.]

The word "shall" in brackets was omitted from the later compilations.

§ 1878. (6651.) Execution to Another County.

If the defendant have not goods and chattels in the county in which judgment was rendered sufficient to satisfy the execution, the justice before whom such judgment may be shall, at the request of the party entitled, make out a certified transcript of the same, which may be delivered to a justice in any other county, who shall make an entry thereof in his docket, and issue execution thereon for the amount of the judgment, or such part as shall be unsatisfied, with costs as in other cases. [L. '54, p. 240, § 97; Cd. '81, § 1797; 2 H. C., § 1546.]

This section is in conflict with §§ 450-452, by which the justice's transcript is transferred to the superior court and operates as establishing a general judgment, from which execution may issue as from the superior court.

§ 1879. (6652.) Execution—Direction, Date, etc.

The execution shall be directed (except when it is otherwise especially provided) to the sheriff or any constable of the county where the justice resides; shall be dated on the day it is issued, and made returnable within thirty days from the date; and it shall be against the goods and chattels of the person against whom the same is issued. [L. '54, p. 240, § 98; Cd. '81, § 1798; 2 H. C., § 1547.]

See *supra*, § 47, territorial extent of jurisdiction.

§ 1880. (6653.) Amount of Debt, etc., to be Stated.

Before any execution shall be delivered, the justice shall state in his docket, and also on the back of the execution, the amount of the debt, or damages and costs, and of the fees due to each person separately, and the officer receiving such execution shall indorse [thereon] the time of the reception of the same. [L. '53, p. 240, § 99; Cd. '81, § 1799; 2 H. C., § 1548.]

The word "thereon" in brackets was omitted from later compilations.

§ 1881. (6654.) Execution may be Renewed.

If an execution be not satisfied, it may, at the request of the plaintiff, be renewed from time to time by the justice who issues the same, or by the justice to whom his docket is transferred, by an indorsement thereon to that effect, signed by him, and dated when the same shall be made. If any part of such execution has been satisfied, the indorsement of renewal shall express the sum due on the execution. Every such indorsement shall renew the execution in full force in all respects for thirty days, and no longer; and an entry of such renewal shall be made in the docket of the justice. [L. '54, p. 240, § 100; Cd. '81, § 1800; 2 H. C., § 1549.]

§ 1882. (6665.) Notice of Sale upon Execution.

The officer, after taking goods and chattels into his custody by virtue of an execution, shall, without delay, give public notice by at least three advertisements, put up at three public places in the county, of the time and place when and where they will be exposed for sale. Such notice shall describe the goods and chattels taken, and shall be put up at least ten days before the day of sale. [L. '54, p. 241, § 101; Cd. '81, § 1801; 2 H. C., § 1550.]

§ 1883. (6656.) Sale upon Execution—Return.

At the time and place so appointed, if the goods and chattels be present for inspection of bidders, the officer shall expose them to sale at public vendue to the highest bidder; he shall return the execution and have the money before the justice, at the time of making such return, ready to be paid over to the persons respectively entitled thereto. [L. '54, p. 241, § 102; Cd. '81, § 1802; 2 H. C., § 1551.]

§ 1884. (6657.) Officer not to Buy at Execution Sale.

No officer shall directly or indirectly purchase any goods or chattels at any sale made by him upon execution, and every such purchase shall be absolutely void. [L. '54, p. 241, § 103; Cd. '81, § 1803; 2 H. C., § 1552.]

§ 1885. (6658.) Execution may Issue Against the Person, When.

If the action be one in which the defendant might have been arrested upon a warrant, an execution against the person of such defendant may be issued, after the return of an execution against his property unsatisfied in whole or in part. An execution against the person may likewise be issued after such return, where the defendant has been arrested upon a warrant and not discharged according to law. [L. '54, p. 241, § 104; Cd. '81, § 1804; 2 H. C., § 1553.]

See notes to § 1795, continuance bond.

§ 1886. (6659.) Garnishees may be Examined Under Oath.

If there be no property found, or if the goods and chattels levied on be not sufficient to satisfy such execution, the officer shall, on demand of the plaintiff, summon, in writing, as garnishees, such persons as may be named to [him by] the plaintiff or his agent, to appear before the justice on the return day of the execution, to answer such interrogatories as may be put to them, touching their liabilities as garnishees, and the like proceedings shall be had thereon before the justice to final judgment as in the proceedings by

attachment. [Cf. L. '54, p. 241, § 105; L. '63, p. 354, § 86; Cd. '81, § 1805; 2 H. C., § 1554.]

Words in brackets omitted in laws subsequent to 1854, evidently by inadvertence.
See supra, § 1807 et seq., proceedings in garnishment.

§ 1887. (6660.) Execution for Costs.

Any justice of the peace may issue an execution against the prevailing party, to collect fees and costs for which such party may be liable, after an execution has been first issued against the other party, and returned "no property found." [L. '54, p. 241, § 106; Cd. '81, § 1806; 2 H. C., § 1555.]

§ 1888. (6661.) Claim by Third Person to Property Levied on or Attached.

If any property levied on be claimed by any other person than the defendant in the execution, and the claimant make affidavit of his title or right to the possession of the same, stating the ground of such title or right, and serve the same upon the sheriff or constable while the property is in his possession, said sheriff or constable shall not be bound to keep the property, unless the plaintiff, on demand, indemnify him in the same manner as provided in this act for cases where property held under attachment is claimed by persons not parties to the suit; and when such claim is made, the sheriff or constable shall immediately file the claimant's affidavit with the justice, and notify the plaintiff thereof, and unless the property be at once released, the justice shall set the case for trial upon the allegations of the claimant's affidavit, and the case shall proceed and be determined in the same manner as provided in this act for cases where property held under attachment is claimed by persons not parties to the suit. [Cf. L. '54, p. 241, § 107; L. '77, p. 202, § 6; Cd. '81, § 1807; 2 H. C., § 1556.]

"This act" refers to §§ 1737, 1738, of the Code of 1881.

See supra, §§ 573-577, adverse claims to property attached by sheriff.

See supra, § 1796, claim and delivery.

Cited in 11 Wash. 583; 36 Wash. 180.

The repeal of §§ 1737, 1738, of the Code of 1881, relating to claim of third party to property attached under § 38, Laws of 1886, did not work a repeal of this section: *Brotton v. Lumkley*, 11 Wash. 581.

In an action upon an indemnifying bond, in which the execution of the bond was admitted, and the other facts necessary to plaintiff's cause of action had been proved, where there was no countervailing testimony on the part of the defendant, it is not error for the court to direct a verdict in favor of plaintiff and charge them to determine the amount of damages: *Id.*

Upon such bond indemnifying a constable against the claim of a third person to property upon which he has made a levy, the obligors therein are liable to the constable for his costs and attorney's fees incurred in consequence of a suit against him by such claimant for the recovery of the value of the property: *Id.*

The fact that a portion of the proceeds of an execution sale accrued to the benefit of other judgment creditors than the one giving an indemnifying bond to the officer, does not affect the liability of the one executing the bond: *Id.*

§ 1889. (6662.) Claimant may Resort to Other Remedies.

Nothing contained in the last section shall be so construed as to prevent the claimant of property levied on by execution from resorting to any legal remedy he may choose to pursue, instead of proceeding in the manner therein prescribed. [L. '54, p. 242, § 108; L. '63, p. 355, § 89; Cd. '81, § 1808; 2 H. C., § 1557.]

CHAPTER XI.

FORMS IN CIVIL ACTIONS IN JUSTICE'S COURT.

§ 1890. (6664.) **Forms—Equivalents may be Used.**

The following or equivalent forms may be used by justices of the peace in civil actions and proceedings under this chapter, to wit:—

FORM OF A WARRANT.

The State of Washington, }
County of ———. } ss.

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are hereby commanded to take the body of C D, if he be found in your county, and bring him forthwith before the undersigned, one of the justices of the peace in and for said county, at his office in ———, to answer A B in a civil action; and you are hereby commanded to give notice thereof to the said plaintiff, or his agent or attorney; and have you there and then this writ.

Given under my hand this ——— day of ———, 18——.

FORM OF A SUBPOENA.

The State of Washington, }
County of ———. } ss.

To ———.

In the name of the state of Washington, you are hereby required to appear before the undersigned, one of the justices of the peace in and for said county, on the ——— day of ———, 18——, at ——— o'clock in the ——— noon, at his office in ———, to give evidence in a certain cause, then and there to be tried, between A B, plaintiff, and C D, defendant, on the part of (the plaintiff or defendant, as the case may be).

Given under my hand this ——— day of ———, 18——.

J P, Justice of the Peace.

FORM OF EXECUTION.

The State of Washington, }
County of ———. } ss.

To the Sheriff or any Constable of said County.

Whereas. judgment against C D, for the sum of ——— dollars. and ——— dollars costs of suit, was recovered on the ——— day of, 18——, before the undersigned, one of the justices of the peace in and for said county, at the suit of A B.—these are, therefore, in the name of the state of Washington, to command you to levy on the goods and chattels of the said C D (excepting such as the law exempts), and make sale thereof, according to law, to the amount of said sum and costs upon this writ, and the same return to me within thirty days, to be rendered to the said A B for his debt, interests and costs.

Given under my hand this ——— day of ———, 18——.

J P, Justice of the Peace.

FORM OF EXECUTION AGAINST THE BODY.

The State of Washington, }
County of —. } ss.

To the Sheriff or any Constable of said County.

Whereas, judgment against C D for the sum of — dollars, and for — dollars costs of suit, was recovered on the — day of —, 18—, before the undersigned, one of the justices of the peace in and for said county, at the suit of A B, and an execution against his property returned unsatisfied,—these are, therefore, in the name of the state of Washington, to command you to take the body of the said C D, and him convey and deliver to the keeper of the jail of said county, who is hereby commanded to receive and keep the said C D in safe custody in prison until the aforesaid sum and all legal expenses be paid and satisfied, or until he be discharged therefrom by due course of law; and of this writ make due return within thirty days.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF EXECUTION AGAINST PRINCIPAL AND SURETY AFTER EXPIRATION OF STAY OF EXECUTION.

The State of Washington, }
County of —. } ss.

To the Sheriff or any Constable of said County.

Whereas, judgment against C D for the sum of — dollars, and for — dollars costs of suit, was recovered on the — day of —, 18—, before the undersigned, one of the justices of the peace in and for said county, at the suit of A B; and whereas, on the — day of —, 18—, E F became surety to pay said judgment and costs, in the — month, from the date of the judgment aforesaid, agreeably to law, in the payment of which the said C D and E F have failed,—these are, therefore, in the name, etc. (as in the common form).

FORM OF ORDER IN REPLEVIN.

The State of Washington, }
County of —. } ss.

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are hereby commanded to take the personal property mentioned and described in the within affidavit and deliver the same to the plaintiff upon receiving a proper undertaking, unless before such delivery the defendant enter into a sufficient undertaking for the delivery thereof to the plaintiff, if delivery be adjudged.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF A WRIT OF ATTACHMENT.

The State of Washington, }
County of —. } ss.

To the Sheriff or any Constable of said County.

In the name of the state of Washington you are commanded to attach and safely keep the goods and chattels, moneys, effects, and credits of C D

(excepting such as the law exempts), or so much thereof as shall satisfy the sum of — dollars, with interest and cost of suit, in whosoever hands or possession the same may be found in your county, and to provide that the goods and chattels so attached may be subject to further proceeding thereon as the law requires; and of this writ make legal service and due return.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF UNDERTAKING FOR ARREST.

Whereas an application has been made by A B, plaintiff, to J P, one of the justices of the peace in and for — county, for a warrant to arrest C D, defendant, founded upon an affidavit of the said plaintiff, setting forth that C D (here state the cause for the arrest of absconding debtor),—now, therefore, we, A B, plaintiff, and E F, acknowledge ourselves bound to C D in the sum of — dollars to pay all costs that may be awarded to the said defendant. and all damages which he may sustain by reason of the arrest, not exceeding the sum of — dollars.

Dated this — day of —, 18—.

A B, E F.

FORM OF UNDERTAKING IN REPLEVIN.

Whereas, A B, plaintiff, has commenced an action before J P, one of the justices of the peace in and for — county, against C D, defendant, for the recovery of certain personal property, mentioned and described in the affidavit of the plaintiff, to wit (here set forth the property claimed),—now, therefore, we, A B, plaintiff, E F, and G H, acknowledge ourselves bound unto C D, in the sum of — dollars for the prosecution of the action for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff.

Dated the — day of —, 18—.

A B, E F, G H.

FORM OF UNDERTAKING IN ATTACHMENT.

Whereas, an application has been made by A B, plaintiff, to J P, one of the justices of the peace in and for — county, for a writ of attachment against the personal property of C D, defendant,—now, therefore, we, A B, plaintiff, and E F, acknowledge ourselves bound to C D, in the sum of — dollars that if the defendant recover judgment in this action the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the said attachment, and not exceeding the sum of — dollars.

Dated the — day of —, 18—.

A B, E F.

FORM OF UNDERTAKING TO DISCHARGE ATTACHMENT.

Whereas, a writ of attachment has been issued by J P, one of the justices of the peace in and for — county, against the personal property of C D, defendant in an action in which A B is plaintiff,—now, therefore, we, C D, defendant, E F and G H, acknowledge ourselves bound unto J K, constable, in the sum of — dollars (double the value of the property) engaging to deliver the property attached, to wit (here set forth a list of articles attached), or pay the value thereof to the sheriff or constable to whom the

execution upon a judgment obtained by plaintiff in the aforesaid action may be issued.

Dated this — day of —, 18—.

C D, E F, G H.

FORM OF UNDERTAKING TO INDEMNIFY CONSTABLE ON CLAIM OF PROPERTY BY A
THIRD PERSON.

Whereas, L M claims to be owner of and have the right to possession of certain personal property, to wit (here describe it), which has been taken by J K, constable in — county, upon an execution by J P, justice of the peace in and for the county of —, upon a judgment obtained by A B, plaintiff, against C D, defendant,—now, therefore, we, A B, plaintiff, E F, and G H, acknowledge ourselves bound unto the said J K, constable, in the sum of — dollars to indemnify the said J K against such claim.

A B, E F.

[L. '54, p. 253, ch. 19; L. '63, p. 370, ch. 17; Cd. '81, § 1885; 2 H. C., § 1558.]

CHAPTER XII.

PROCEEDINGS FOR CONTEMPT BEFORE JUSTICES OF THE PEACE.

§ 1891. (6715.) When Justice may Punish for Contempt.

In the following cases, and no others, a justice of the peace may punish for contempt:—

1. Persons guilty of disorderly, contemptuous, and insolent behavior towards such justice while engaged in the trial of a cause, or in rendering judgment, or in any judicial proceedings, which tend to interrupt such proceedings or impair the respect due to his authority;

2. Persons guilty of any breach of the peace, noise, or disturbance, tending to interrupt the official proceedings of such justice;

3. Persons guilty of resistance or disobedience to any lawful order or process made or issued by him. [L. '54, p. 248, § 145; Cd. '81, § 1842; 2 H. C., § 1601.]

See supra, § 43, general powers of justices of the peace.

See supra, § 1062, contempts in justices' courts are governed by the provisions of this chapter, and § 1049 et seq. have no application thereto.

§ 1892. (6716.) Punishment for Contempt.

Punishment for contempt may be by fine not exceeding twenty-five dollars, or by imprisonment in the county jail not exceeding two days, at the discretion of the justice, unless otherwise provided by statute. [L. '54, p. 249, § 146; Cd. '81, § 1843; 2 H. C., § 1602.]

§ 1893. (6717.) Hearing—Warrant for Offender.

No person shall be punished for a contempt before a justice of the peace until an opportunity shall have been given to him to be heard in his defense; and for that purpose, the justice may issue his warrant to bring the offender before him. [L. '54, p. 249, § 147; Cd. '81, § 1844; 2 H. C., § 1603.]

§ 1894. (6718.) Summary Arraignment.

If the offender be present, he may be summarily arraigned by the justice, and proceeded against in the same manner as if a warrant had been previ-

ously issued, and the offender arrested thereon. [L. '54, p. 249, § 148; Cd. '81, § 1845; 2 H. C., § 1604.]

§ 1895. (6719.) Form of Warrant.

The warrant for contempt may be in the following form:—

The State of Washington, } ss.
 — County.

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are hereby commanded to apprehend A B, and bring him before J P, one of the justices of the peace of said county, at his office in said county, to show cause why he should not be convicted of a contempt alleged to have been committed on the — day of —, A. D. 18—, before the said justice, while engaged as a justice of the peace in a judicial proceeding.

Dated this — day of —, A. D. 18—.

J P, Justice of the Peace.

[L. '54, p. 249, § 149; Cd. '81, § 1846; 2 H. C., § 1605.]

§ 1896. (6720.) Form of Judgment.

Upon the conviction of any person for contempt an entry thereof shall be made in the docket of such justice, stating the particular circumstances of the offense, and the judgment rendered thereon, and may be in the following form:—

The State of Washington, } ss.
 — County.

Whereas, on the — day of —, A. D. 18—, while the undersigned, one of the justices of the peace of said county, was engaged in the trial of an action between C D, plaintiff, and E F, defendant, in said county, A B, of the said county, did interrupt the said proceedings and impair the respect due to the authority of the undersigned, by (here describe the cause particularly); and whereas, the said A B was thereupon required by the undersigned to answer for the said contempt, and show cause why he should not be convicted thereof; and whereas, the said A B did not show cause against the said charge.—be it therefore ordered that the said A B is adjudged to be guilty, and is convicted of the contempt aforesaid, and is adjudged by the undersigned to pay a fine of — dollars (or be imprisoned, etc.).

Dated this — day of —, A. D. 18—.

J P, Justice of the Peace.

[L. '54, p. 249, § 150; Cd. '81, § 1847; 2 H. C., § 1606.]

§ 1897. (6721.) Warrant of Commitment.

If any person convicted of a contempt be adjudged to be imprisoned, a warrant of commitment shall be issued by the justice. If he be adjudged to pay a fine, a process may be issued to collect the same; and when so collected, it shall forthwith be paid by the justice into the county treasury. [L. '54, p. 250, § 151; Cd. '81, § 1848; 2 H. C., § 1607.]

CHAPTER XIII.

WITNESSES AND DEPOSITIONS.

§ 1898. (6740.) **Witnesses may be Subpoenaed Within Twenty Miles.**

A subpoena issued by a justice of the peace shall be valid to compel the attendance of a witness in the justice's court, if such witness be within twenty miles of the place of trial. [L. '54, p. 233, § 57; Cd. '81, § 1869.]

The sections in this chapter were omitted from Hill's Code, presumably because of their being in a large measure covered by the provisions of chapters 1 to 4, of title 9, *supra*.

See *supra*, § 47, territorial extent of jurisdiction.

See *supra*, § 1215, witnesses, when compelled to attend.

See *supra*, § 1217, issuance of subpoena.

§ 1899. (6741.) **How and by Whom Served.**

A subpoena may be served by any person above the age of eighteen years, by reading it to the witness, or by delivering to him a copy at his usual place of abode. [L. '54, p. 233, § 58; Cd. '81, § 1870.]

See *supra*, § 1218, service of subpoena.

§ 1900. (6742.) **Attachment for Failure to Appear.**

Whenever it shall appear to the satisfaction of the justice, by proof made before him, that any person, duly subpoenaed to appear before him in an action, shall have failed, without a just cause, to attend as a witness, in conformity to such subpoena, and the party in whose behalf such subpoena was issued, or his agent, shall make oath that the testimony of such witness is material, the justice shall have the power to issue an attachment to compel the attendance of such witness: Provided, that no attachment shall issue against witness in any civil action, unless his fees for mileage and one day's attendance have been tendered or paid in advance, if previously demanded by such witness from the person serving the subpoena. [L. '54, p. 233, § 59; Cd. '81, § 1871.]

See *supra*, § 1221, attachment for witnesses.

See *supra*, §§ 1223, 1224, testimony of prisoner, how secured.

§ 1901. (6743.) **Service and Costs in Attachment.**

Every such attachment may be directed to any sheriff or constable of the county in which the justice resides, and shall be executed in the same manner as a warrant; and the fees of the officer for issuing and serving the same shall be paid by the person against whom the same was issued, unless he show reasonable cause, to the satisfaction of the justice, for his omission to attend; in which case the party requiring such attachment shall pay all costs. [L. '54, p. 233, § 60; Cd. '81, § 1872.]

See *supra*, § 1222, service of attachment.

§ 1902. (6744.) **Damages for Nonattendance.**

Every person subpoenaed as aforesaid, and neglecting to appear, shall also be liable to the party in whose behalf he may have been subpoenaed, for all damages which such party may have sustained by reason of his non-appearance: Provided, that such witness had the fees allowed for mileage and one day's attendance paid, or tendered him, in advance, if demanded by him at the time of the service. [L. '54, p. 234, § 61; Cd. '81, § 1873.]

See *supra*, § 1220, damages for failure to appear.

§ 1903. (6745.) Party to Action as Witness.

A party to an action may be examined as a witness, at the instance of the adverse party, and for that purpose may be compelled in the same manner, and subject to the same rules of examination, as any other witness, to testify at the trial, or appear and have his deposition taken. [L. '54, p. 243, § 62; Cd. '81, § 1874.]

See *supra*, § 1226, interrogatories to adversary.

§ 1904. (6746.) Testimony of Party may be Rebutted.

The examination of a party thus taken may be rebutted by adverse testimony. [L. '54, p. 234, § 63; Cd. '81, § 1875.]

See *supra*, § 1229, testimony not conclusive.

§ 1905. (6747.) Proceedings on Party's Refusal to Testify.

If a party refuse to attend and testify at the trial, or give his deposition before trial, when required, his complaint, answer or reply, may be stricken out, and judgment taken against him. [L. '54, p. 234, § 64; Cd. '81, § 1876.]

See *supra*, § 1230, penalty for refusing to testify.

§ 1906. (6748.) Examination of Party in His Own Behalf.

A party examined by an adverse party may be examined on his own behalf, in respect to any matter pertinent to the issue. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to qualify or explain his answer thereto, or to discharge, when his answer would charge himself, such adverse party may offer himself as a witness, and he shall be so received. [L. '54, p. 234, § 65; Cd. '81, § 1877.]

§ 1907. (6749.) When Depositions may be Taken.

Either party, in an action depending before a justice of a peace, may cause a deposition of a witness therein to be taken, when such witness resides, or is about to go more than twenty miles from the place of trial, or is so sick, infirm, or aged, as to make it probable that he will not be able to attend at the trial. [L. '54, p. 234; § 66; Cd. '81, § 1878.]

See *supra*, § 1231 et seq., depositions in courts of record.

§ 1908. (6750.) How Taken and Certified.

The notice shall be served, and the deposition taken, certified, and returned, according to the law regulating the taking of depositions to be read in the superior court. [L. '54, p. 234, § 67; Cd. '81, § 1879.]

§ 1909. (6751.) How Used on Trial.

The justice shall allow every deposition taken, certified and returned according to law, to be read on the trial of the cause in which it is taken, in all cases where the same testimony, if given verbally before him, could have been received; but no such deposition shall be read on the trial, unless it appears to the justice that the witness, whose deposition is so offered:

1. Is dead, or resides more than twenty miles from the place of trial; or
2. Is unable, or cannot safely attend before the justice, on account of sickness, age, or other bodily infirmity;

3. That he has gone more than twenty miles from the place of trial without the consent or collusion of the party offering the deposition. [L. '54, p. 234, § 68; Cd. '81, § 1880.]

See *supra*, § 1244, how used on trial.

CHAPTER XIV.

APPEALS FROM JUSTICE'S COURT.

§ 1910. (6754.*) **Appeal in Civil Actions.**

Any person considering himself aggrieved by the judgment or decision of a justice of the peace in a civil action may, in person or by his agent, appeal therefrom to the superior court of the same county where the judgment was rendered or the decision made: Provided, there shall be no appeal allowed unless the amount in controversy exclusive of costs, shall exceed the sum of twenty dollars. [L. '05, p. 41, § 1. Cf. L. '54, p. 252, § 160; Cd. '81, § 1858; L. '91, p. 66, § 1; 2 H. C., § 1630.]

See notes to next section.

See *supra*, § 17, appellate jurisdiction of superior court.

See notes to § 1914, *infra*, transcript, jurisdiction, etc.

The provisions relating to certiorari, as found in 2 Hill's Code, at § 1621 et seq., have been omitted, as repealed by §§ 1001-1012, *supra*.

Cited in 11 Wash. 15; 12 Wash. 550.

Under § 1857, *supra*, defendant may take advantage on appeal of any error in overruling its objections, even after a trial upon the merits: *Knoff v. Puget S. C. C.*, 1 Wash. 57.

No appeal lies from a default judgment rendered by a justice of the peace, in a cause where the complaint and notice has been personally served and when no reason exists preventing a determination in the justice's court upon the merits: *State v. Superior Court*, 12 Wash. 548.

Where a justice of the peace had no jurisdiction of the subject matter, the superior court cannot acquire jurisdiction thereof by an appeal from the justice: *State v. Superior Court*, 9 Wash. 369. See *State ex rel. Hibbard v. Superior Court*, 21 Wash. 631; *State ex rel. Washington Dredging & Imp. Co. v. Moore*, 21 Wash. 629; *State ex rel. Vincent v. Benson*, 21 Wash. 571.

The supreme court can acquire no jurisdiction by appeal over an action begun in a justice's court, where the amount in controversy, as determined by the pleadings, is seventy-five dollars, although the justice may have erroneously sustained a demurrer to the counterclaim for damages in the sum of five hundred dollars; as certiorari is the proper remedy for reviewing

the ruling of the justice upon the defense interposed: *Gabriel v. S. & M. Ry. Co.*, 7 Wash. 515.

Under a former statute (covering certiorari in justices' courts, § 1621 et seq., 2 Hill's Code), certiorari and appeal from a justice's court were treated as concurrent remedies; either of which could be resorted to by any person conceiving himself injured by error in any process, proceeding or judgment of a justice of the peace: *Woodbury v. Henningsen*, 11 Wash. 12.

The sureties on appeal bond submit to the jurisdiction of the court and are concluded by its judgment: *Cline v. Mitchell*, 1 Wash. 24.

There being a remedy by appeal, the superior court has no jurisdiction to grant a writ of review for the purpose of bringing before it the proceedings of a justice's court: *State ex rel. Weymouth v. Lockhart*, 28 Wash. 460.

Where the action of a justice of the peace in denying a motion for a change of venue is brought before the superior court by the issuance of a writ of review, it is error for the superior court to give judgment upon any other question than the alleged error of the justice in not granting the change of venue: *State ex rel. Grady v. Lockhart*, 18 Wash. 531.

§ 1911. (6755.) **Appeal, How Taken—Bond.**

Such appeal shall be taken by filing a notice of appeal with the justice and serving a copy on the adverse party, or his attorney, and unless such appeal be by a county, city, or school district, filing a bond or undertaking, as herein provided, within twenty days after the judgment is rendered, or the

decision made. No appeal, except when such appeals are by a county, city, or school district, shall be allowed in any case, unless a bond or an undertaking shall be executed on the part of the appellant, and filed with and approved by the justice, with one or more sureties, in the sum of one hundred dollars, to the effect that the appellant will pay all costs that may be awarded against him on the appeal; or if a stay of proceedings before the justice be claimed, except by a county, city, or school district, a bond of undertaking, with two or more sureties, to be approved by the justice, in a sum equal to twice the amount of the judgment and costs, to the effect that the appellant will pay such judgment, including costs, as may be rendered against him on appeal. [Cf. L. '54, p. 252, §§ 161, 162; L. '81, p. 8, § 1; Cd. '31, § 1859; L. '91, p. 66, § 2; 2 H. C., § 1631.]

See notes to last section.

See notes to § 1914, transcript, jurisdiction, etc.

Cited in 17 Wash. 56; 24 Wash. 606; 41 Wash. 413.

Notice of appeal: See 2 Remington's Digest, p. 1666, §§ 23-26; State ex rel. Gardner v. Superior Court, 9 Wash. 307; State ex rel. Alladio v. Superior Court, 17 Wash. 54; State ex rel. Fleischer v. Superior Court, 20 Wash. 709.

A NOTICE OF APPEAL from a judgment of a justice which notifies the opposite party that the "defendant appeals to the superior court from a judgment heretofore rendered by said justice of the peace against him in the above-entitled cause," is sufficient: State v. Superior Court, 7 Wash. 223.

Immaterial discrepancies between the notice of appeal filed with the justice and the copy of the same served upon the appellee, will not defeat the appeal: McKilver v. Manchester, 1 W. T. 255.

If a notice of appeal is filed with the justice of the peace, and a copy thereof served upon the adverse party or his attorney, the appeal is taken; but in order

to stay the proceedings, it is necessary to file a bond and make an entry of the allowance of appeal in the justice's docket: Seattle Coal etc. Co. v. Lewis, 1 W. T. 488.

DESTRUCTION OF RECORDS.—Where the records in the justice's office are destroyed by fire before the transcript is certified to in the upper court, but after the appeal has been properly taken, plaintiffs are entitled to have the cause docketed in the superior court, in order to show the facts and supply the missing records, after which the appeal should be heard as in other cases: Mullen v. Mullen, 1 W. T. 192.

If the notice of appeal has been given and the bond filed within the time prescribed by law, but the transcript is not filed until after the time limited, the denial of the motion to dismiss the appeal after the transcript was filed, will be sustained, the presumption being that good cause was shown for failure to file the transcript in time: State v. Campbell, 5 Wash. 517.

§ 1912. (6756.) Stay of Proceedings, When.

Upon appeal being taken, and a bond filed to stay all proceedings, the justice shall allow the same, and make an entry of such allowance in his docket, and all further proceedings on the judgment before the justice shall thereupon be suspended; and if in the mean time execution shall have been issued, the justice shall give the appellant a certificate that such appeal has been allowed. [Cf. L. '54, p. 252, § 164; Cd. '81, § 1861; L. '91, p. 67, § 3; 2 H. C., § 1632.]

See notes to last section.

§ 1913. (6757.) Release of Property on Certificate of Appeal.

On such certificate being presented to the officer holding the execution, he shall forthwith release the property of the defendant that may have been taken on execution; and if the body of the defendant have been taken on execution, he shall be discharged from imprisonment. [L. '54, p. 252, § 165; Cd. '81, § 1862; 2 H. C., § 1633.]

§ 1914. (6758.) Transcript—Jurisdiction—Procedure in Superior Court.

Within ten days after the appeal has been taken in a civil action or proceeding, the appellant shall furnish the superior court with a transcript of all the entries made in the justice's docket relating to the case, together with all the processes and other papers relating to the action, and file[d] with the justice, which shall be certified by such justice to be correct; and upon the filing of such transcript, the superior court shall become possessed of the cause, and shall proceed in the same manner, as near as may be, as in actions originally commenced in that court, except as herein otherwise provided. [Cf. L. '54, p. 252, § 166; Cd. '81, § 1863; L. '91, p. 67, § 4; 2 H. C., § 1634.]

See notes to § 1910, appeals.

Cited in 9 Wash. 307; 17 Wash. 56; 25 Wash. 204; 41 Wash. 413.

On appeal from a justice of the peace the constable's return cannot be amended for the purpose of aiding the transcript from the lower court, and showing jurisdiction in the justice: *Knoff v. P. S. C. C.*, 1 Wash. 57.

The supreme court will presume that the superior court did not abuse its discretion in denying a motion to dismiss an appeal

from a judgment of a justice of the peace, when there is no showing to the contrary: *State v. Campbell*, 5 Wash. 517.

A motion to dismiss an appeal from a justice of the peace for failure to file transcript within the time allowed is addressed to the discretion of the superior court; the failure to file the transcript within the time allowed does not deprive the superior court of jurisdiction: *State v. Superior Court*, 9 Wash. 307.

§ 1915. (6759.) Pleadings in Superior Court on Appeal.

The issue before the justice shall be tried in the superior court without other or new pleadings unless otherwise directed by the court. [L. '54, p. 253, § 167; Cd. '81, § 1864; 2 H. C., § 1635.]

See supra, § 1788, amendments.

Cited in 3 Wash. 709.

It is discretionary with the superior court under this and § 1788, supra, to allow amendments to pleadings used before the justice: *State v. Superior Court*, 3 Wash. 705.

Unless issues are changed thereby, amendments in pleadings should be liberally allowed on appeals from justices' courts: *Newberg v. Farmer*, 1 W. T. 182.

§ 1916. (6760.) Attachment for Certified Transcript.

Upon an appeal being taken and allowed the superior court may, by rule and attachment, compel the justice to make and deliver to the appellant a certified transcript of the proceedings, upon paying to such justice the fees allowed by law for making such transcript, and whenever the court is satisfied that the return of the justice is substantially erroneous or defective, it may, by rule and attachment, compel him to amend the same. [Cf. L. '54, p. 253, § 168; Cd. '81, § 1865; L. '91, p. 67, § 5; 2 H. C., § 1636.]

§ 1917. (6761.) Appeal not to be Dismissed for Defective Bond, When.

No appeal allowed by justice shall be dismissed on account of the bond being defective, if the appellant will, before the motion is determined, execute and file in the superior court such a bond as he should have executed at the time of taking the appeal, and pay all costs that shall have accrued by reason of such defect. [L. '54, p. 253, § 169; Cd. '81, § 1866; 2 H. C., § 1637.]

§ 1918. (6762.) Judgment Against Appellant and Sureties, When.

In all cases of appeal to the superior court if, on the trial anew in such court, the judgment be against the appellant in whole or in part, such

judgment shall be rendered against him and his sureties in the bond for the appeal. [L. '54, p. 253, § 170; Cd. '81, § 1867; 2 H. C., § 1638.]

Cited in 1 Wash. 25; 34 Wash. 155. Sureties on appeal bond from justice's court, by signing the bond, submit themselves to the jurisdiction of the court, and, are concluded by the judgment rendered against the principal and themselves without further notice: *Cline v. Mitchell*, 1 Wash. 24.

§ 1919. (6763.) Appeal in Criminal Cases—Notice.

Every person convicted before a justice of the peace of any offense may appeal from the judgment, within ten days thereafter, to the superior court. The appeal shall be taken by orally giving notice thereof at the time the judgment is rendered, or by serving a written notice thereof upon the justice at any time after the judgment, and within the time allowed for taking the appeal; when the notice is given orally, the justice shall enter the same in his docket. The appellant shall be committed to the jail of the county until he shall recognize or give a bond to the state, in such reasonable sum with such sureties as said justice may require, with condition to appear at the court appealed to, and there prosecute his appeal, and to abide the sentence of the court thereon, if not revised by a higher court. [Cf. L. '54, p. 261, § 177; L. '77, p. 203, § 7; Cd. '81, § 1898; L. '91, p. 67, § 6; 2 H. C., § 1639.]

Cited in 49 Wash. 437. Upon appeal, the superior court has jurisdiction of the cause for trial de novo, and after sustaining a demurrer to the complaint below, may direct a new complaint or information to be filed: *State v. Bringgold*, 40 Wash. 12. Where the accused, convicted in a police court, has on appeal been discharged from custody on giving bond to appear and prosecute his appeal, he is not entitled to a dismissal of the charge because more than sixty days elapsed without trial after the taking of the appeal, where he made no demand for trial, under section 2120; since he was accorded a speedy trial in the police court, and was bound to demand trial on appeal for his own benefit under this section: *State v. Parmeter*, 49 Wash. 435.

§ 1920. (6764.) Fees not Required in Advance—Failure to Prosecute, Effect of.

The appellant in a criminal action shall not be required to advance any fees in claiming his appeal, nor in prosecuting the same; but if convicted in the appellate court, or if sentenced for failing to prosecute his appeal, he may be required, as a part of the sentence, to pay the costs of prosecution. If the appellant shall fail to enter and prosecute his appeal, he shall be defaulted on his recognizance, if any was taken, and the superior court may award sentence against him for the offense whereof he was convicted, in like manner as if he had been convicted thereof in that court; and if he be not then in custody, process may be issued to bring him into court to receive sentence. [Cf. L. '54, p. 261, § 179; Cd. '81, § 1900; L. '91, p. 68, § 7; 2 H. C., § 1640.]

In no instance shall any accused person before final judgment be compelled to advance money or fees to secure his right of appeal, or any other constitutional rights guaranteed to him: See Const., Art. I, § 22.

Cited in 49 Wash. 437.

§ 1921. (6765.) Justice to Recognize Witnesses—Transcript.

Upon an appeal being taken in a criminal action, the justice shall require the witnesses to give recognizances for their appearance in the superior court, or if they are not present, indorse their names on the copy of proceeding. He shall, on such appeal, make and certify a copy of the conviction and other proceedings in the case, and transmit the same, together with the recognizance and an abstract bill of the costs, to the clerk of the court

appealed to, who shall issue a subpoena for the witnesses, if they are not under recognizance. [Cf. L. '54, p. 261, § 178; L. '73, p. 384, § 197; Cd. '81, § 1899; L. '91, p. 68, § 8; 2 H. C., § 1641.]

§ 1922. (6766.) Appeal from Order for Security to Keep the Peace.

An appeal may be taken from the order of a magistrate requiring a person to give security, to keep the peace, or for good behavior. Such appeal shall be taken in the same manner and subject to the same conditions as appeals from justices' courts in criminal actions, and the magistrate may require recognizances of the appellant and the witness, as in appeals in such criminal actions. [Cf. L. '54, p. 106, §§ 18, 19; L. '63, p. 385, §§ 191, 192; Cd. '81, §§ 1911, 1912; L. '91, p. 68, § 9; 2 H. C., § 1642.]

See *supra*, § 1919, appeals in criminal actions.

Cited in 23 Wash. 88.

§ 1923. (6767.) Proceedings on Such Appeal—New Bonds—Costs.

The court before which such appeal is prosecuted may affirm the order of the justice or discharge the appellant, or may require the appellant to enter into a new recognizance, with sufficient sureties, in such sum and for such time as the court shall think proper, and may also make such order in relation to the costs of prosecution as may be deemed just and reasonable. [L. '54, p. 155, § 20; Cd. '81, § 1913; 2 H. C., § 1643.]

§ 1924. (6768.) Failure to Prosecute Such Appeal, Effect of.

If any party appealing from such order of a magistrate shall fail to prosecute his appeal, his recognizance shall remain in full force and effect, as to any breach of the condition, without an affirmance of the judgment or order of the magistrate, and also shall stand as security for costs which shall be ordered by the court appealed to to be paid by the appellant. [Cf. L. '54, p. 105, § 21; Cd. '81, § 1914; L. '91, p. 68, § 10; 2 H. C., § 1644.]

TITLE XIII.

PROCEDURE IN CRIMINAL ACTIONS.

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| 1969. Arrest without warrant. | 1973. Breach of bond. |
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TITLE XIII]

PROCEDURE IN CRIMINAL ACTIONS.

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| 2063. Construction of words and phrases. | 2076. Ownership of property, how pleaded—Variance. |
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CHAPTER I.

PRACTICE IN CRIMINAL ACTIONS IN JUSTICE'S COURT.

§ 1925. (6666.) Justice to Issue Warrant of Arrest, When.

Any justice shall, on complaint on oath in writing before him charging any person with the commission of any crime or misdemeanor of which he has jurisdiction, issue a warrant for the arrest of such person, and cause him to be brought forthwith before him for trial. [L. '54, p. 260, § 172; Cd. '81, § 1888; 2 H. C., § 1559.]

See supra, § 46, jurisdiction in criminal cases.

See infra, §§ 1967–1975, proceedings against vagrants.

See *infra*, § 1999, child may be taken before juvenile court.

See *infra*, § 5201, jurisdiction, violations of fish laws.

See *infra*, § 5344, jurisdiction, offenses against sea gulls.

Preliminary complaint, affidavit, warrant, and summary trial: See 1 Remington's Digest, pp. 765, 766, §§ 54-60; *State v. Newton*, 29 Wash. 373; *State ex rel. Romano v. Yakey*, 43 Wash. 15; *State v. Yourex*, 30 Wash. 611; *State ex rel. Belt v. Kennan*, 25 Wash. 621; *State v. Bringgold*, 40 Wash. 12. A justice of the peace

is not required under Article I; § 22, of the Constitution, to prepare a copy of the complaint in a criminal action and deliver it to the accused, but the constitutional mandate is sufficiently complied with when the accused is given the complaint and told to make a copy of it if he chooses to do so: *State v. White*, 8 Wash. 230.

§ 1926. (6667.) Offense Committed in View of Justice, Proceedings.

When any offense is committed in view of any justice, he may, by verbal direction to any constable, or if no constable is present, to any citizen, cause such constable or citizen to arrest such offender, and keep him in custody for the space of one hour, unless such offender shall sooner be taken from such custody by virtue of a warrant issued on complaint on oath. But such person so arrested shall not be confined in jail nor put upon any trial until arrested by virtue of such warrant. And on the return of any warrant issued by him, it shall be the duty of the justice to docket the cause, and unless continuance be granted, forthwith to hear and determine the cause, and either acquit, convict and punish, or hold to bail the offender, if the offense be bailable, and prove to be one which should be tried in the superior court, or in default of bail, commit him to jail, as the facts and law may justify. [L. '54, p. 260, §§ 173, 174; Cd. '81, § 1889; 2 H. C., § 1560.]

Cited in 23 Wash. 88.

§ 1927. (6668.) Either Side may Demand Jury.

In all trials for offenses within the jurisdiction of a justice of the peace, the defendant or the state may demand a jury, which shall consist of six or a less number, agreed [upon] by the state and accused, to be impaneled and sworn as in civil cases, or the trial may be by the justice. When the complaint is for a crime or misdemeanor in the exclusive jurisdiction of the superior court, the justice hears the case as a committing magistrate, and no jury shall be allowed. [L. '54, p. 260, § 174; L. '73, p. 382, § 188; L. '75, p. 51, § 2; Cd. '81, § 1890; L. '91, p. 18, § 1; 2 H. C., § 1561.]

Right to jury trial, see Const., Art. I, § 21, and notes.

See *supra*, § 1849 et seq., jury in civil cases.

See Const., Art. I, § 21, the legislature may provide for a jury of any number less than twelve in courts not of record.

Cited in 40 Wash. 405.

§ 1928. (6669.) Proceedings on Verdict of Guilty.

Such justice or jury, if they find the prisoner guilty, shall assess his punishment: or if, in their opinion, the punishment they are authorized to assess is not adequate to the offense, they may so find, and in such case the justice shall order such defendant to enter [into] recognizance to appear in the superior court of the county, and shall also recognizance the witnesses, and proceed as in proceedings by a committing magistrate. [Cf. L. '54, p. 260, § 174; Cd. '81, § 1891; L. '91, p. 18, § 2; 2 H. C., § 1562.]

See *infra*, § 1957, recognizance to appear before superior court.

Cited in 27 Wash. 687.

Upon failure of jury to fix the punishment, the action of the justice in fining the accused, although erroneous, was not

void where the justice had jurisdiction of the person and subject matter: *Casey*, *In re*, 27 Wash. 686.

§ 1929. (6670.) Plea of Guilty.

The defendant may plead guilty to any offense charged. [L. '54, p. 260, § 174; Cd. '81, § 1892; 2 H. C., § 1563.]

§ 1930. (6671.) Justice to Summon Witnesses.

In all cases arising under this chapter, if the offense charged involve injury to a particular person who is within the county, it shall be the duty of the justice of the peace to summon the injured person, and all others whose testimony may be deemed material, as witnesses at the trial, and to enforce their attendance by attachment if necessary. [Cf. L. '54, p. 260, § 174; Cd. '81, § 1894; L. '91, p. 18, § 3; 2 H. C., § 1564.]

§ 1931. (6672.) Judgment not to be Given Without Evidence.

No justice shall assess a fine, or enter a judgment thereon, until a witness or witnesses have been examined to state the circumstances of the transaction. [Cf. L. '54, p. 260, § 174; Cd. '81, § 1893; L. '91, p. 19, § 4; 2 H. C., § 1565.]

Defendant has right to testify in his own behalf, and to meet the witnesses against him face to face: See Const., Art. I, § 22.

§ 1932. (6673.) Continuance to be Granted, How—Costs, etc.

Continuance may be granted, either on application of the defendant or the prosecuting witness, under the same rules as in civil cases; the cost of such continuance shall abide the event of the prosecution in all cases, and the justice shall recognize the defendant and the witnesses to appear from time to time, in the same manner as is provided in other criminal examinations before him. [Cf. L. '54, p. 261, § 176; Cd. '81, § 1895; L. '91, p. 19, § 5; 2 H. C., § 1566.]

See *infra*, § 1955, recognizance of defendant and witnesses.

§ 1933. (6674.) Judgment, How Rendered and Satisfied.

In all cases of conviction, unless otherwise provided in this chapter, the justice shall enter judgment for the fine and costs against the defendant, and may commit him to jail, to be placed at hard labor until the judgment is satisfied, or the payment thereof be secured as provided by section 1934, and further proceedings therein shall be had as in like cases in the superior court; but the defendant shall not be imprisoned for a longer aggregate time than one day for every three dollars of the fine and costs; and a defendant who has been committed shall be discharged at any time upon the payment of such part of the fine and costs as remains unpaid after deducting from the whole amount any previous payment, and three dollars for every day he has been imprisoned upon the commitment. [Cf. L. '54, p. 261, § 176; Cd. '81, § 1896; L. '91, p. 19, § 6; 2 H. C., § 1567.]

See *infra*, § 2279, prisoners in county jail to labor.

See *infra*, §§ 8493, 8494, city and county prisoners, when to be sentenced to work.

§ 1934. (6675.) Stay of Execution, Manner of Procuring.

Every defendant may stay the execution for the fine and costs for thirty days by procuring sufficient sureties, to be approved by the justice, to enter into recognizance before him for the payment of the fine and costs; the entry of such recognizance shall be made on the docket of the justice, and signed by the sureties, and shall have the same effect as a judgment, and if the same

be not paid in thirty days, the justice shall proceed as in like cases in the superior court. [L. '54, p. 261, § 176; Cd. '81, § 1897; 2 H. C., § 1568.]

See supra, § 522 et seq., stay of execution in superior court.

See supra, § 1867 et seq., stay of execution in civil cases in justices' courts.

CHAPTER II.

FORMS IN CRIMINAL ACTIONS IN JUSTICE'S COURT.

§ 1935. (6678.) Forms in Criminal Actions—Equivalents Authorized.

The following or equivalent forms may be used by justices of the peace in criminal proceedings under this act:—

FORM OF A SEARCH-WARRANT.

The State of Washington, }
County of ———. } ss.

To the Sheriff or any Constable of said County.

Whereas, A B has this day complained in writing under oath to the undersigned, one of the justices of the peace in and for said county, that on the ——— day of ———, 18—, at ———, in said county (here insert the substance of the complaint, whatever it may be),—therefore, in the name of the state of Washington, you are commanded forthwith to apprehend the said C D, and bring him before me, to be dealt with according to law.

Given under my hand this ——— day of ———, 18—.

J P, Justice of the Peace.

FORM OF A SEARCH-WARRANT.

The State of Washington, }
County of ———. } ss.

To the Sheriff or any Constable of said County.

Whereas, A B has this day made complaint on oath to the undersigned, one of the justices of the peace in and for said county, that the following goods and chattels, to wit (here describe them), the property of the said A B, have been within ——— days past, or were on the ——— day of ———, by some person or persons unknown, stolen, taken, and carried away out of the possession of the said A B, in the county aforesaid; and also, that the said A B verily believes that the said goods or a part thereof are concealed in or about the house of C D, in said county (describe the premises to be searched),—therefore, in the name of the state of Washington, you are commanded that, with the necessary and proper assistance, you enter into the said house (describe the premises to be searched), and then diligently search for the said goods and chattels; and if the same or any part thereof be found on such search, bring the same, and also the same [said] C D, forthwith before me, to be disposed of according to law.

Given under my hand this ——— day of ———, 18—.

J P, Justice of the Peace.

FORM OF COMMITMENT WHERE JUSTICE ON THE TRIAL SHALL FIND THAT HE
HAS NOT JURISDICTION IN THE CASE.

The State of Washington, }
County of —. } ss.

To any Constable and the Keeper of the Jail of said County.

Whereas, C D, of —, etc., has been brought this day before the undersigned, one of the justices of the peace in and for said county, charged, on the oath of A B, with having, on the — day of —, 18—, in said county, committed the offense of (here state the offense charged in the warrant), and in the progress of the trial of said charge, it appearing to the said justice that the said C D has been guilty of the offense of (here state the new offense found on the trial), committed at the time and place aforesaid; and whereas the said C D has failed to give bail in the sum of — dollars, for his appearance to answer at the next session of the superior court, as required by me,—therefore, in the name of the state of Washington, etc. (as in the last form), to receive the said C D into your custody in the said jail, and him there safely keep until he be discharged by due course of law.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF WARRANT TO KEEP THE PEACE.

The State of Washington, }
County of —. } ss.

To the Sheriff or any Constable of said County.

Whereas, A B has this day complained in writing under oath to the undersigned, one of the justices of the peace in and for said county, that he has just cause to fear and does fear C D, late of the said county, will (here state the threatened injury or violence, as sworn to),—therefore, in the name of the state of Washington, you are commanded to apprehend the said C D, and bring him forthwith before me, to show cause why he should not give surety to keep the peace and be of good behavior towards all people of this state, and the said A B especially, and further to be dealt with according to law.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF COMMITMENT UPON SENTENCE.

The State of Washington, }
County of —. } ss.

To any Constable and the Keeper of the County Jail of said County.

Whereas, at a justice's court held at my office in said county for the trial of C D, for the offense hereinafter stated, the said C D was convicted of having on the — day of —, 18—, in said county, committed (here state the offense), and upon conviction the said court did adjudge and determine that the said C D should be imprisoned in the county jail of said county, for — days,—therefore, you, the said constable, are commanded, in the name of the state of Washington, forthwith to convey and deliver the said C D to the said keeper; and you, the said keeper, are hereby commanded to receive the said C D into your custody in said jail and him there safely keep until the expira-

tion of said — days, or until he shall thence be discharged by due course of law.

Dated this — day of —, 18—.

J. P. Justice of the Peace.

FORM OF CERTIFICATE OF CONVICTION.

The State of Washington, }
County of —. } ss.

At a justice's court held at my office in said county before me, one of the justices of the peace in and for said county, for the trial of C D, for the offense hereinafter stated, the said C D was convicted of having on the — day of —, 18—, in said county committed (here insert the offense), and upon conviction, the said court did adjudge and determine that the said C D should pay a fine of — dollars (or be imprisoned, as the case may be), and the said fine has been paid to me.

Given under my hand this — day of —, 18—.

J. P., Justice of the Peace.

The State of Washington, }
County of —. } ss.

To the Sheriff or any Constable of said County.

Whereas, at a justice's court held at my office in said county for the trial of C D for the offense hereinafter stated, the said C D was convicted of having on the — day of —, 18—, in said county committed (here state the offense), and upon conviction the said court did adjudge and determine that the said C D should pay a fine of — dollars, and — dollars costs; and whereas, the said fine and costs have not been paid,—these are, therefore, in the name of the state of Washington, to command you to levy on the goods and chattels, etc. (as in execution in civil cases).

[Cf. L. '54, p. 262, § 181; L. '60, p. 281, § 181; Cd. '81, § 1902; L. '91, p. 19, § 7; 2 H. C., § 1569.]

Cited in 30 Wash. 615.

CHAPTER III.

PROCEEDINGS TO PREVENT THE COMMISSION OF CRIME.

§ 1936. (6680.) Power to Preserve Peace.

Justices of the peace shall have power to cause all laws made for the preservation of the public peace to be kept; and in the execution of that power may require persons to give security to keep the peace, or for their good behavior, or both, in the manner herein provided. [L. '54, p. 104, § 11; Cd. '81, § 1903; 2 H. P. C., § 26.]

Cited in 23 Wash. 86.

§ 1937. (6681.) Duty of Justice When Complaint Made.

Whenever complaint shall be made to any such magistrate that any person has threatened to commit an offense against the property or person of another, the magistrate shall examine the complaint, and any witness who may be produced on oath, and reduce such complaint to writing, and the same shall be subscribed by the complainant. [L. '54, p. 104, § 12; Cd. '81, § 1904; 2 H. C., § 1570.]

Cited in 16 Wash. 353.

§ 1938. (6682.) Examination of Witnesses—Transcript of Testimony.

It shall be the duty of every magistrate examining a person charged with an offense, or with an intention to commit an offense, to examine all the witnesses he shall deem material, and reduce their testimony to writing, a copy of which, whether the accused is discharged, committed, or held to bail, or shall take an appeal, he shall transmit to the clerk of the court having jurisdiction of the offense. [Cf. Cd. '81, § 1905; L. '91, p. 22, § 8; 2 H. C., § 1571.]

§ 1939. (6683.) Magistrate to Issue Warrant, When.

If, upon the examination, it shall appear that there is just cause to fear that such offense may be committed, the magistrate shall issue a warrant, under his hand, reciting the substance of the complaint, and requiring the officer to whom it may be directed forthwith to apprehend the person complained of and bring him before such magistrate, or some other magistrate or court having jurisdiction of the cause. [L. '54, p. 104, § 13; Cd. '81, § 1906; 2 H. C., § 1572.]

See supra, § 50, definition of magistrate.

Cited in 30 Wash. 615.

a misdemeanor: *State v. Yourex*, 30 Wash.

Only the substance of the complaint
need be recited in a warrant of arrest for

611.

§ 1940. (6684.) Recognizance in Cases of Apprehended Danger.

The magistrate before whom any person is brought upon charge of having made threats as aforesaid shall, as soon as may be, hear and examine the complaint; and if it shall appear that there is just cause to fear that any such offense will be committed by the party complained of, he shall be required to enter into recognizance, with sufficient sureties, in such sum as the magistrate shall direct, towards all the people of the state, and especially towards the person requiring such security, for such term as the magistrate shall order, not exceeding one year, but he shall not be ordered to recognizance for his appearance at the superior court unless he is charged with some offense for which he ought to be held to answer at said court. [L. '54, p. 104, § 14; Cd. '81, § 1907; 2 H. C., § 1573.]

See supra, §§ 1922, 1923, appeal from order.

See infra, § 1946, recognizance without process.

See infra, § 2202, recognizance after conviction.

§ 1941. (6685.) Commitment of Defendant to Jail, When.

If the person so ordered to recognize shall fail to enter into such recognizance, the magistrate shall commit him to the county jail during the period for which he was required to give security, or until he shall so recognize, stating in the warrant the cause of commitment, with the sum and time for which security was required. [L. '54, p. 104, § 15; Cd. '81, § 1908; 2 H. C., § 1574.]

See infra, § 1972, commitment of vagrant.

§ 1942. (6686.) Magistrate to Discharge, When—Costs.

If, upon examination, it shall appear that there is not just cause to fear that any such offense will be committed by the party complained of, he shall be forthwith discharged; and if the magistrate shall deem the complaint unfounded, frivolous, or malicious, he may order the complainant to pay the

costs of prosecution, who shall thereupon be answerable to the magistrate and the officer for their fees, as for his own debt. [L. '54, p. 104, § 16; Cd. '81, § 1909; 2 H. C., § 1575.]

See *supra*, § 50, definition of magistrate.

See *infra*, § 1954, taxing costs to complainant.

See *infra*, § 2225, where complaint unfounded, costs, how taxed.

Cited in 8 Wash. 450.

The provisions authorizing the taxing of costs to complaining witnesses apply only to examinations before magistrates, and complaints submitted to grand juries: *Town of Ilwaco v. Miller*, 8 Wash. 449; see *In re Permstick*, 3 Wash. 672.

§ 1943. (6687.) Costs—How Payment Enforced, etc.

When no order respecting the costs is made by the magistrate, they shall be allowed and paid in the same manner as costs before justices in criminal prosecutions; but in all cases where a person is required to give security for the peace, or for his good behavior, the magistrate may further order that the costs of prosecution, or any part thereof, shall be paid by such person, who shall stand committed until such costs are paid, or he is otherwise legally discharged. [L. '54, p. 105, § 17; Cd. '81, § 1910; 2 H. C., § 1576.]

Cited in 23 Wash. 87.

A judgment for costs against a defendant who has been required to enter into a recognizance to keep the peace constitutes a lien on his real estate: *Clallam County v. Hall*, 23 Wash. 85.

§ 1944. (6688.) Defendant Discharged on Giving Security.

Any person committed for not finding sureties or refusing to recognize as required by the magistrate may be discharged by any judge or justice of the peace on giving such security as was required. [L. '54, p. 105, § 22; Cd. '81, § 1915; 2 H. C., § 1577.]

§ 1945. (6689.) Recognizances to be Transmitted and Filed.

Every recognizance taken pursuant to the foregoing provisions shall be transmitted to the superior court for the county within ten days, and shall be there filed on record by the clerk. [Cf. L. '54, p. 105, § 23; Cd. '81, § 1916; L. '91, p. 22, § 9; 2 H. C., § 1578.]

§ 1946. (6690.) Recognizances Without Process, When.

Every person who shall, in the presence of any magistrate, or before any judge of a court of record, make an affray, or threaten to kill or beat another, or to commit any violence or outrage against his person or property, and every person who, in the presence of such judge or magistrate, shall contend with hot and angry words to the disturbance of the peace, may be ordered, without process or other proof, to recognize for keeping the peace or being of good behavior for a term not exceeding three months, and in case of refusal, may be committed as before directed. [Cf. L. '54, p. 105, § 24; Cd. '81, § 1917; L. '91, p. 22, § 10; 2 H. C., § 1579.]

See *supra*, § 50, definition of magistrate.

§ 1947. (6691.) Portion of Penalty Remitted, When.

Whenever, upon a suit brought on any such recognizance, the penalty thereof shall be adjudged forfeited, the court may remit such portion of the penalty, on the petition of any defendant, as the circumstances of the case

shall render just and reasonable. [L. '54, p. 106, § 25; Cd. '81, § 1918; 2 H. C., § 1580.]

§ 1948. (6692.) Surety may Surrender Principal, When—Effect of.

Any surety in recognizance to keep the peace or for good behavior, or both, shall have the same authority and right to take and surrender his principal as if he had been bail for him in a civil cause, and upon such surrender shall be discharged and exempt from all liability for any act of the principal, subsequent to such surrender, which would be a breach of the condition of the recognizance; and the person so surrendered may recognize anew, with sufficient sureties, before any justice of the peace, for the residue of the term, and thereupon shall be discharged. [L. '54, p. 106, § 26; Cd. '81, § 1919; 2 H. C., § 1581.]

Cited in 23 Wash. 86.

CHAPTER IV.

EXAMINATION OF PERSONS CHARGED WITH CRIME BEFORE MAGISTRATES.

§ 1949. (6695.) Examination of Offenses Before Magistrate.

Upon complaint being made to any justice of the peace, or judge of the superior court, that a criminal offense has been committed, he shall examine on oath the complainant, and any witness provided by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it shall appear that any offense has been committed of which the superior court has exclusive jurisdiction, the magistrate shall issue a warrant reciting the substance of the accusation, and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before the person issuing the warrant, unless he shall be absent or unable to attend thereto, then before some other magistrate of the county, to be dealt with according to law, and in the same warrant may require the officer to summon such witnesses as shall be therein named, to appear and give evidence on the examination. [L. '54, p. 106, § 27; Cd. '81, § 1921; 2 H. C., § 1582.]

See Const., Art. I, § 22, accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy, and to testify in his own behalf, etc.

See supra, § 51, who are magistrates.

See supra, § 1077, habeas corpus to obtain bail.

Cited in 30 Wash. 615; 43 Wash. 19, 20.

The fact that the complaint does not state facts sufficient to constitute a crime, with all the particularity required in an indictment or information does not render all the subsequent proceedings void, nor make illegal the custody of one committed after an examination of such informal complaint: State v. Newton, 29 Wash. 373.

Upon complaint being made to the jus-

tice, he has no power to dismiss the complaint on the ground that it is the business of the prosecuting attorney to investigate the matter and determine whether or not an information shall be filed: State ex rel. Romano v. Yakey, 43 Wash. 15.

As to sufficiency of recitals in a warrant of arrest for a misdemeanor, see State v. Yourex, 30 Wash. 611.

§ 1950. (6696.) Officer may Pursue and Retake Prisoner.

If any person against whom a warrant may be issued for an alleged offense committed in any county shall, either before or after the issuing of such warrant, escape from or be out of the county, the sheriff or other officer to whom such warrant may be directed may pursue and apprehend the party charged in any county in this state, and for that purpose may command aid

and exercise the same authority as in his own county. [L. '54, p. 107, § 28; Cd. '81, § 1922; 2 H. C., § 1583.]

§ 1951. (6697.) Recognizance With or Without Examination.

The magistrate before whom such accused person shall be brought, when the offense is bailable, may, at the request of such person, with or without examination, allow him to enter into recognizance, with sufficient sureties, to be approved by the magistrate, conditioned for his appearance in the superior court having jurisdiction of the offense. [Cf. L. '54, p. 107, § 29; Cd. '81, § 1923; L. '91, p. 22, § 11; 2 H. C., § 1584.]

§ 1952. (6698.) Hearing and Adjournment—Bail.

If the defendant shall not enter into recognizance with sureties, the magistrate shall proceed to hear and examine the complaint, and may adjourn the examination from time to time, not exceeding in all ten days from the time such defendant shall have been brought before him, and in case of such adjournment the magistrate may, if the offense be bailable, take a recognizance, with sufficient sureties for the appearance of the defendant at such further examination; and if he fail to enter into such recognizance, he shall be ordered into custody until the time appointed for such examination. [L. '54, p. 107, § 30; Cd. '81, § 1924; 2 H. C., § 1585.]

See § 1999, *infra*, complaint against child, to be transferred to juvenile court, when.

§ 1953. (6699.) Testimony, How Taken.

The testimony of the witness examined shall be reduced to writing by the magistrate, or under his direction, when he shall think it necessary, and shall be signed by the witness. [L. '54, p. 109, § 40; Cd. '81, § 1933; 2 H. C., § 1586.]

See *infra*, § 1962, deposition of witnesses.

§ 1954. (6700.) Defendant Entitled to Discharge, When—Costs.

If it should appear, upon the whole examination, that no offense has been committed, or that there is not probable cause for charging the defendant with an offense, he shall be discharged; and if in the opinion of the magistrate the complaint was malicious or without probable cause, and there was no reasonable ground therefor, the costs shall be taxed against the party making the complaint. [L. '54, p. 107, § 31; Cd. '81, § 1925; 2 H. C., § 1588.]

See *supra*, § 1942, taxing costs to complaining witness.

See *infra*, § 2225, costs, how taxed when complaint unfounded.

Cited in 8 Wash. 450; 19 Wash. 348.

§ 1955. (6701.) Defendant Recognized to Appear Before Justice, When.

If it shall appear that an offense has been committed of which a justice of the peace has jurisdiction, and one which would be sufficiently punished by a fine not exceeding one hundred dollars, if the magistrate having the complaint is a justice of the peace, he shall cause the complaint to be ordered [altered], and proceed as in like cases before a justice of the peace; or if any other magistrate, he shall certify the papers, with a statement of the offense appearing to be proved, to the nearest justice of the peace, and shall, by order, require the defendant and the witnesses to enter into recognizances, with sufficient sureties, to be approved by the magistrate, for their appear-

ance before such justice at the time and place stated in the order; and such justice shall proceed to the trial of the action as if originally commenced before him. [Cf. L. '54, p. 107, § 32; Cd. '81, § 1926; L. '91, p. 23, § 12; 2 H. C., § 1589.]

See supra, § 1928, proceedings on verdict.

§ 1956. (6702.) Bail to Justify, When Required.

Bail shall, when required, justify as in civil cases. [L. '54, p. 129, § 178; Cd. '81, § 1169; 2 H. C., § 1590.]

See supra, § 765, qualifications of bail.

§ 1957. (6703.) Defendant to be Discharged on Bail, When.

If it appear that a bailable offense has been committed, the magistrate shall order the defendant to enter into recognizance, with sufficient sureties, for his appearance in the superior court, to answer the charge, and if he shall not do so, or the offense be not bailable, he shall commit him to jail. The justice of the peace who committed the person, or the judge of the superior court to which the party is held to answer, may admit to bail in the amount required, and approve the sureties. The recognizance shall be conditioned in effect that the defendant will appear in the superior court to answer said charge whenever the same shall be prosecuted, and at all times, until discharged according to law, render himself amenable to the orders and process of the superior court, and if convicted, render himself in execution of the judgment. [Cf. L. '54, p. 108, §§ 33, 34; Cd. '81, § 1927; L. '91, p. 23, § 13; 2 H. C., § 1591.]

See supra, § 1077, habeas corpus for purpose of bail.

See supra, § 1928, order for recognizance in lieu of verdict.

See infra, § 1971, bond by vagrant.

See infra, § 2052, appearance to answer information or indictment.

See infra, § 2053, duty of prosecuting attorney in cases of preliminary examination.

See infra, § 2078, right of accused to give bail.

See infra, § 2088, certified and recorded, effect of.

See infra, § 2230, duty of prosecuting attorney on forfeited recognizances.

§ 1958. (6704.) Magistrates may Associate Other Magistrates.

Any magistrate to whom complaint is made, or before whom any defendant is brought, may associate with himself one or more magistrates of the same county, and they may, together, execute the powers and duties before mentioned; but no fees shall be taxed for such associates. [L. '54, p. 103, § 35; Cd. '81, § 1928; 2 H. C., § 1592.]

§ 1959. (6705.) Witnesses to be Recognized, When.

When the person arrested is held to bail or committed to jail or forfeits his recognizance, the magistrate shall recognize the witnesses for the prosecution to be and appear in the superior court to which the party is recognized, bailed, or committed, whenever their attendance shall be required. [Cf. L. '54, p. 108, § 36; Cd. '81, § 1929; L. '91, p. 23, § 14; 2 H. C., § 1593.]

In all criminal prosecutions the accused is entitled to have compulsory process to compel the attendance of witnesses in his own behalf: See Const., Art. I, § 22.

§ 1960. (6706.) Witnesses to Recognize With Sureties, When.

If the magistrate shall be satisfied that there is good cause to believe that any such witness will not perform the condition of his recognizance unless

other security be given, such magistrate may order the witness to enter into recognizance with such sureties as may be deemed necessary for his appearance at court. [L. '54, p. 108, § 37; Cd. '81, § 1930; 2 H. C., § 1594.]

§ 1961. (6707.) Recognizance of Minor or Married Woman.

When any married woman or a minor is a material witness, any other person may be allowed to recognize for the appearance of such witness, or the magistrate may, in his discretion, take the recognizance of such married woman or minor in a sum not exceeding fifty dollars, which shall be valid and binding in law, notwithstanding the disability of coverture or minority. [L. '54, p. 108, § 38; Cd. '81, § 1931; 2 H. C., 1595.]

§ 1962. (6708.) Commitment of Witnesses on Default of Bond—Depositions.

All witnesses required to recognize with or without sureties shall, if they refuse, be committed to the county jail by the magistrate, there to remain until they comply with such orders or be otherwise discharged according to law. Provided, that when the magistrate is satisfied that any witness required to recognize with sureties is unable to comply with such orders, he shall immediately take the deposition of such witness and discharge him from custody upon his own recognizance. The testimony of the witness shall be reduced to writing by the justice or some competent person under his direction, and he shall take only the exact words of the witness; the deposition, except the cross-examinations, shall be in the narrative form, and upon the cross-examination the questions and answers shall be taken in full. The defendant must be present in person when the deposition is taken, and shall have an opportunity to cross-examine the witnesses; he may make any objections to the admission of any part of the testimony, and all objections shall be noted by the justice; but the justice shall not decide as to the admissibility of the evidence, but shall take all the testimony offered by the witness. The deposition must be carefully read to the witness, and any corrections he may desire to make thereto shall be made in presence of the defendant, by adding the same to the deposition as first taken; it must be signed by the witness, certified by the justice, and transmitted to the clerk of the superior court, in the same manner as depositions in civil actions. And if the witness is not present when required to testify in the case, either before the grand jury or upon the trial in the superior court, the deposition shall be submitted to the judge of such superior court, upon the objections noted by the justice, and such judge shall suppress so much of said deposition as he shall find to be inadmissible, and the remainder of the deposition may be read as evidence in the case, either before the grand jury or upon the trial in the court. [Cf. L. '54, p. 108, § 39; L. '77, p. 203, § 8; Cd. '81, § 1932; L. '91, p. 24, § 15; 2 H. C., § 1596.]

See supra, § 1244, note.

See supra, § 1953, testimony of witnesses to be reduced to writing.

See infra, § 2131, and note, use of depositions.

The last sentence of this section is believed to be unconstitutional, as being in conflict with the provision of the Const., Art. I, § 22, guaranteeing the defendant the right to meet the witnesses against him face to face.

§ 1963. (6709.) Magistrate to Make Return—Penalty.

It shall be the duty of all magistrates within this state, before whom any person or persons shall be committed or held to bail to answer to [for] any

crime, to return their proceedings, duly certified, including a copy of all recognizances taken by them, to the clerk of the superior court within ten days after the final hearing and commitment, or holding to bail, as aforesaid; and any justice of the peace who shall fail or neglect to make such return shall not be entitled to receive any fees or costs in such case. [Cf. L. '54, p. 109, § 41; Cd. '81, § 1934; L. '91, p. 25, § 16; 2 H. C., § 1597.]

§ 1964. (6710.) Offense may be Compromised, When.

When any person shall be committed to prison, or shall be under examination or recognizance to answer any charge for a misdemeanor for which the party injured may have a remedy by civil action, except where the offense was committed upon a sheriff or other officer, justice, or violently or with intent to commit a felony, if the party injured shall appear before the magistrate who made the commitment or took the recognizance or is conducting the examination, and acknowledge in writing that he has received satisfaction for the injury, the magistrate may, in his discretion, on payment of all costs which may have accrued, discharge the recognizance or supersede the commitment by an order under his hand, and may also discharge all recognizance and supersede the commitment of all witnesses in the case. [L. '54, p. 109, § 42; Cd. '81, § 1935; 2 H. C., § 1598.]

See *infra*, §§ 2126-2128, compromising offenses.

§ 1965. (6711.) Action on Forfeiture of Recognizance.

When any person under recognizance in any criminal prosecution, either to appear and answer before a justice, or to testify in any court, shall fail to perform the condition of any recognizance, his default shall be recorded; and it shall be the duty of the prosecuting attorney to proceed at once, by action against the person bound by recognizance, or such of them as he may elect. [L. '54, p. 109, § 43; Cd. '81, § 1936; 2 H. C., § 1599.]

See *infra*, § 2234 *et seq.*, action on forfeited recognizance.

§ 1966. (6712.) Abstract of Costs to be Forwarded With Papers.

In all cases where any magistrate shall order a defendant to recognize for his appearance before a justice of the peace or the superior court, he shall forward with the papers in the case an abstract of the costs that have accrued in the case, and such costs shall be subject to the final determination of the case. [L. '54, p. 109, § 44; Cd. '81, § 1937; 2 H. C., § 1600.]

CHAPTER V.

PROCEEDINGS AGAINST VAGRANTS.

§ 1967. (6724.) Vagrancy, Defined.

The following persons are vagrants: All persons who tell fortunes, or who keep houses where lost and stolen goods may be found; all common prostitutes, and keepers of bawdy-houses or houses for the resort of prostitutes; all habitual drunkards, gamblers, or other disorderly persons; all persons wandering about and having no visible calling or business to maintain themselves; all persons going about as collectors of alms for charitable institutions under any false or fraudulent pretense; all persons playing or betting in any street, or public or open place, at or with any table or in-

strument of gaming at any game or pretended game of chance. [L. '75, p. 89, § 1; Cd. '81, § 1271; 2 H. C., § 1608.]

As to repeal of this section, see § 2304, and note. Present law, § 2688, *infra*. If § 2688 is to be construed as a continuation of this section (under § 2300), the balance of this chapter may still be in force, particularly the procedure: See notes to §§ 2301 and 2697, *infra*.

See *Spokane v. Williams*, 6 Wash. 376.

§ 1968. (6725.) Proceedings for Examination of.

Upon complaint made on oath to any justice of the peace against any person as being such vagrant within his local jurisdiction, as defined in the last preceding section, he shall issue a warrant for the arrest of such person, and the complaint, warrant, arrest, and examination shall be governed by the provisions of this code relating to the examination and commitment for trial of persons charged with offenses, so far as the same may be applicable. [Cf. L. '75, p. 90, § 2; Cd. '81, § 1272; L. '91, p. 25, § 17; 2 H. C., § 1609.]

§ 1969. (6726.) Arrest Without Warrant.

All peace officers shall arrest any vagrant whom they may find at large, and take him before some justice of the peace of the county, city, or town in which the arrest is made. [L. '75, p. 90, § 3; Cd. '81, § 1273; 2 H. C., § 1610.]

§ 1970. (6727.) Officer must Confine Vagrant.

If the arrests authorized in the last two sections are made during the night, the officer must keep the person arrested in confinement until the next morning. [L. '75, p. 90, § 4; Cd. '81, § 1274; 2 H. C., § 1611.]

As to repeal of this section, see § 2304, and note. See note to § 1967.

§ 1971. (6728.) Bond for Good Behavior.

If it appear, by the confession of such person, or by competent testimony, that such person is a vagrant, the justice of peace before whom he is brought may require of such person a bond, with sufficient surety, for good behavior for the term of three months thereafter. [L. '75, p. 90, § 5; Cd. '81, § 1275; 2 H. C., § 1612.]

As to repeal of this section, see § 2304, and note. See note to § 1967.

§ 1972. (6729.) Record to be Filed in Superior Court.

The justice shall make up, sign and file with the clerk of the superior court of the county a record of conviction of such person as a vagrant, specifying generally the nature and circumstances of the charge, and shall, in default of such security being given, by warrant under his hand, commit such vagrant to the jail of the county, city, or town, as the case may be, until such security be found, or such vagrant be discharged, according to law. [L. '75, p. 90, § 6; Cd. '81, § 1276; 2 H. C., § 1613.]

As to repeal of this section, see § 2304, and note. See note to § 1967.

§ 1973. (6730.) Breach of Bond.

The committing of any of the acts which constitute such person so bound a vagrant shall be deemed a breach of the condition of such bond for good behavior. [L. '75, p. 91, § 7; Cd. '81, § 1277; 2 H. C., § 1614.]

As to repeal of this section, see § 2304, and note. See note to § 1967.

§ 1974. (6371.) New Sureties, When.

On a recovery upon any such bond, the court before which such recovery may be had may, in its discretion, either require new sureties for good behavior, or may commit such vagrant to the county jail of the county for any time not exceeding six months. [L. '75, p. 91, § 8; Cd. '81, § 1278; 2 H. C., § 1615.]

As to repeal of this section, see § 2304, and note. See note to § 1967.

§ 1975. (6732.) Discharge on Bond After Commitment.

Any person committed to jail for not finding sureties for good behavior may be discharged by any magistrate upon giving such sureties for good behavior as was originally required of such person. [L. '75, p. 91, § 9; Cd. '81, § 1279; 2 H. C., § 1616.]

As to repeal of this section, see § 2304, and note. See note to § 1967.

§ 1976. (6733.) Trial in Superior Court.

The superior court to which the papers are returned shall, on demand of the defendant, impanel a jury to inquire into and determine the truth of the charge made against him; and the rules and regulations of law governing said court in the trials of misdemeanors shall be applicable to and govern it in the trial herein contemplated. If no jury be demanded, the superior court may revise such conviction, and discharge such vagrant from the bond or confinement absolutely, or upon sureties for good behavior, in its discretion. L. '75, p. 91, §§ 10, 11; Cd. '81, §§ 1280, 1281; 2 H. C., § 1617.]

As to repeal of this section, see § 2304, and note. See note to § 1967.

§ 1977. (6734.) Confinement of Vagrant at Hard Labor.

Such superior court may, in its discretion, order any such vagrant to be kept in the county jail for any time not exceeding six months at hard labor. [L. '75, p. 91, § 12; Cd. '81, § 1282; 2 H. C., § 1618.]

As to repeal of this section, see § 2304, and note. See note to § 1967.

§ 1978. (6735.) Court may Provide Material for Labor.

If there be no means in such jail for employing offenders at hard labor, such court may direct the keeper thereof to furnish such employment as it shall specify to such vagrants as may be committed thereto, either by a justice or any court, and for that purpose to purchase any necessary raw materials and implements, not exceeding such amount as the court shall prescribe, and to compel such persons to perform such work as shall be allotted to them. The expenses incurred in pursuance of such order shall be audited by the board of commissioners of the county, and paid out of the county treasury. [L. '75, pp. 91, 92, §§ 13, 14; Cd. '81, §§ 1283, 1284; 2 H. C., § 1619.]

As to repeal of this section, see § 2304, and note. See note to § 1967.

§ 1979. (6736.) Disposition of Proceeds of Labor.

One-half of the net proceeds of such labor shall be paid to the person earning the same, upon his discharge from imprisonment, and the other half shall be paid into the county treasury for the use of the county. [L. '75 p. 92, § 15; Cd. '81, § 1285; 2 H. C., § 1620.]

As to repeal of this section, see § 2304, and note. See note to § 1967.

CHAPTER VI.

JUVENILE OFFENDERS—COMMITMENT TO STATE TRAINING SCHOOL.

See *infra*, §§ 1987–2004, delinquent children and juvenile courts.

§ 1980. (2721.*) **Juvenile Offender Committed, When.**

When a boy of sane mind between the ages of eight and sixteen years, or a girl of sane mind between the ages of eight and eighteen (18) years shall, in any court of record in this state, be found guilty of any crime except murder or manslaughter, or who for want of proper paternal care is growing up in mendicancy or vagrancy, or is incorrigible, and complaint thereof is made and properly sustained, the court may if in its opinion the accused is a proper subject therefor, instead of entering judgment cause an order to be entered that said boy or girl be sent to the state training school, in pursuance of the provisions of this act, and a copy of said order under the seal of said court shall be sufficient warrant for carrying said boy or girl to the said school and for his or her commitment to the custody of the superintendent thereof. [L. '05, p. 39, § 1. Cf. L. '91, p. 195, § 1; 1 H. C., § 1227.]

State reform school in this chapter changed to state training school: See § 8596, *infra*.
See *infra*, § 1986, discharge.

See *infra*, § 1988, superior court to have original jurisdiction over delinquent or neglected children.

See *infra*, § 1999, justice to transfer complaints against children to juvenile court.

Compare, § 2276, same subject.

See *infra*, § 4382, causes for commitment to state training school.

See *infra*, § 8615, incorrigibles in truant school to be committed to training school.

Cited in 3 Wash. 611, 613; 19 Wash. 309.

Under § 8601, *infra*, and this section a child sixteen years of age who, upon conviction of robbery, has been committed to the state training school, and has been found incorrigible and returned to the court which committed him, but sent back by the court to the school whence he was taken and confined in the jail of the county where the school is located, is entitled to be dis-

charged therefrom on habeas corpus, but he should be redelivered to the trustees of the school; and semble, that the trustees should return him to the court for sentence under the judgment of conviction for robbery: *In re Mason*, 3 Wash. 609.

A municipal court has no jurisdiction to commit a child to the state training school: *In re Barbee*, 19 Wash. 306.

§ 1981. (2722.*) **Proceedings in Case of Conviction Before Justice—Order to Show Cause.**

When a boy of sane mind between the ages of eight and sixteen years or a girl of sane mind between the ages of eight and eighteen years, shall be convicted before a justice of the peace or other inferior court of any crime, mendicancy, vagrancy or incorrigibility, it shall be the duty of said magistrate before whom he or she may be convicted to forthwith send such boy or girl, together with all the papers filed in his office upon the subject, under the control of some officer, to a judge of a court of record. He shall then issue an order to the parent or guardian of said boy or girl, or such person as may have him or her in charge, or with whom she or he has last resided, or any known to be near related to him or her, or if she or he be alone or friendless then to such person as said judge may appoint to act as guardian for the purposes of the case[s], requiring him or her to appear at the time and place stated in said order to show cause why said boy or girl should not

be committed to the said state training school for training and reformation. [L. '91, p. 195, § 2; 1 H. C., § 1228; L. '05, p. 40, § 2.]

Compare § 2276, *infra*, commitment to training school.

Cited in 19 Wash. 310; 24 Wash. 333; 37 Wash. 258; 40 Wash. 405.

As to rights of a child convicted before a justice of the peace, after the proceedings are sent to the superior court: *State v. Packenham*, 40 Wash. 403.

§ 1982. (2723.) Order to Show Cause, How Served—Fees.

Said order shall be served by the sheriff or other qualified officer by delivering a copy thereof personally to the party to whom it is addressed, or leaving it with some person of full age at the place of residence or business of said party, and immediate returns shall be made to said judge of the time and manner of such service. The fees of the sheriff or other officer under this chapter shall be the same as now or may hereafter be allowed by law for like services. [L. '91, p. 196, § 3; 1 H. C., § 1229.]

Cited in 19 Wash. 3111.

§ 1983. (2724.) Examination, Hearing, and Commitment by Warrant.

At the time and place mentioned in said order, or at the time and place to which it may be adjourned, if the parent or guardian to whom said order may be addressed shall appear, then in his or her presence, or if he or she fail to appear, then in the presence of some competent person whom the said judge shall appoint as guardian for the purposes of the case, it shall be lawful for the said judge to proceed to take the voluntary examination of said boy or girl, and to hear the statements of the party appearing for him or her, and such testimony in relation to the case as may be produced, and if upon such examination and hearing the said judge shall be satisfied that the boy or girl is a fit subject for the state training school, he may commit him or her to said school by warrant. [L. '91, p. 196, § 4; 1 H. C., § 1230.]

Cited in 19 Wash. 311; 24 Wash. 333.

Commitment for vagrancy is unwarranted, when: *State v. Rasch*, 24 Wash. 332.

§ 1984. (2725.) Warrant of Commitment must State What—Expense.

The judge shall certify in the warrant the place in which said boy or girl resided at the time of his or her arrest, also his or her age as near as can be ascertained, and command the said officer to take the said boy or girl, and deliver him or her without delay to the superintendent of said school, or other persons in charge thereof at the place where the same is located and established: and such certificate, for the purpose of this act, shall be conclusive evidence of his or her residence or age; accompanying this warrant, the judge shall transmit to the superintendent, by the officer executing it, a statement of the nature of the complaint, together with such other particulars concerning the boy or the girl as the judge is able to ascertain: Provided, the expense of conveying any boy or girl so committed to said state training school, or returning him or her to his or her parent or guardian after his or her release therefrom, shall be at the expense of the state. [L. '91, p. 196, § 5; 1 H. C., § 1231.]

See *infra*, § 1995, commitment of delinquent child.

See *infra*, § 8955, transportation of incorrigibles.

§ 1985. (2726.) Proceedings in Lower Court—How Reviewed.

The proceedings of any judge or court may be reviewed on writ of error by the superior court, and proceedings before any superior court or

judge thereof may be reviewed by the supreme court, in the manner provided by law for reviewing criminal cases in these courts. [L. '91, p. 197, § 6; 1 H. C., § 1232.]

Cited in 37 Wash. 259.

§ 1986. (2727.*) Term of Confinement—Effect of Discharge.

Each boy committed to the state training school shall remain there until he arrives at the age of eighteen years, and each girl committed to the state training school shall remain there until she arrives at the age of nineteen years, unless sooner paroled or legally discharged. The discharge of any boy having arrived at the age of eighteen years or of any girl having arrived at the age of nineteen years, shall be a complete release from all penalties incurred by conviction of the offense for which he or she was committed. [L. '91, p. 197, § 7; 1 H. C., § 1233; L. '05, p. 40, § 3.]

See *infra*, § 2276, commitment on conviction of crime.

See *infra*, § 8601, inmate to be returned, when.

Cited in 3 Wash. 613, 614.

CHAPTER VII.

DELINQUENT CHILDREN, AND JUVENILE COURTS.

See *supra*, §§ 1980–1986, juvenile offenders.

§ 1987. “Delinquent Child,” “Neglected Child,” etc., Defined—Wards of the State.

The words “delinquent child” shall for the purpose of this act mean any child under the age of eighteen years who violates any law of this state, or any city or town ordinance, or who is incorrigible, or who knowingly associates or lives with thieves, vicious, immoral or disreputable persons, or who is growing up in idleness or crime, or who knowingly visits or enters a house of ill-repute, or who knowingly patronizes or visits any policy-shop or place where any gambling device is or shall be operated, or who patronizes or visits any saloon or dram-shop where intoxicating liquors are sold, or who patronizes or visits any public poolroom or bucket-shop or who wanders about the streets in the night-time without being on any lawful business or occupation, or who habitually uses vile, obscene, vulgar, profane or indecent language, or is guilty of immoral conduct in any public place, or about any schoolhouse. For the purpose of this act the words “neglected child” shall mean any child under the age of eighteen years who, for any reason, is destitute or homeless, or abandoned, and is unable to earn his own living or is growing up under such circumstances as would tend to cause such child to lead a vicious or immoral life; or who habitually begs or receives alms; or who is found in any house of ill-repute, or with any vicious or disreputable person, or whose home or stopping place, by reason of neglect, ignorance, cruelty, or depravity on the part of its parents, or others, is an unfit place for such child, and any child under ten (10) years of age found begging, peddling or selling any articles or singing or playing any musical instrument for gain upon the street, or giving any public entertainment, or accompanies, or is used in the aid of, any person so doing. The word “child” or “children” may mean one or more children, or the word “parent” or “parents” may mean one or both parents when consistent with the intent of this act. The word “association” shall mean any incorpora-

tion which includes in its purpose the care and disposition of children consistent with the intent of this act.

For the purpose of this act only, all delinquent and neglected children within the state shall be considered wards of this state and their persons shall be subject to the custody, care, guardianship and control of the court as hereinafter provided. [L. '09, p. 668, § 1. Cf. L. '05, p. 34, § 1.]

"Act" in this and the following sections refers to this chapter.

See *infra*, §§ 8605-8615, truant schools.

§ 1988. Superior Court to Have Original Jurisdiction—Trial by Jury.

The superior courts in the several counties of this state shall have original jurisdiction in all cases coming within the terms of this act. In all trials under this act any person interested therein may demand a jury trial or the judge, of his own motion, may order a jury to try the case. [L. '05, p. 35, § 2; L. '09, p. 669, § 2.]

§ 1989. Juvenile Court—Special Session—Juvenile Record.

In counties of the first and second class the judges of the superior court shall, at such times as they may determine, designate one or more of their number whose duty it shall be to hear all cases arising under this act. A special session, to be designated as the "Juvenile Court Session," shall be provided for the hearing of such cases and the finding of the court shall be entered in a book or books to be kept for that purpose, and known as the "Juvenile Record"; and the court may, for convenience, be called the "Juvenile Court." [L. '05, p. 35, § 3; L. '09, p. 669, § 3.]

§ 1990. Complaint Against Child—Who may File—Contents.

Any reputable person, being a resident in the county, having knowledge of a child in his county who appears to be either delinquent or neglected within the meaning of this act, may file with the clerk of the court a complaint, in writing, setting forth the facts, including a statement of the name and place of residence of the parent, parents or other guardian, also of the person having the custody of such child, if known, and if unknown that fact shall be stated. The complaint shall be verified by affidavit, which shall be sufficient if made upon information and belief. [L. '09, p. 669, § 4. Cf. L. '05, p. 35, § 4.]

See *infra*, § 8609, petition for commitment to truant school.

§ 1991. Service of Summons—Guardian ad Litem—Summary Hearing.

Upon the filing of an information or the complaint the clerk of the court shall issue a summons requiring the person having custody or control of the child, or with whom the child may be, to appear with the child at a place and time stated in the summons, which time shall not be less than twenty-four hours after service. The parents of the child, if living, and their residence is known, or its legal guardian, if there be one, or if there is neither parent nor guardian, or if his or her residence is not known, then some relative, if there be one, and his residence is known, shall be notified of the proceedings; and in any case the judge shall appoint some suitable person or association to act in behalf of the child. If the person summoned, as herein provided, shall fail without reasonable cause to appear and abide the order of the court, or to bring the child, he shall be proceeded against as for contempt of court. In case the summons cannot be served, or the parties served fail to obey the same, and in any case when it shall be made to appear

to the court that said summons will be ineffectual a warrant may issue on the order of the court, either against the parent or guardian or the person having custody of the child, or with whom the child may be, or against the child itself. On return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear and dispose of the case in a summary manner. Pending the final disposition of the case, the child may be retained in the possession of the person having charge of the same, or may be kept in some suitable place provided by the city or county authorities, or by any association having for one of its objects the care of delinquent and neglected children. [L. '05, p. 36, § 5; L. '09, p. 670, § 5.]

§ 1992. When Parents or Guardian Unknown or Nonresident—Notice by Publication.

In any case where it shall appear, by the complaint or other verified statement, that the person standing in the position of natural or legal guardian of the person of any child, is a nonresident of this state or that the name or place of residence or whereabouts of such person is unknown, as well as in all cases where, after due diligence, the officer has been unable to make service of the summons or notice provided for in section 1990 [1991], the court may, by order, direct the clerk of the court to publish a notice four consecutive weeks in some newspaper printed in the county and having a general circulation therein. Such notice shall be directed to the parent, parents or other person claiming the right to the custody of the child, if their names are known, and if unknown the phrase "To All Whom It May Concern," shall be used and apply to, and be binding upon, any such persons whose names are unknown. The name of the court, the name of the child (or children if of one family), the date of the filing of the complaint and the date of hearing, which shall not be less than twenty days from the date of the last publication, and the object of the proceeding in general terms, shall be set forth, and the whole shall be subscribed by the clerk. There shall be filed with the clerk an affidavit showing due publication of the notice and the cost of publication shall be paid by the county at not to exceed the rate paid by the county for other legal notices.

The publication of notice shall be deemed equivalent to personal service upon all persons, known or unknown, who have been designated as provided in this section. [L. '09, p. 670, § 6.]

"Section 4" in this section was evidently intended to be "section 5" and is changed to read 1990 [1991].

§ 1993. Probation Officers—Appointment, Duties, etc.

The court or judge designated, as provided in section 1989 of this chapter, shall appoint or designate one or more discreet persons of good character, to serve as probation officers during the pleasure of the court, said probation officers to receive no compensation from the public treasury. In case a probation officer shall be appointed by any court, it shall be the duty of the clerk of the court, if practicable, to notify the said probation officer in advance when the child is to be brought before the said court; it shall be the duty of said probation officers to make such investigation as may be required by the court, and to be present in order to represent the interests of the child when the case is heard, to furnish the court such information and assistance as the judge may require, and to take such charge of the child

before and after trial as may be directed by the court. [L. '05, p. 36, § 6; L. '09, p. 671, § 7.]

§ 1994. Chief Probation Officer in Cities of First Class—Salary.

In counties containing cities of the first class, when it shall appear to the court that there is a necessity for such officers, the court shall appoint a chief probation officer, in addition to the officers above provided for, who shall be paid a sum not to exceed \$125 per month, and also may appoint an assistant probation officer, who shall be paid a sum not to exceed \$83.33 per month as compensation for their services in the same manner as other county officers are paid, and such officers shall possess all the powers conferred upon sheriffs and police officers to serve process and make arrests for the violation of any state law or city ordinance. One of said salaried probation officers shall be a woman. [L. '07, p. 208, § 1; L. '09, p. 672, § 7.]

See Const., Art. II, § 5, all county officers to be elected.

§ 1995. Commitment of Child—Support by Parent.

When any child under the age of eighteen years shall be found to be delinquent or neglected, within the meaning of this act, the court may, at any time, make an order committing the child to some suitable institution, or to the care of some reputable citizen of good moral character, or to the care of some training school or industrial school as provided by law, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for or obtaining homes for dependent, neglected or delinquent children: Provided, such order may be temporary or permanent in the discretion of the court and may be revoked or modified as the circumstances of the case may thereafter require. In any case in which the court shall find a child neglected, dependent or delinquent, it may in the same or in a subsequent proceeding, upon the parent or parents, guardian or other person having custody of said child being duly summoned or voluntarily appearing, proceed to inquire into the ability of such person or persons to support the child or contribute to its support, and if the court shall find such person or persons able to support the child or contribute thereto, the court may enter such order or decree as shall be according to equity in the premises, and may enforce the same by execution, or in any way in which a court of equity may enforce its decrees. [L. '09, p. 672, § 8. Cf. L. '05, p. 37, § 7.]

See supra, § 1983, commitment to state training school.

See infra, §§ 8609, 8610, commitment to truant schools.

§ 1996. Control of Child—Adoption—Property Rights—Jurisdiction of Court Continues.

In any case where the court shall award a child to the care of any association or individual, the child shall, unless otherwise ordered, become a ward and be subject to the guardianship of the association or individual to whose care it is committed; such association shall have authority, with the assent of the court, to place such child in a family home, either temporarily or for adoption. With the written consent of the parents or one of them, or other person having the right, under the laws of this state, to dispose of a neglected or delinquent child, the court may make an order or decree of adoption transferring to any suitable person or persons, willing to receive such child, all the rights of the parent or other guardian. The order of the court

made upon such consent shall be binding upon the child and its parents or guardian, or other person, the same as if such persons were personally in court and consented thereto, whether made party to the proceeding or not. The estate or property rights of any child shall not be affected, nor subjected to guardianship by the provisions of this act. The jurisdiction of the court shall continue over every child brought before the court, or committed pursuant to this act, and the court shall have power to order a change in the custody or care of such child, if at any time it is made to appear to the court that it would be for the best interests of the child to make such change. [L. '09, p. 673, § 9.]

§ 1997. Continuance and Probation—Limit of Commitment—Discharge.

In any case of a delinquent or neglected child, the court may continue the hearing from time to time, and may commit the child to the care and guardianship of a probation officer, duly appointed by the court, and may allow said child to remain at its own home, subject to the visitation of the probation officer, such child to report to the probation officer as often as may be required and subject to be returned to the court for further proceedings whenever such action may appear to be necessary, or the court may commit the child to the care and guardianship of the probation officer, to be placed in a suitable family home, in case provision is made by voluntary contribution or otherwise for the payment of the board of such child, until a suitable provision may be made for the child in a home without such payment, or the court may commit the child to a suitable institution for the care of delinquent or neglected children. In no case shall a child be committed beyond the age of twenty-one years. A child committed to such institution shall be subject to the control thereof and the said institution shall have power to parole such child, on such condition as it may prescribe, and the court shall, on the recommendation of such institution, have power to discharge such child from custody, whenever, in the judgment of the court, his or her reformation shall be complete; or the court may commit the child to the care and custody of some association that will receive such child, embracing in its object the care of neglected and delinquent children. [L. '05, p. 37, § 8; L. '09, p. 673, § 10.]

See *infra*, §§ 8612-8614, parole at truant schools.

See *infra*, § 8615, incorrigible truants to be committed to training school.

§ 1998. Commitment of Child Under Fourteen—No Jails, Lock-ups, etc.

No court or magistrate shall commit a child under fourteen years of age to a jail, common lock-up or police station; but, if such a child is unable to give bail, it may be committed to the care of the sheriff, police officer, or probation officer, who shall keep said child in some suitable place or house or school of detention provided by the city or county, outside of the inclosure of any jail or police station, or in the care of any association willing to receive it, and having as one of its objects the care of neglected and dependent children. When any child shall be sentenced to confinement in any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in the same building with such adult convicts, or to confine such child in the same yard or inclosure with such adult convicts, or to bring such child into any yard or building in which such adult convicts may be present. [L. '05, p. 38, § 9; L. '09, p. 674, § 11.]

§ 1999. Juvenile Court, Justices' Courts to Transfer Case to—Procedure.

When in any county where a court is held as provided in section 1989 of this chapter, a child under the age of eighteen (18) years is arrested with or without warrant, such child may, instead of being taken before a justice of the peace or police magistrate, be taken directly before such court; or if the child is taken before a justice of the peace, or police magistrate, it shall be the duty of such justice of the peace or police magistrate to transfer the case to such court, and the officer having the child in charge to take the child before that court, and in any case the court may proceed to hear and dispose of the case in the same manner as if the child had been brought before the court upon complaint as hereinbefore provided. In any such case the court shall require notice to be given and investigation to be made as in other cases under this act, and may adjourn the hearing from time to time for such purpose. If upon investigation it shall appear that a child has been arrested upon the charge of having committed a crime, the court, in its discretion, may order such child to be turned over to the proper officers for trial under the provisions of the criminal code. [L. '09, p. 674, § 12. Cf. L. '05, p. 38, § 10.]

§ 2000. Providing Place of Detention in Certain Counties.

In counties of the first and second class it shall be the duty of the proper authorities to provide and maintain at public expense a detention-room, or house of detention, separated or removed from any jail, lock-up or police station, to be in charge of a matron, or other person of good character, wherein all children within the provisions of this act, shall, when necessary, be sheltered. [L. '05, p. 38, § 11; L. '09, p. 675, § 13.]

§ 2001. Construction of Act—Method of Handling Children.

This act shall be liberally construed to the end that its purpose may be carried out, to wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be provided by its parents, and that as far as practicable any neglected or delinquent child shall be treated, not as a criminal, but as misdirected and misguided, and needing aid, encouragement, help and assistance. [L. '05, p. 38, § 12; L. '09, p. 675, § 14.]

§ 2002. Officer not Entitled to Fees.

No fees shall be charged or collected by any officer for any proceedings under this act. [L. '05, p. 39, § 13; L. '09, p. 675, § 15.]

§ 2003. Board of Visitation—Appointment, Expenses, and Duties.

In each county the judge presiding over the juvenile court session, as defined in this act, may appoint a board of four reputable citizens, who shall serve without compensation, to constitute a board of visitation, whose duty it shall be to visit as often as once a year all institutions, societies and associations within the county receiving children under this act. Also to visit other institutions, societies and associations within the state receiving or caring for children whenever requested so to do by the judge of the juvenile court: Provided, the actual expenses of such board may be paid by the county commissioners when members thereof are requested to visit institutions outside of the county seat, and no member of the board shall be required to visit

any institution outside of the county unless his actual traveling expenses shall be paid as aforesaid. Said visits shall be made by not less than two of the members of the board, who shall go together, or make a joint report; the board of visitors shall report to the court from time to time the condition of children received by or in charge of such associations or institutions. It shall be the duty of every institution, society and association receiving or caring for children to permit any member, or members, of the board of visitation to visit and inspect such institution in all its departments, so that a full report may be made to the court. [L. '09, p. 675, § 16; L. '09, p. 676, § 17.]

§ 2004. Parents Criminally Liable—Responsibility for Children's Delinquency.

In all cases where any child shall be a delinquent or neglected child, as defined by the statutes of this state, the parent or parents or persons having custody of such child, or any other person, responsible for, or by any act encouraging, causing or contributing to, the delinquency or neglect of such child, shall be fined in any sum not exceeding one thousand dollars (\$1,000), or imprisoned in the county jail for a period not exceeding one (1) year, or punished by both such fine and imprisonment. The court may impose conditions upon any person found guilty under this act, and so long as such person shall comply therewith to the satisfaction of the court the sentence may be suspended: Provided, that no such sentence or execution thereof shall be stayed to exceed a period of two (2) years, and if at the expiration of the stay of such sentence or at such time prior thereto as the court may deem proper, it shall appear to the satisfaction of the court that such person has complied faithfully with the conditions of his probation, or such suspended sentence, the court may suspend such sentence absolutely, in which case such person shall be released therefrom. If, at any time during the stay of execution of any sentence, it shall be made to appear to the satisfaction of the court that the sentence ought to be enforced, the court shall have the power to revoke the stay of such sentence and execution, and enforce the same, and the term of such sentence shall commence from the date upon which the same is ordered to be enforced. [L. '09, p. 595, § 1. Cf. L. '07, p. 16, § 1.]

See *infra*, § 4394, compulsory attendance at school for deaf and blind.

See *infra*, § 4405, compulsory attendance at school for feeble-minded.

See *infra*, § 4729, parent failing to comply with compulsory school law.

CHAPTER VIII.

LIMITATION OF CRIMINAL ACTIONS AND REPEALS.

§ 2005. (6780.) Limitation on Criminal Actions Other than Murder.

Prosecutions for the offenses of murder and arson, where death ensues, may be commenced at any period after the commission of the offense; for offenses the punishment of which may be imprisonment in the penitentiary, within three years after their commission; and for all other offenses, within one year after their commission: Provided, that any length of time during which the party charged was not usually and publicly resident within this state shall not be reckoned within the one and three years respectively: And further provided, that where an indictment has been found, or an informa-

tion filed, within the time limited for the commencement of a criminal action, if the indictment or information be set aside, the time of limitation shall be computed from the setting aside of such indictment or information. [Cf. L. '54, p. 77, § 10; Cd. '81, § 779; L. '91, p. 46, § 2; 2 H. C., § 1188.]

Cited in 19 Wash. 436.

Under this section, the term "murder" includes both degrees of that offense and manslaughter: *State v. Erving*, 19 Wash. 435.

A preliminary examination before a committing magistrate constitutes the commencement of a prosecution within the meaning of this section: *Id.*

§ 2006. Repeal and Amendment of Criminal Statutes—Saving Clause Presumed.

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses, committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein. [L. '01, Ex. Ses., p. 13, § 1.]

See *infra*, § 2221, saving clause in act of 1901, Ex. Ses., p. 19.

See *infra*, § 2294, saving clause in act of 1909.

CHAPTER IX.

PARTIES TO CRIMINAL ACTIONS.

§ 2007. (6782.) Distinctions Relating to Accessory Abolished.

No distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, and all persons concerned in the commission of an offense, whether they directly counsel the act constituting the offense, or counsel, aid and abet in its commission, though not present, shall hereafter be indicted, tried, and punished as principals. [L. '54, p. 98, § 125; Cd. '81, § 956; 2 H. C., § 1189.]

See *infra*, § 2260, principal defined.

See *infra*, § 2787, accessories in arson.

Cited in 3 Wash. 178, 179; 7 Wash. 340; 12 Wash. 350; 19 Wash. 467; 20 Wash. 502; 21 Wash. 356; 48 Wash. 262.

Parties to offenses: See 1 Remington's Digest, p. 758, §§ 17-22; *State v. Webb*, 20 Wash. 500; *State v. Duncan*, 7 Wash. 336, overruled in *State v. Gifford*, 19 Wash. 464; *State v. Payne*, 6 Wash. 563;

State v. Nugent, 20 Wash. 522; *State v. Boysen*, 30 Wash. 338.

This section, in connection with the two following sections, have the effect to do away with the crime of accessory before the fact, but that of accessory after the fact remains in full force, and is specially provided for therein: *State v. Jones*, 3 Wash. 175, 179.

One charged with murder in the first degree as an accessory before the fact cannot be properly convicted of manslaughter, when the evidence shows that he was not present at the commission of the homicide, and that, if guilty at all, it was in conspiring with others to procure the murder of deceased: *State v. Robinson*, 12 Wash. 349.

Although a defendant may have entered into a conspiracy to kill, yet where the proof shows that he was also present aiding and abetting whatever was done at the

time of the homicide, a conviction of murder in the second degree will not warrant a reversal of the case: *State v. Robinson*, 12 Wash. 491; *State v. Robinson*, 12 Wash. 349, distinguished.

An information charging the commission of a crime by an accessory as though he were a principal is proper: *State v. White*, 10 Wash. 611.

Under this section, a person counseling and abetting a manslaughter may be indicted and punished as a principal: *State v. McFadden*, 48 Wash. 259.

§ 2008. (6783.) **Accessory After the Fact—Who may be.**

Every person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, to the offender, who, after the commission of any felony, shall harbor, conceal, or maintain, or assist any principal felon or accessory before the fact, or shall give the offender any other aid, knowing that he had committed a felony, or had been accessory thereto before the fact, with intent that he shall avoid or escape from detection, arrest, trial, or punishment, shall be deemed accessory after the fact, and shall, on conviction thereof, be imprisoned in the county jail not more than one year, or be fined in any sum not exceeding five hundred dollars. [L. '54, p. 98, § 126; Cd. '81, § 957; 2 H. C., § 1190.]

See notes to § 2007, distinction between accessories abolished.

See *infra*, § 2261, accessory defined, a later enactment; but see §§ 2304, 2253, and notes.

§ 2009. (6784.) **Accessory After Fact Tried Though Principal not.**

Every person who shall become an accessory after the fact to any felony may be indicted, convicted, and punished, whether the principal felon shall or shall not have been convicted previously, or shall or shall not be amenable to justice by any court having jurisdiction to try the principal felon. [Cf. L. '54, p. 98, § 127; Cd. '81, § 958; L. '91, p. 65, § 97; 2 H. C., § 1376.]

See notes to § 2007, distinction between accessories abolished.

See *infra*, § 2017, venue of actions against accessory.

See *infra*, § 2262, trial of accessories.

§ 2010. (6785.) **Who may be Tried and Punished.**

Every person, whether an inhabitant of this state, or of any other state, territory, or county, may be tried and punished under the laws of this state for an offense committed by him therein, except when such offense is cognizable exclusively in the courts of the United States. [L. '91, p. 47, § 3; 2 H. C., § 1191.]

See notes to § 2065, sufficiency of information.

See *infra*, § 2254, persons punishable.

It is no less a crime to murder a foreigner than a citizen at a place within the admiralty jurisdiction of the United States courts: *Smith v. United States*, 1 W. T. 262.

An Indian who has severed his tribal relations may be prosecuted in the courts of this state, whether the offense was committed within or without the limits of a reservation: *State v. Williams*, 13 Wash. 335.

An Indian who retains his tribal relations may be prosecuted in the courts of this state for offenses committed at a place not within the limits of an Indian reservation: *Id.*

A foreign subject accused of murder in the first degree committed within the state jurisdiction is not entitled to a removal of the prosecution to the United States court: *State v. Champoux*, 33 Wash. 339.

A territorial district court, in the exercise of its jurisdiction, under the laws of the territory, had jurisdiction to try and punish any person who committed murder on San Juan island: *Watts v. Territory*, 1 W. T. 288; same, 1 W. T. 411.

A murder, committed on San Juan island in 1869, while the same was in the joint military occupancy of Great Britain

and the United States, pursuant to a convention entered into between these powers, pending the final adjustment of the international boundary line, is not an offense committed at a place within the sole and exclusive jurisdiction of the United States, contemplated by the third section of the act of Congress of April 30, 1870: *Watts v. Territory*, 1 W. T. 288.

§ 2011. (6786.) Term "Person" Defined.

When the term "person" or other word is used to designate the party whose property is the subject of an offense, or against whom any act is done with intent to defraud or injure, the term may be construed to include the United States, this state, or any state or territory, or any public or private corporation, as well as an individual. [L. '54, p. 99, § 134; Cd. '81, § 964.]

See *supra*, § 146, and notes, term "person" defined.

See *infra*, § 2063, words and phrases, how construed.

See *infra*, § 2303, terms, defined.

CHAPTER X.

VENUE OF CRIMINAL ACTIONS.

§ 2012. (6788.) Criminal Actions, Where Commenced.

Except as otherwise specially provided by statute, all criminal actions shall be commenced and tried in the county where the offense was committed. [Cf. L. '79, p. 75, § 10; Cd. '81, § 780; L. '91, p. 47, § 4; 2 H. C., § 1192.]

See *infra*, notes to § 2055.

See *infra*, § 2164, venue may be corrected and action certified.

See *infra*, § 2274, venue, criminal sending of letter.

See *infra*, § 2422, venue, duel outside of state.

See *infra*, § 2412, venue, kidnaping.

See *infra*, §§ 2428, 2429, venue in libel.

Cited in 23 Wash. 576; 15 Wash. 17.

Jurisdiction: See 1 Remington's Digest, pp. 759, 760, §§ 23-29; *State v. Considine*, 16 Wash. 358; *State v. Cross*, 12 Wash. 673; *In re Barbee*, 19 Wash. 306; *In re Nolan*, 21 Wash. 395; *State v. Melvern*, 32 Wash. 7; *State v. Gleason*, 15 Wash. 509.

Under this section, it is not necessary, in an information charging the commission of murder in a certain county, to also

allege the place of death of the deceased, in order to give jurisdiction to the court of the county where the offense was committed: *State v. Baldwin*, 15 Wash. 15.

Where an information charges the commission of murder in a certain county, but fails to allege where the deceased died as a result of the assault upon him, the introduction of proof showing death in the county in which the assault was made is harmless error: *Id.*

§ 2013. (6789.) Jurisdiction When Offense Committed in Two or More Counties.

When a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county. [L. '54, p. 99, § 129; Cd. '81, § 959; 2 H. C., § 1193.]

Cited in 26 Wash. 654.

Place of bringing prosecution: See 1 Remington's Digest, p. 761, §§ 30-33; *Leschi v. Territory*, 1 W. T. 13; *McAllister v. Territory*, 1 W. T. 360; *State v. Hoshor*, 26 Wash. 643.

Where there was circumstantial evidence sufficient to justify the jury in finding that the deceased, who was last seen alive in Spokane county, had been killed in that county and his body thrown into a river forming the boundary line and had floated

down and lodged on the other side of the river, in Stevens county, the fact that the body was found in Stevens county would not show want of jurisdiction in the supe-

rior court of Spokane county, or that the crime had been committed in Stevens county: State v. Fillpot, 51 Wash. 223.

§ 2014. (6790.) Offenses Committed on County Boundaries.

Offenses committed on the boundary line of two counties, or within one hundred rods of the dividing line between them, may be alleged in the indictment or information to have been committed in either of them, and may be prosecuted and punished in either county. [Cf. L. '54, p. 99, § 130; Cd. '81, § 960; L. '91, p. 47, § 5; 2 H. C., § 1194.]

§ 2015. (6791.) Venue of Stolen Property Taken into Another County.

When property taken in one county by burglary, robbery, larceny, or embezzlement has been brought into another county, the jurisdiction is in either county. [L. '54, p. 99, § 131; Cd. '81, § 961; 2 H. C., § 1195.]

See Const., Art. I, § 22, right of accused to trial by jury of county where the offense is alleged to have been committed.

Cited in 14 Wash. 553.

The stealing of neat cattle may be prosecuted either in the county where the prop-

erty was first taken or in the county into which it was brought by the thief, under this section: State v. Kyle, 14 Wash. 550.

§ 2016. (6792.) Jurisdiction of Homicide in Either County, When.

If any mortal wound is given or poison administered in one county, and death, by means thereof, ensue in another, the jurisdiction is in either. [L. '54, p. 99, § 132; Cd. '81, § 962; 2 H. C., § 1196.]

See notes to § 2015.

§ 2017. (6793.) Venue of Action Against Accessory After the Fact.

An accessory after the fact to a felony may be tried either in the county in which he shall have become an accessory, or in the county in which the felony shall have been committed. [Cf. Cd. '81, § 958; L. '91, p. 47, § 6; 2 H. C., § 1197.]

See supra, § 1940, trial of accessory.

See infra, § 2262, venue and trial of accessories.

§ 2018. (6794.) Change of Venue, Proceedings to Obtain.

The defendant may show to the court, by affidavit, that he believes he cannot receive a fair trial in the county where the action is pending, owing to the prejudice of the judge, or to excitement or prejudice against the defendant in the county, or some part thereof, and may thereupon demand to be tried in another county. The application shall not be granted on the ground of excitement or prejudice other than prejudice of the judge, unless the affidavit of the defendant be supported by other evidence; nor in any case unless the judge is satisfied the ground upon which the application is made does exist. [L. '54, p. 117, § 98; Cd. '81, § 1072; 2 H. C., § 1198.]

See notes to § 209, supra.

Cited in 23 Wash. 291; 40 Wash. 609.

Change of venue: See 1 Remington's Digest, pp. 761, 762, §§ 34-39; State v. Straub, 16 Wash. 111; State v. Champoux, 33 Wash. 339; State v. Hillman, 42 Wash. 615; State v. Hawkins, 23 Wash. 289; State v. Storemier, 4 Wash. 608; State v. Lyts, 25 Wash. 347.

The allowance or refusal of a motion to change the venue in a criminal case is

largely discretionary in the trial court: McAllister v. Territory, 1 W. T. 360. Such motion is addressed to a sound judicial discretion, to be disposed of in furtherance of substantial justice, and an order refusing a change will not be reviewed on appeal, except in cases of gross abuse of discretion: Id.

§ 2019. (6795.) Discretion of Court—Duty of Clerk.

When the affidavit is founded on prejudice of the judge, the court may, in its discretion, grant a change of venue to some other county, or may continue the cause until such time as it can be tried by another judge in the same county; if the affidavit is founded upon excitement or prejudice in the county against the defendant, the court may, in its discretion, grant a change of venue to the most convenient county. The clerk must, upon the granting of a change of the place of trial, make a transcript of the proceedings and order of court, and, having sealed up the same with the original papers, deliver them to the sheriff, who must without delay, deposit them in the clerk's office of the proper county, and make his return accordingly. [Cf. L. '54, p. 117, § 99; Cd. '81, § 1073; L. '91, p. 47, § 8; 2 H. C., § 1199.]

See notes and references to preceding section.

Cited in 23 Wash. 291.

Under this section, vesting the matter of a change of venue in a criminal case entirely in the discretion of the trial

court, the supreme court will not reverse a conviction, unless the discretion has been most clearly abused: *Edwards v. State*, 2 Wash. 291.

§ 2020. (6796.) Change upon Consent of Parties.

The court may, at its discretion, at any time, order a change of venue or place of trial to any county in the state, upon the written consent or agreement of the prosecuting attorney and the defendant. [L. '73, p. 235, § 237; Cd. '81, § 1075; 2 H. C., § 1200.]

§ 2021. (6797.) Recognizance of Defendant and Witnesses on Change.

When a change of venue is ordered, if the offense be bailable, the court shall recognize the defendant, and in all cases the witnesses, to appear at the court to which the change of venue was granted. [Cf. L. '54, p. 117, § 100; Cd. '81, § 1076; L. '91, p. 48, § 9; 2 H. C., § 1201.]

CHAPTER XI.

FORMS OF CRIMINAL ACTIONS.

§ 2022. (6800.) Pleadings—Forms Abolished.

All the forms of pleading in criminal actions heretofore existing are abolished; and hereafter, the forms of pleading, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed herein. [L. '69, p. 240, § 180; Cd. '81, § 1002; 2 H. C., § 1202.]

Cited in 4 Wash. 106; 9 Wash. 97; 11 Wash. 119; 23 Wash. 549, 576; 44 Wash. 208.

The ancient formalities and technicalities of the common law are abolished: *State v. Day*, 4 Wash. 104, 106; *State v. Wright*, 9 Wash. 96, 97; *State v. Blanchard*, 11 Wash. 116, 119; *State v. Fillpot*, 51 Wash. 226.

In construing an indictment, forms of expression are not to be utterly disregarded, and things are not to be understood as intended to be expressed, for which there appears no adequate or sensible form of expression: *Leonard v. Territory*, 2 W. T. 381, 393.

§ 2023. (6801.) The Charge must be by Information or Indictment.

No person shall be held to answer in any court for an alleged crime or offense, unless upon information filed by the prosecuting attorney, or upon an indictment by a grand jury, except in cases of misdemeanor before a justice of the peace, or before a court-martial. [Cf. Cd. '81, § 764; L. '91, p. 48, § 10; 2 H. C., § 1203.]

Jurisdiction of justices and other officers: See 1 Remington's Digest, p. 760, § 25; State v. Gleason, 15 Wash. 509; State v. Schomber, 23 Wash. 573; State v. Davis, 43 Wash. 116. It is not neces-

sary for the state to avoid by reply any defense set up in a criminal case, as the only pleadings provided by statute on the part of the state are the information or indictment: State v. Lewis, 31 Wash. 515.

§ 2024. (6802.*) All Prosecutions may be by Information.

All public offenses may be prosecuted in the superior courts by information. [L. '09, p. 186, § 1. Cf. L. '90, p. 100, § 1; L. '91, p. 214, § 1; 2 H. C., § 1204.]

See notes to Const., Art. I, § 25.

See *infra*, § 2050, manner of bringing information.

See *infra*, § 2053, duty of prosecuting attorney.

Cited in 1 Wash. 380; 3 Wash. 174; 13 Wash. 337; 20 Wash. 245; 30 Wash. 139; 32 Wash. 10; 50 Wash. 322.

Filing and formal requisites of information under former laws amended by this section: See 2 Remington's Digest, p. 1467, §§ 13-25; State v. Melvern, 32 Wash. 7; State v. McGilvery, 20 Wash. 240; State v. De Paoli, 24 Wash. 71; State v. Anderson, 5 Wash. 350; State v. Rose-ner, 8 Wash. 429; State v. Munson, 7 Wash. 239; State v. Boyce, 24 Wash. 514; State v. Lewis, 31 Wash. 515; State v. Strange, 50 Wash. 321.

PROSECUTION BY INFORMATION.—The provisions of the law authorizing prosecution of offenses by information are not void, as depriving defendant of his liberty without "due process of law": In re Humason (Wash.), 46 Fed. 388.

Infamous crimes may be prosecuted in this state by information, as the constitution of the United States does not assume to regulate prosecutions under our state laws: State v. Nordstrom, 7 Wash. 506; Lybarger v. State, 2 Wash. 552; see State v. Baldwin, 15 Wash. 15, 18; and a preliminary examination on a charge before one justice of the peace, after the dismissal of a charge before another justice without an examination, is sufficient to found an information upon: State v. Nordstrom, *supra*.

Where an information is set aside it is proper to permit a new information to be

filed without a preliminary examination: State v. Williams, 13 Wash. 335, 337.

Our Constitution, Article I, § 25, unlike that of California and some other states, does not make a preliminary examination necessary: State v. Williams, *supra*; but see State v. Anderson, 5 Wash. 350.

No affidavit is required as a basis for an information when the information itself recites sufficient facts to bring the case within the provisions of § 1, subdivision 4, Laws of 1890, page 100: Hammond v. State, 3 Wash. 171.

Felonies can only be tried in the superior court and upon indictment or information, and if any act conferred jurisdiction thereof on municipal courts, it would be unconstitutional: In re Barbee, 19 Wash. 306.

Where an information is lost, the substitution of a new information at the trial, which is given a new case number, is not an institution of a new prosecution: State v. McFadden, 42 Wash. 1.

After a mistrial in a criminal case, the court may permit the prosecution to file a new information: State v. Williams, 43 Wash. 505.

Entry of a plea of not guilty waives the right to object to an information on the ground that it was filed while a grand jury was in session: State v. Strange, 50 Wash. 321.

CHAPTER XII.

INDICTMENTS AND PROCEEDINGS BY INFORMATION.

§ 2025. (6805.) Challenge to Panel of Grand Jurors.

Challenges to the panel of grand jurors shall be allowed to any person in custody or held to answer for an offense, when the clerk has not drawn from the jury box the requisite number of ballots to constitute a grand jury, or when the drawing was not done in the presence of the proper officers; and such challenges shall be in writing and verified by affidavit, and proved to the satisfaction of the court. [Cf. L. '54, p. 110, § 45; Cd. '81, § 977; L. '91, p. 48, § 11; 2 H. C., § 1205.]

See *supra*, § 91, grand jury, defined.

See *supra*, §§ 90-111, drawing jurors, etc.

See *supra*, § 104, grand jury, how drawn.

Grand jury: See 1 Remington's Digest, pp. 1325, 1326, §§ 1-8.

It is a mere irregularity, not prejudicial to the rights of the defendant, for the court to order a venire for additional jurors before the regular panel is ex-

hausted, especially when the record shows that none of the existing jurors or talesmen were drawn as trial jurors, until the regular panel is entirely exhausted: *Blanton v. State*, 1 Wash. 265.

§ 2026. (6806.) Challenge to Individual Grand Juror.

Challenges to individual grand jurors may be made by such person for reason of want of qualification to sit as such juror, and, when, in the opinion of the court, a state of mind exists in the juror, such as would render him unable to act impartially and without prejudice. [L. '54, p. 110, § 46; Cd. '81, § 978; 2 H. C., § 1206.]

See supra, § 94 et seq., qualifications of jurors.

See supra, § 97, effect of disqualification of member.

See infra, § 2373, grand juror acting after challenge allowed.

If objection be not taken to a juror at the time of impaneling the jury, the same is waived: *Clarke v. Territory*, 1 W. T. 68; *Blanton v. State*, 1 W. T. 265.

jury, the defendant has no right to raise the objection by motion to quash the indictment, if he is substantially in the position of one contemplated by § 2029: *Id.*

After waiving his right to object to the

§ 2027. (6807.) Venire When Panel Discharged.

If a challenge to the panel be allowed, the panel shall be discharged, and the court may order the sheriff to summon from the bystanders and the body of the county a sufficient number of persons to act as grand jurors. [Cf. L. '54, p. 110, § 47; Cd. '81, § 979; L. '91, p. 48, § 12; 2 H. C., § 1207.]

See supra, § 107, when venire set aside.

See infra, § 2041, resummoning from county and from bystanders.

Court should terminate proceedings at any stage of the case when it is discovered that the impaneling of the grand jurors was null and void: *Yelm Jim v. Territory*, 1 W. T. 63; *Clarke v. Territory*, 1 W. T. 68.

Order of court to summon from bystanders to fill the panel is good, if the qualifications of those selected are such as the law requires: *Yelm Jim v. Territory*, supra; *Clarke v. Territory*, supra. Temporary absence from the state does not disqualify one from acting as a juror: *Id.*

§ 2028. (6808.) Discharge of Juror—Panel to be Filled.

If a challenge to an individual juror be allowed, he shall be discharged, and the panel filled. [L. '54, p. 110, § 48; Cd. '81, § 980; 2 H. C., § 1208.]

See supra, § 110, venire to fill vacancies and open venire.

§ 2029. (6809.) Oath of Grand Jury—Form.

The following oath shall be administered to the grand jury:—

“You, as grand jurors for the body of the county of —, do solemnly swear (or affirm) that you will diligently inquire into and true presentment make of all such matters and things as shall come to your knowledge, according to your charge; the counsel of the state, your own counsel, and that of your fellows. you shall keep secret; you shall present no person through envy, hatred, or malice; neither will you leave any person unrepresented through fear, favor, affection, or reward, or the hope thereof; but that you will present things truly as they come to your knowledge, according to the best of your understanding, and according to the laws of this state. So help you God.” [Cf. L. '54, p. 110, § 49; Cd. '81, § 981; L. '91, p. 48, § 13; 2 H. C., § 1209.]

§ 2030. (6810.) Foreman—Powers of—Clerk of Grand Jury.

A foreman of the grand jury shall be appointed by the court, who may remove him and appoint another at any time, and such foreman shall have

power to administer all oaths and affirmations to witnesses who shall appear before such grand jury, and the jury may appoint one of their number as clerk to keep a minute of their proceedings. [L. '54, p. 110, § 50; Cd. '81, § 982; 2 H. C., § 1210.]

Cited in 39 Wash. 695.

The county commissioners have no power to employ a stenographer for the grand jury, as under this section no per-

son other than one of their number can be chosen: *Mather v. King County*, 39 Wash. 693.

§ 2031. (6811.) Grand Jury Charged by Court—Advice to.

The grand jury shall be charged by the court as to the nature of their duties, and may at any reasonable time ask the advice of the court as to any legal questions upon which they may desire information. [L. '54, p. 110, § 51; Cd. '81, § 983; 2 H. C., § 1211.]

§ 2032. (6812.) Prosecuting Attorney to Attend, etc.

The prosecuting attorney shall attend on the grand jury for the purpose of examining witnesses and giving them such advice as they may ask. [Cf. L. '54, p. 110, § 52; Cd. '81, § 984; L. '91, p. 49, § 14; 2 H. C., § 1212.]

See *infra*, § 3967, prosecuting attorney to attend, duties, etc.

Cited in 21 Wash. 61; 39 Wash. 695; 52 Wash. 490.

review or order prohibiting the taking of notes: *State ex rel. Pugh v. Superior Court*, 52 Wash. 484.

Right of prosecuting attorney to secure

§ 2033. (6813.) Duties of Grand Jury.

The grand jury shall inquire into the cases of parties in custody or under bail, charged with commission of offenses against the laws of this state, and duly returned by a committing magistrate, or upon a complaint sworn to before an officer authorized to administer oaths and presented by the prosecuting attorney, or under the instructions of the court. [Cf. L. '54, p. 111, § 53; L. '65, p. 19, § 1; Cd. '81, § 985; L. '91, p. 49, § 15; 2 H. C., § 1213.]

This section is inapplicable in cases where one is in custody under an informa-

tion filed by the prosecuting attorney: *State v. Cronney*, 31 Wash. 122.

§ 2034. (6814.) Jurors to Communicate Personal Knowledge of Offenses.

If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow-jurors, who may thereupon investigate the same, if a majority so order. [Cd. '81, § 986; 2 H. C., § 1214.]

§ 2035. (6815.) Complainant not to be Present, When.

No complainant who may institute a prosecution shall be competent to be present at the deliberations of a grand jury, or vote for the finding of an indictment. [L. '65, p. 19, § 1; Cd. '81, § 987; 2 H. C., § 1215.]

§ 2036. (6816.) Malicious and Frivolous Prosecution—Costs.

Where a grand jury ignore a bill of indictment, they shall also find whether the prosecution is malicious and frivolous, and find whether the complainant or county shall pay the costs, which shall be returned with their proceedings into open court. [L. '65, p. 20, § 2; Cd. '81, § 988; 2 H. C., § 1216.]

§ 2037. (6817.) Inquiry into Persons in Prison, etc.

The grand jury shall especially inquire as to the offense of any person confined in prison on a criminal charge; into the condition and mismanagement of the public prisons in the county; into the willful misconduct in office of public officers; and shall in their discretion examine the public records of the county. [L. '54, p. 111, § 53; Cd. '81, § 989; 2 H. C., § 1217.]

The first clause of this section is covered by § 2033, *supra*, which is a later enactment.

§ 2038. (6818.) Duty to Hear Evidence.

The grand jury are not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may cause process to issue for the witnesses. [L. '54, p. 111, § 54; Cd. '81, § 990; 2 H. C., § 1218.]

§ 2039. (6819.) Fact of Indictment Found not to be Disclosed, When.

No grand jury shall disclose the fact that an indictment for a felony has been found against any person not in custody or under recognizance until such person has been arrested. [L. '54, p. 111, § 56; Cd. '81, § 991; 2 H. C., § 1219.]

See *infra*, § 2046, secrecy of indictment.

See *infra*, § 2378, penalty for violating secrecy.

§ 2040. (6820.) Secrecy of Proceedings, Charge as to.

No grand juror shall be allowed to state or to testify in any court in what manner he or any member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question, or what question was before them; and in charging the grand jury the court shall remind them of the provisions of this and the preceding sections. [L. '54, p. 111, § 57; Cd. '81, § 992; 2 H. C., § 1220.]

Cited in 8 Wash. 464.

§ 2041. (6821.) Grand Jury may be Resummoned, When.

Whenever the grand jury shall have been dismissed, they may be summoned to attend again, if necessary; and if a full jury do not attend, the number may be completed from the by-standers. [L. '54, p. 111, § 58; Cd. '81, § 993; 2 H. C., § 1221.]

See note to § 2027, *supra*.

CHAPTER XIII.

FINDINGS AND PRESENTMENT OF INDICTMENTS.

§ 2042. (6824.) Twelve Jurors must Concur—Indorsement.

An indictment cannot be found without the concurrence of at least twelve grand jurors, and when so found, it must be indorsed "a true bill," and such indorsement, signed by the foreman of the jury. [Cf. L. '54, p. 111, §§ 55, 59; L. '69, p. 238, § 173; Cd. '81, § 994; 2 H. C., § 1223.]

Where the grand jury come into open court and present a bill duly indorsed and signed by their foreman, it is evidence of the most satisfactory kind that twelve of their number concurred in finding the bill Watts v. Territory, 1 W. T. 409.

§ 2043. (6825.) Names of Witnesses Indorsed, Defendant Entitled to Copy.

When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court, and the clerk of the court must, within one day after demand made, furnish the defendant, or his counsel, a copy thereof without charge, or permit the defendant's counsel, or the clerk of such counsel, to take a copy. [Cf. L. '54, p. 111, § 59; L. '69, p. 239, § 174; Cd. '81, § 995; 2 H. C., § 1223.]

See *infra*, § 2050, and notes.

Cited in 8 Wash. 233. the accused is given the complaint and told to make a copy of it if he chooses: State v. White, 8 Wash. 230.
The mandate of the Constitution, Article I, § 22, is sufficiently complied with when

§ 2044. (6826.) Indictment at Instance of Private Prosecutor—Costs.

When an indictment is found at the instance of a private prosecutor, the following must be added to the indorsement required by the preceding section: "Found at the instance of" (here state the name of the person); and in such case, if the prosecution fails, the court trying the cause may award costs against the private prosecutor, if satisfied, from all circumstances, that the prosecution was malicious or without probable cause. [Cd. '81, § 996; 2 H. C., § 1224.]

See *infra*, § 2226, costs against complainant on frivolous or malicious accusation.

This section was intended to cover all criminal cases triable by jury, but the jury has no authority, on acquitting the defendant, to find that the complaint was malicious or without probable cause; and the judgment on such verdict, that complaining witness pay costs of trial and stand committed until costs are paid is void: *In re Permstick*, 3 Wash. 672.

Two prominent elements of this section are: (1) that the court, upon failure of prosecution, is to be satisfied from all the circumstances that the action of the complainant was malicious or without probable cause; (2) that the imprisonment until costs are paid is not a part of the judgment there permitted: *Id.*

§ 2045. (6827.) Custody and Inspection of.

An indictment, when found by the grand jury, must be presented by their foreman, in their presence, to the court and filed by the clerk, and remain in his office as a public record; but if the defendant has not been held to answer the charge, neither the indictment, nor any order or process in relation thereto, must be inspected by any person other than the judge of the court, or an officer thereof, in the discharge of a duty concerning the same, until after the arrest of the defendant. [L. '69, p. 239, § 175; Cd. '81, § 997; 2 H. C., § 1225.]

§ 2046. (6828.) Secrecy as to Indictment.

No grand juror or officer of the court must disclose any fact concerning such indictment while it is not subject to public inspection; and a violation of this section or the foregoing section is punishable as a contempt. [L. '69, p. 239, § 176; Cd. '81, § 998; 2 H. C., § 1226.]

See *supra*, § 2039, grand jury not to disclose.

See *infra*, § 2378, penalty for violating secrecy.

§ 2047. (6829.) Indictment Found "Not a True Bill," Filing, etc.

When a person has been held to answer a criminal charge, and the indictment in relation thereto is not found a "true bill," it must be indorsed "not

a true bill," which indorsement must be signed by the foreman, and presented to the court and filed with the clerk, and remain a public record; but in the case of an indictment not found "a true bill," against a person not so held, the same, together with the minutes of the evidence in relation thereto, must be destroyed by the grand jury. [L. '69, p. 239, § 177; Cd. '81, § 999; 2 H. C., § 1227.]

§ 2048. (6830.) Effect of Finding "Not a True Bill."

When an indictment indorsed "not a true bill" has been presented in court and filed, the effect thereof is to dismiss the charge; and the same cannot be again submitted to or inquired of by the grand jury, or made the cause of an information, unless the court so order. [Cf. L. '69, p. 239, § 178; Cd. '81, § 1000; L. '91, p. 49, § 16; 2 H. C., § 1228.]

This section is not intended to confer any right upon the defendant, but simply to expedite the business of the court, subject to its discretion: *Lybarger v. State*, 2 Wash. 552, 560.

§ 2049. (6831.) Presentment, Defined.

A presentment is an informal statement of facts, for the purpose of obtaining the advice of the court as to the law thereon. It is made by the foreman, in the presence of the grand jury, and with the concurrence of twelve of their number. A presentment is not to be filed in court, or preserved beyond the sitting of the grand jury. [Cf. L. '69, p. 239, § 179; Cd. '81, § 1001; L. '91, p. 49, § 17; 2 H. C., § 1229.]

§ 2050. (6832.) Information, Filing, Indorsement, etc.

All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same, and at such time before the trial of any case as the court may, by rule or otherwise, prescribe he shall indorse thereon the names of such other witnesses as shall then be known to him; and said court shall possess and may exercise the same powers and jurisdiction to hear, try, and determine all such prosecutions upon information, to issue writs and process, and do all other acts therein, as it possesses and may exercise in cases of like prosecutions upon indictments. [L. '90, p. 101, § 2; 2 H. C., § 1230.]

See supra, § 2024, offenses which may be prosecuted by information.

Cited in 3 Wash. 173; 7 Wash. 309; 7 Wash. 465; 7 Wash. 509; 14 Wash. 411; 30 Wash. 139; 33 Wash. 326, 327.

The following (§ 4, Laws of 1890, p. 101) is here given because believed to be partly, at least, in force:

"§ 4. That the provisions of the criminal code of the late territory now in force in this state in relation to prosecutions, crimes and misdemeanors or indictments, and all other provisions of law applying to prosecutions upon indictments, to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments, or the execution of any sentence, and to all other proceedings in cases of indictment, whether in the court of original or appellate

jurisdiction, shall in the same manner and to the same extent, as near as may be, apply to information and all prosecutions and proceedings thereon."

INFORMATION, SUBSCRIPTION.—An information is sufficiently subscribed when the deputy prosecuting attorney subscribes his principal's name thereto: *Hammond v. State*, 3 Wash. 171; *State v. Riddell*, 35 Wash. 324.

COPY OF.—A defendant is not entitled to another copy of the information, upon the indorsement of additional witnesses thereon, but notice of the addition of new names is sufficient: *State v. Nordstrom*, 7 Wash. 506.

A motion requiring the state to furnish a bill of particulars will not be sustained

where the information presents a clear statement of facts sufficient to advise the defendant of the particulars of the crime charged: *State v. Lewis*, 31 Wash. 515; *State v. Lewis*, 31 Wash. 75.

Indorsement of witnesses: See 1 Remington's Digest, pp. 796, 797, §§ 197-200; *State v. Phelps*, 22 Wash. 181; *State v. Champoux*, 33 Wash. 339; *State v. Sexton*, 37 Wash. 110; *State v. Van Waters*, 36 Wash. 358; *State v. Hunter*, 18 Wash. 670.

In the absence of a rule of court, the prosecuting attorney may, under this section, indorse upon the information during the impaneling of a jury the names of additional witnesses, as the trial does not commence until the jury has been accepted and sworn: *State v. Lee Doon*, 7 Wash. 308.

The indorsement of additional witnesses upon an information shortly before trial is a matter within the discretion of the court, and does not constitute error unless there is abuse of such discretion: *State v. Holmes*, 12 Wash. 170.

If defendant proceeds to trial without objection that the names of certain witnesses for the state had not been indorsed upon the information, the presumption is that he considers himself ready for trial and was not injured with want of notice: *State v. John Port Townsend*, 7 Wash. 462.

The misspelling of the names of witnesses for the state as indorsed upon the indictment does not require the exclusion

of their testimony, where they testified at the preliminary examination and were called and sworn in open court before the commencement of the trial, as the only object of the statute requiring the indorsement of the names of the state's witnesses upon the indictment is to guard against surprise: *State v. Everett*, 14 Wash. 574.

The technical omission to indorse names of witnesses on an information is not ground for reversal, where they were written in the body of the information: *State v. McGonigle*, 14 Wash. 594.

The indorsement of the name of an additional witness upon the information after the beginning of the trial only entitles the defense to a continuance, and is not ground of error when a continuance for that reason is not applied for: *State v. Holedger*, 15 Wash. 443.

If it does not appear that the defendant in a criminal prosecution was prejudiced by the fact that the names of witnesses offered in rebuttal by the state were not indorsed upon the information, and no continuance was asked for on that ground, the error will be held harmless: *State v. Regan*, 8 Wash. 506; citing *State v. John Port Townsend*, supra.

The court may permit the indorsement of names of additional witnesses on the information, during the course of the trial, in furtherance of justice, which action, in case of surprise, would entitle defendant to a reasonable continuance for the purpose of meeting the unexpected evidence: *State v. Bokien*, 14 Wash. 403.

§ 2051. (6833.) Verification of Information.

All informations shall be verified by the oath of the prosecuting attorney, complainant, or some other person. [L. '91, p. 49, § 18; 2 H. C., § 1231.]

Cited in 3 Wash. 174; 6 Wash. 643; 20 Wash. 514.

Verification: See 2 Remington's Digest, p. 1468, §§ 23-25.

When the information is amended it should be reverified: *State v. Van Cleve*, 5 Wash. 642, 643.

The verification of the information by the deputy prosecuting attorney is sufficient under this section, and the fact that in the body of the affidavit he is described as prosecuting attorney, instead of deputy, is immaterial: *Hammond v. State*, 3 Wash. 171; and if defendant goes to trial without objection to the irregularity, or in-

sufficiency of the verification, the objection is waived: *Id.*

If the verification to an information is made by the prosecuting attorney, before the deputy county clerk, it is proper that the jurat should be signed by such officer in his own name; and he need not sign his principal by himself as deputy: *State v. Devine*, 6 Wash. 587; *State v. Rosener*, 8 Wash. 42; *State v. White*, 12 Wash. 417, 419.

A verification to the effect that the information is true, as affiant "verily believes," is sufficient: *State v. Cronin*, 20 Wash. 512.

§ 2052. (6834.) Commitment or Recognizance of Defendant Held to Answer.

Any person who may according to law be committed to jail, or become recognized, or held to bail with sureties for his appearance in court to answer to any indictment, may in like manner so be committed to jail, or become recognized and held to bail for his appearance to answer to any information or indictment, as the case may be. [L. '90, p. 101, § 5; 2, H. C., § 1587.]

See supra, § 1957, recognizance, when and how taken.

§ 2053. (6835.) Duty of Prosecuting Attorney Relating to Preliminary Examinations.

It shall be the duty of the prosecuting attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination, as provided by law, touching the commission of any offense, wherein the offender shall be committed to jail, or become recognized or held to bail; and if the prosecuting attorney shall determine, in any such case, that an information ought not to be filed, he shall make, subscribe, and file with the clerk of the court a statement in writing containing his reasons, in fact and in law, for not filing an information in such case, and such statement shall be filed at and during the session of court at which the offender shall be held for his appearance: Provided, that in such case, such court may examine such statement, together with the evidence filed in the case, and if, upon such examination, the court shall not be satisfied with such statement, the prosecuting attorney shall be directed by the court to file the proper information, and bring the case to trial. [L. '90, p. 102, § 6; 2 H. C., § 1232.]

See supra, § 1949 et seq., examination before magistrate.

See supra, § 2024, offenses which may be prosecuted by information.

See supra, § 2050, information, filing, etc.

Cited in 43 Wash. 20.

CHAPTER XIV.

REQUISITES OF INDICTMENTS AND INFORMATIONS.

§ 2054. (6839.) First Pleading.

The first pleading on the part of the state is the indictment or information. [Cf. L. '69, p. 240, § 181; Cd. '81, § 1003; L. '90, p. 49, § 19; 2 H. C., § 1233.]

Cited in 23 Wash. 549.

§ 2055. (6840.) Contents of Indictment or Information.

The indictment or information must contain,—

1. The title of the action, specifying the name of the court to which the indictment or information is presented, and the names of the parties;

2. A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. [Cf. L. '69, p. 240, § 182; Cd. '81, § 1004; L. '91, p. 49, § 20; 2 H. C., § 1234.]

See notes to §§ 2012, 2013, 2015, offense occurring partly in one and partly in another county.

See infra, § 2057, particulars in which information must be direct and certain.

See infra, § 2058, true name may be inserted, when.

See infra, § 2064, words of the statute need not be strictly followed.

See infra, § 2065, requisites of information, etc., and notes.

See infra, § 2096, defendant required to declare his true name.

Cited in 9 Wash. 10, 97; 11 Wash. 418; 12 Wash. 353; 15 Wash. 7; 20 Wash. 249; 23 Wash. 549; 34 Wash. 600; 38 Wash. 272; 43 Wash. 121; 48 Wash. 263.

An information sufficiently shows that the prosecution is in the name of the state when the caption of the information entitles the case as the "State of Washington against" the defendants, naming them: *State v. Devine*, 6 Wash. 587.

An indictment, under our statutes, is a plain statement in ordinary and concise language of a fact or state of facts: *State v. Womack*, 4 Wash. 19, 23.

The venue of a crime is sufficiently set forth as being in King county, charging the same as having been committed in the city of Seattle; the court taking judicial notice of the fact that such city is in that

county: Schilling v. Territory, 2 W. T. 283; State v. Fetterly, 33 Wash. 599.

Where an information charges the defendant with carrying on the business of barbering on Sunday on a day named, which in fact was Sunday, the court will take judicial notice of the day: State v. Bergfeldt, 41 Wash. 234.

Under this section an information describing property alleged to have been stolen as "two certain mares," of the value of \$200, the property of F., is sufficiently certain and specific: State v. Shuck, 38 Wash. 270.

§ 2056. (6841.) Form of Indictment.

The indictment may be substantially in the following form:—

| | | |
|--|---|---|
| The State of Washington, v. A—— B——. | } | Superior Court of the State of Washington. for the County of ——. |
|--|---|---|

A B is accused by the grand jury of the ——, by this indictment, of the crime of (here insert the name of the crime, if it have one, such as treason, murder, arson, manslaughter, or the like; or if it be a crime having no general name, such as libel, assault and battery, and the like, insert a brief description of it as given by law), committed as follows:—

The said A B, on the —— day of ——, 18——, in the county of ——, aforesaid (here set forth the act charged as a crime).

Dated at ——, in the county aforesaid, the —— day of ——, A. D., 18——.
(Signed) C D, Prosecuting Attorney.

(Indorsed) A true bill.

(Signed) E F, Foreman of the Grand Jury.

[Cf. L. '69, p. 240, § 183; Cd. '81, § 1005; L. '91, p. 50, § 21; 2 H. C., § 1235.]

Cited in 9 Wash. 98.

Form of indictment suitable for use by grand jurors and prosecuting attorneys: Leonard v. Territory, 2 W. T. 381, 400;

Timmerman v. Territory, 3 W. T. 445; Frederick v. Territory, 2 Wash. 358; State v. Day, 4 Wash. 104, 105.

§ 2057. (6842.) Indictment or Information must be Direct and Certain.

The indictment or information must be direct and certain, as it regards:—

1. The party charged;
2. The crime charged; and

3. The particular circumstances of the crime charged, when they are necessary to constitute a complete crime. [Cf. L. '54, p. 112, § 61; L. '69, p. 241, § 184; Cd. '81, § 1006; L. '91, p. 50, § 22; 2 H. C., § 1236.]

See supra, § 2055, contents of indictment, etc., and notes.

See infra, § 2065, requisites of indictment, etc., and notes.

Cited in 4 Wash. 107; 15 Wash. 444; 21 Wash. 356; 22 Wash. 5; 27 Wash. 461; 27 Wash. 464; 34 Wash. 600.

If the information is direct and certain as to the crime charged, the party charged,

and the facts constituting the crime, that is all that is required under this section: State v. Day, 4 Wash. 107; State v. Roberts, 22 Wash. 1.

§ 2058. (6843.) True Name Inserted, When.

When a defendant is designated in the indictment or information by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being indicted or informed against by the name

mentioned in the indictment or information. [Cf. L. '69, p. 241, § 185; Cd. '81, § 1007; L. '91, p. 50, § 23; 2 H. C., § 1237.]

See supra, § 2055, notes, contents of indictment, etc.

See infra, § 2065, notes, requisites of indictment, etc.

See infra, § 2096, true name ascertained on arraignment.

§ 2059. (6844.) One Crime to be Charged and in One Form Only.

The indictment or information must charge but one crime, and in one form only, except that where the crime may be committed by use of different means, the indictment or information may allege the means in the alternative. [Cf. L. '69, p. 241, § 186; Cd. '81, § 1008; L. '91, p. 50, § 24; 2 H. C., § 1238.]

Cited in 7 Wash. 463; 15 Wash. 444; 20 Wash. 164; 27 Wash. 464; 32 Wash. 302; 42 Wash. 674; 51 Wash. 226.

Duplicity: See 2 Remington's Digest, pp. 1480, 1481, §§ 73-77; State v. Butts, 42 Wash. 455; State v. Bliss, 27 Wash. 463; State v. McCormick, 20 Wash. 94; State v. Nelson, 39 Wash. 221; State v. Klein, 38 Wash. 475; State v. Michel, 20 Wash. 162; State v. Snider, 32 Wash. 299; State v. Dix, 33 Wash. 405; State v. Ilomaki, 40 Wash. 629; State v. Holedger, 15 Wash. 443; State v. Newton, 29 Wash. 373; State v. Elswood, 15 Wash. 453; State v. Priest, 32 Wash. 74; State v. Adams, 41 Wash. 552; State v. Williams, 43 Wash. 505; State v. Lewis, 31 Wash. 75; State v. Osborne, 39 Wash. 548.

An indictment which charges the stealing, at time and place, a horse as property of one Mary, and another horse the property of —, charges but one offense—a single transaction. But if the transaction were double, objection on this ground, if not made until after verdict, comes too late: Territory v. Heywood, 2 W. T. 180; State v. Rogan, 18 Wash. 43; State v. Anderson, 30 Wash. 14.

Under this section an information charging an assault with a deadly weapon is not bad for duplicity on the ground that it alleges that the assault was made "without considerable provocation, and with a willful, malignant and abandoned heart": State v. John Port Townsend, 7 Wash. 462.

§ 2060. (6845.) Statement as to Time When Offense Committed.

The precise time at which the crime was committed need not be stated in the indictment or information; but it may be alleged to have been committed at any time before the finding of the indictment or the filing of the information, and within the time in which an action may be commenced therefor, except where the time is a material ingredient in the crime. [Cf. L. '69, p. 241, § 187; Cd. '81, § 1009; L. '91, p. 51, § 25; 2 H. C., § 1239.]

Cited in 13 Wash. 338; 30 Wash. 16; 35 Wash. 154; 39 Wash. 551.

An information charging a murder "on or about" a certain date is sufficient, under this section: State v. Williams, 13 Wash. 335.

Time of offense: See 2 Remington's Digest, p. 1472, §§ 40-43; Id., p. 1484, § 95;

State v. Gottfreedson, 24 Wash. 398; State v. Anderson, 30 Wash. 14; State v. Osborne, 39 Wash. 548; State v. Champoux, 33 Wash. 339; State v. Schaffer, 31 Wash. 305; State v. Smith, 19 Wash. 376; State v. Hoshor, 26 Wash. 613; State v. Bergfeldt, 41 Wash. 234; State v. Nelson, 39 Wash. 221.

§ 2061. (6846.) Statement as to Person Injured or Intended to be.

When the crime involves the commission of or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material. [L. '69, p. 241, § 188; Cd. '81, § 1010; 2 H. C., § 1240.]

Cited in 35 Wash. 154.

It is not necessary in charging one with the crime of employing a female in a place where intoxicating liquors are sold to allege in the information the name of the female so employed: State v. Considine, 16 Wash. 358.

An information charging a bank officer with receiving a deposit after the insolvency of the bank should allege the name of the depositor in order to identify the act of such deposit with certainty, and a failure to do so does not identify the act under this section: State v. Oleson, 35 Wash. 149.

§ 2062. (6847.) Animal, What Description of Sufficient.

When the crime involves the taking of or injury to an animal, the indictment or information is sufficiently certain in that respect if it describes the animal by the common name of its class. [Cf. L. '69, p. 241, § 189; Cd. '81, § 1011; L. '91, p. 51, § 26; 2 H. C., § 1241.]

As to sufficiency of description of animals, see *State v. Barkuloo*, 18 Wash. 141; *State v. Shuck*, 38 Wash. 270.

§ 2063. (6848.) Construction of Words and Phrases.

The words used in an indictment or information must be construed in their usual acceptance, in common language, except words and phrases defined by law, which are to be construed according to their legal meaning. [Cf. L. '69, p. 241, § 190; Cd. '81, § 1012; L. '91, p. 51, § 27; 2 H. C., § 1242.]

See *supra*, § 2011, word "person" defined.

Cited in 23 Wash. 549.

§ 2064. (6849.) Words of the Statute Need not be Strictly Pursued.

Words used in a statute to define a crime need not be strictly pursued in the indictment or information, but other words, conveying the same meaning, may be used. [Cf. L. '69, p. 241, § 191; Cd. '81, § 1013; L. '91, p. 51, § 28; 2 H. C., § 1243.]

Cited in 8 Wash. 464; 11 Wash. 518; 12 Wash. 463; 21 Wash. 272; 22 Wash. 276; 31 Wash. 247.

Sufficiency of substituted words: See 2 Remington's Digest, p. 1477, § 62; *State v. Bohn*, 19 Wash. 36; *State v. Young*, 22 Wash. 273.

Under this section, allowing words conveying the same meaning as the statutory words to be used, the word "malicious" is supplied by the words "of his premeditated malice": *State v. Ackles*, 8 Wash. 462.

A charge in an information, being in the language of the statute defining the offense, is sufficient: *Watts v. Territory*, 1 W. T. 409; *Schilling v. Territory*, 2 W. T. 283; *State v. Day*, 4 Wash. 104, 107; *State v. Knowlton*, 11 Wash. 512, 518.

An information for embezzlement charging the crime substantially in the terms of the statute is sufficient: *State v. Turner*, 10 Wash. 94.

An information in a prosecution for making an aperture in a dam used for agricultural purposes is sufficient where it charges that the dam was used for irrigation purposes, as the terms are synonymous: *State v. Tiffany*, 44 Wash. 602.

An information, though not charging that the prosecutrix was under the age of consent, is good as against an objection made for the first time after verdict, when it alleges that the prosecutrix was at the time of the offense "of the age of sixteen years," the age of consent being eighteen years: *State v. Fetterly*, 33 Wash. 599.

§ 2065. (6850.) Requisites of Indictments, etc.

The indictment or information is sufficient if it can be understood therefrom,—

1. That it is entitled in a court having authority to receive;
2. That it was found by a grand jury of the county in which the court was held;
3. That the defendant is named, or if his name cannot be discovered, that he is described by a fictitious name, with the statement that his real name is to the jury unknown;
4. That the crime was committed within the jurisdiction of the court, except where, as provided by law, the act, though done without the county in which the court is held, is triable therein;
5. That the crime was committed at some time previous to the finding of the indictment, or filing of the information, and within the time limited by law for the commencement of an action therefor;

6. That the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;

7. [That] the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case. [L. '69, p. 242, § 192; Cd. '81, § 1014; L. '91, p. 51, § 29; 2 H. C., § 1244.]

See supra, § 2013 et seq., venue of offenses.

See supra, § 2055, and notes, contents of indictment and information.

See supra, § 2056, and notes, form of indictments.

See supra, § 2057, indictment, etc., to be direct and certain.

See supra, § 2058, insertion of true name of defendant.

See supra, § 2059, and notes, duplicity of charge.

See supra, § 2060, and notes, precise time immaterial.

See supra, § 2061, statement as to person injured, etc.

See supra, § 2064, and notes, words of statute need not be strictly followed.

See infra, § 2067 et seq., facts in particular cases, how pleaded.

Cited in 4 Wash. 107; 9 Wash. 99, 403; 10 Wash. 98; 11 Wash. 419; 13 Wash. 338; 23 Wash. 550; 29 Wash. 373; 31 Wash. 247, 310; 33 Wash. 346; 51 Wash. 226, 228.

Requisites and sufficiency of accusation: See 2 Remington's Digest, pp. 1469, 1479, §§ 26-70. The fact that an information does not charge the same crime as that upon which the accused was committed upon the preliminary examination is no ground for setting it aside: *State v. Myers*, 8 Wash. 177.

In the case of extradition, a prisoner extradited upon a certain charge may be tried for an offense slightly different from the charge, if nothing appears to suggest fraud in securing the extradition: *Harland v. Territory*, 3 Wash. 131.

It is a matter of discretion to allow the prosecuting attorney to withdraw an information on file prior to trial, and file another charging the same offense: *State v. Gile*, 8 Wash. 12; *State v. Friedrich*, 4 Wash. 204.

The provision of the code requiring the county commissioners to select annually a list of persons qualified to serve as grand jurors is not mandatory; and an indictment found by a grand jury selected by a venire of the preceding year which had not been exhausted is not prejudicial to the defendant when the jury is otherwise qualified to serve: *State v. Krug*, 12 Wash. 288.

When objection to the jurisdiction of a court on account of the ineligibility of the judge is not urged until after the submission of a cause to the jurisdiction, the objection is waived, as well in criminal as in civil proceedings: *State v. Holmes*, 12 Wash. 170.

A law changing the mode of procedure in prosecutions for crime from an indictment to an information does not contain any of the elements or respond to any of the accepted definitions of an *ex post facto* law although the offense under the prosecution may have been committed prior

to the change in the law: *Lybarger v. State*, 2 Wash. 552; but see *State v. McCarty*, 1 Wash. 377.

Subject matter of allegations: See 2 Remington's Digest, p. 1469, §§ 27-32; *State v. Halbert*, 14 Wash. 306; *State v. McGilvery*, 20 Wash. 240; *State v. Lewis*, 31 Wash. 515; *State v. Druximan*, 34 Wash. 257; *State v. Douette*, 31 Wash. 6; *State v. Ryan*, 34 Wash. 597; *Armstrong v. Van de Vanter*, 21 Wash. 682; *State v. Power*, 24 Wash. 34; *State v. Nelson*, 39 Wash. 221.

In a prosecution for the statutory offense of "willfully or maliciously" making an aperture in a dam for agricultural purposes, it is not necessary to charge that the act was maliciously done; since "or" cannot be construed to mean "and" in this connection: *State v. Tiffany*, 44 Wash. 602.

Statutory offenses—Sufficiency of averments in the language of the statute—Sufficiency of substituted words: See 2 Remington's Digest, p. 1477, §§ 60-62.

An indictment under our statute is a plain statement in ordinary and concise language of a fact or state of facts: *State v. Womack*, 4 Wash. 19, 23.

Useless allegations cannot, in an information, destroy the legal effect of necessary averments: *State v. Ackles*, 8 Wash. 462.

It is unnecessary that an information charging a crime should set forth the conditions which the law provides must exist in order that a prosecution may be by information: *State v. Munson*, 7 Wash. 239; *State v. Anderson*, 5 Wash. 350.

If the information is direct and certain as to the crime charged, the party charged, and the facts constituting the crime, that is all that is required under § 2057, supra: *State v. Day*, 4 Wash. 104-107.

An information which omits the name of the defendant in the charging part, but names him in the accusing part, is sufficient: *Whitcher v. State*, 2 Wash. 286.

In case of a statutory offense, unknown to the common law, an indictment should charge the offense to have been under the circumstances and with the intent mentioned in the statute; but even in such case, the exact words of the statute need not be followed, provided words of equivalent meaning be employed: *Leschi v. Territory*, 1 W. T. 13.

It is the general rule that it is sufficient if the information or indictment charges the offense substantially in the language of the statute defining the crime: *Foster v. Territory*, 1 Wash. 411; *Watts v. Territory*, 1 W. T. 409; *State v. Day*, 4 Wash. 104; *State v. Wilson*, 9 Wash. 16; *State v. Reis*, 9 Wash. 329; *State v. Turner*, 10 Wash. 94; *State v. Phelps*, 22 Wash. 181; *State v. Levan*, 23 Wash. 547; *State v. Hoshor*, 26 Wash. 643; *State v. Ryan*, 34 Wash. 597; *State v. Bogardus*, 36 Wash. 297; *State v. Smith*, 40 Wash. 615; *State v. Lewis*, 42 Wash. 672. But this rule does not apply when the law does not sufficiently set out the facts so that the defendant may have notice of that with which he is charged: *State v. Carey*, 4 Wash. 424; *State v. Ryan*, 34 Wash. 597. If the necessary facts constituting a statutory crime are so stated in an information that a man of common understanding can determine therefrom the offense with which he is charged, the information will be held sufficient under this section: *State v. Phelps*, 22 Wash. 181; *State v. Levan*, 23 Wash. 547; *State v. Whitworth*, 30 Wash. 47; *State v. Smith*, 31 Wash. 245; *State v. Druxinman*, 34 Wash. 257; *State v. Ryan*, 34 Wash. 497; *State v. Nelson*, 39 Wash. 221; *State v. Davis*, 43 Wash. 116.

An information is amendable on leave of the court of another county to which the prosecution has been transferred on a change of venue: *State v. Lyts*, 25 Wash. 347.

ACCESSORY.—An information against an accessory before the fact is sufficient when it charges the commission of the crime by him as a principal, without setting out the acts going to show that he aided and abetted in its commission: *State v. Golden*, 11 Wash. 422. See *supra*, § 2007 et seq., and notes.

ARSON: See 1 Remington's Digest, p. 270, §§ 1-6; *State v. Mann*, 39 Wash. 144; *State v. McLain*, 43 Wash. 124. It is unnecessary in charging the crime of arson to allege that the dwelling-house set fire to was used and occupied as the place of abode by any person or persons: *McClaine v. Territory*, 1 Wash. 345.

An information charging defendant with the crime of arson in setting fire to "a two-story wooden storehouse building" is sufficient in description, although the lower story only was a storehouse and the upper a lodging-house: *State v. Biles*, 6 Wash. 186.

An information sufficiently alleges the place of the commission of the crime of arson when it charges the defendant, on

a day named, "in the county of Spokane, state of Washington, did then and there unlawfully and maliciously set fire to and burn a certain storehouse building, the property of another": *State v. Meyers*, 9 Wash. 8.

ASSAULT WITH INTENT TO COMMIT MURDER: See 1 Remington's Digest, p. 1387, § 32; *State v. Michel*, 20 Wash. 162; *State v. Young*, 22 Wash. 273; *State v. McCormick*, 20 Wash. 94; *State v. Dunlap*, 25 Wash. 292; *State v. Snider*, 32 Wash. 299; *State v. Levan*, 23 Wash. 547. An information charging assault with intent to commit murder sufficiently charges an assault, though not following the words of the statute defining that offense, when it alleges that defendant, having the present ability, attempted to kill a certain person with a pistol: *State v. Feamster*, 12 Wash. 461; and an information charging that the accused "did unlawfully, purposely and of his premeditated malice, and with intent to murder, assault and shoot one Benjamin Franklin with a deadly weapon," sufficiently charges assault with intent to commit murder in the second degree: *State v. Ackles*, 8 Wash. 462.

Under § 2064, *supra*, allowing words conveying the same meaning as the statutory words to be used, the word "maliciously" is supplied by the words "of his premeditated malice": *Id.*

An information which alleges in the formal part that the defendant is "guilty of the crime of assault with the intent to commit murder," but which fails, in setting out the acts constituting an assault, to affirmatively charge that by such acts defendant intended to murder the party assaulted, merely charges the crime of assault: *Watson v. State*, 2 Wash. 504. See notes to § 2168, *infra*.

WITH DEADLY WEAPON.—An information charging assault with a deadly weapon is not bad for duplicity under § 2059, *supra*, on the ground that it alleges the assault was made "without considerable provocation, and with a willful, malignant and abandoned heart": *State v. John Port Townsend*, 7 Wash. 462.

With intent to commit felony, see *State v. Costello*, 29 Wash. 366.

In an indictment charging defendant with an assault with a deadly weapon with the intent to inflict a bodily injury, the employment of the term "personal injury," although the statute uses the term "bodily injury," will not render the indictment insufficient: *State v. Clayborne*, 14 Wash. 622.

WITH INTENT TO COMMIT RAPE: See 2 Remington's Digest, pp. 2453, 2454, §§ 7-15; *State v. Smith*, 19 Wash. 376; *State v. Hunter*, 18 Wash. 670; *State v. Dunlap*, 25 Wash. 292; *State v. Falsetta*, 43 Wash. 159; *State v. Fetterly*, 33 Wash. 599; *State v. Phelps*, 22 Wash. 181. Although upon an information as framed, charging the crime of assault with intent to commit rape, the defendant might properly be con-

victed of assault and battery, the failure of the court to so instruct the jury is harmless error when the instructions, given at the request of the defendant, required the jury, in order to render the verdict returned by them, to find from the evidence beyond a reasonable doubt not only that defendant committed an assault, but also that he intended to carry the force, if necessary, to the extent of consummated rape: *State v. Courtemarch*, 11 Wash. 446.

BRIBERY: See 1 Remington's Digest, p. 398, § 2; *Armstrong v. Van de Vanter*, 21 Wash. 682. An indictment for attempting to bribe a member of the state board of education charging that defendants "did then and there conspire together to tempt, silence, bribe and corrupt said member by then and there offering to pay him five thousand dollars, all of which defendants then and there did and performed to unlawfully," etc., is sufficient, as the antecedent of "did and performed" is obviously the offering to pay, and not the conspiring together: *State v. Womack*, 4 Wash. 19.

BURGLARY: See 1 Remington's Digest, pp. 413, 414, §§ 3-10; *State v. Dolson*, 22 Wash. 259; *State v. Burton*, 27 Wash. 528; *State v. Nelson*, 36 Wash. 126; *State v. Randall*, 36 Wash. 438; *State v. Garbe*, 34 Wash. 395; *State v. Lewis*, 42 Wash. 672. Burglary with intent to commit a felony is sufficiently alleged when the information charges intent to commit grand larceny, followed by a statement of the acts intended, which, if carried into effect, would have constituted such offense: *State v. Sufferin*, 6 Wash. 107.

An information for grand larceny charging the breaking and entry of an office is sufficient under § 2794, *infra*, without alleging that such office was a place where goods, etc., were kept for sale or deposit: *Id.*

An information for burglary which charges the unlawful burglarious entry of a dwelling-house with intent to commit a felony therein is sufficient: *State v. Wilson*, 9 Wash. 218; following *Linbeck v. State*, 1 Wash. 336; *State v. Anderson*, 5 Wash. 350.

Where a room in a hotel is leased for a definite period of time by one who keeps his effects there, and makes it his home and does not occupy it merely as a guest, an information against a person for burglariously entering such room should allege that it is the dwelling-house of the roomer, and not of the hotel-keeper: *State v. Johnson*, 4 Wash. 593.

In a prosecution for burglary, an information charging the defendant with the unlawful breaking and entering a certain house is sufficient to sustain the charge, either by day or night, without alleging an unlawful entry in the night-time, or an unlawful breaking and entering in the daytime: *State v. Miller*, 3 Wash. 131.

The averment that the house broken into was a dwelling-house and a house used as

a hotel and lodging-house, "the same being then and there the dwelling-house" of a party, was held sufficient under § 2066: *Id.*

If the information alleges that the burglarious entry of a house was made in a certain county, it is a sufficient averment that the house was within the county: *State v. Johnson*, *supra*.

An information which charges that the defendant in the night-time did unlawfully break and unlawfully enter the dwelling-house of another, "with intent then and there to commit a misdemeanor therein," is sufficient as charging the crime of burglary, as under § 2795, *infra*, the burden of showing with what intent he entered the house is cast upon the defendant: *Linbeck v. State*, 1 Wash. 336.

CONSPIRACY: See 1 Remington's Digest, p. 507, § 3; *State v. Stewart*, 32 Wash. 103; *State v. Mann*, 39 Wash. 144; *State v. Hillman*, 42 Wash. 615; *State v. Messner*, 43 Wash. 206; *Armstrong v. Van de Vanter*, 21 Wash. 682. Under § 2723, *infra*, the common-law offense of conspiracy is indictable, and an indictment which sufficiently charges the crime as at common law will support a judgment of conviction: *Bradshaw v. Territory*, 3 W. T. 265.

DISTURBING RELIGIOUS MEETING. The failure to charge the disturbance of a religious society as having been done willfully will not render the information insufficient, if other words of the same import are used: *State v. Stuth*, 11 Wash. 423. See *supra*, § 2064, as to language to be used in the charge.

EMBEZZLEMENT: See 1 Remington's Digest, p. 1010, §§ 8-13; *State v. McCauley*, 17 Wash. 88; *State v. Boggs*, 16 Wash. 143; *State v. Dix*, 33 Wash. 405; *State v. Whitworth*, 30 Wash. 47; *State v. Raby*, 31 Wash. 111; *State v. Lewis*, 31 Wash. 75; *State v. Hoshor*, 26 Wash. 643; *State v. Bogardus*, 36 Wash. 297. When a public officer charged with the custody of public funds misappropriates and embezzles the same, he may be prosecuted either under § 2808 or § 2812, *infra*: *State v. Isensee*, 12 Wash. 254.

Although an indictment drawn under § 2812, *infra*, charging a city treasurer with using money intrusted to him as such officer for an unauthorized purpose, may charge the defendant with the crime of larceny, it is sufficient when it sets out the commission of the acts whereby he has unlawfully and fraudulently appropriated the money: *Id.*

Under §§ 2812, 2813, *infra*, an indictment charging a city treasurer with unlawfully, feloniously and in a manner not authorized by law, using a certain amount of public money, under his care and control as such treasurer for safekeeping, in order to make a profit out of the same, is sufficiently direct and certain as to the crime charged and specifies with sufficient particularity the acts and circumstances necessary to constitute the

crime of embezzlement of public funds under said provisions of law: *State v. Krug*, 12 Wash. 288.

An indictment for embezzlement by an agent which does not allege that defendant was an agent for hire is insufficient under § 2808, *infra*: *Terry v. State*, 1 Wash. 277; see *State v. Turner*, 10 Wash. 94, 95.

An information for embezzlement is sufficient under § 2808, *infra*, and this section, which alleges that defendant, on a day and at a place named, was intrusted with a certain sum of money, the property of another, which he took into his possession and was holding for and on account of such other, and that he did then and there fraudulently convert said money to his own use: *Id.*

An information charging that a sum of money had come into the hands of the accused as assignee of certain persons, and that at a certain time and place he had unlawfully and fraudulently converted the same to his own use, sufficiently charges the crime of embezzlement under said § 2808, *infra*, when interpreted in the light of this section: *State v. Whiteman*, 9 Wash. 402.

An information for embezzlement alleging that the defendant in King county, state of Washington, on a day named, was agent of a certain person, and as such agent, was then and there intrusted with a certain sum of money, the property of his principal, and that thereafter, on a day named, he did unlawfully convert the same to his own use, is insufficient, as it does not charge the conversion as taking place within said county of King: *State v. Mayberry*, 9 Wash. 194.

An information charging one as having received by virtue of his office as county clerk a sum of money belonging to the county, which he unlawfully, knowingly, fraudulently and feloniously took and converted to his own use and embezzled, is sufficient to charge a crime under the provisions of § 2812: *State v. Downing*, 15 Wash. 413; following *State v. Isensee*, 12 Wash. 254.

NUISANCES: See 2 Remington's Digest, p. 2168, § 31; *State v. Paggett*, 8 Wash. 579; *State v. Schaffer*, 31 Wash. 305. It is sufficient, under Bal. Code, § 7359, to aver in an information that the defendant kept a house "used as a place of resort, where women are employed to draw custom and to dance, all of which is to the injury and common nuisance of all the people," but the information should show that the character of the women alleged to have been employed or the manner of their deportment, and character and quality of conversation, was such as tended to draw crowds of disorderly persons, or to debauch the morals of those resorting to the place: *State v. Brown*, 7 Wash. 10; and in such case the information should aver that women were employed for the purposes mentioned at the time when it is alleged the defendant kept the house described therein: *Id.*

FALSE PRETENSES, OBTAINING MONEY UNDER: See 1 Remington's Digest, p. 1244, §§ 6-12; *State v. Bokien*, 14 Wash. 403; *State v. Ryan*, 34 Wash. 597; *State v. Phelps*, 41 Wash. 470; *State v. Merdenhall*, 24 Wash. 12; *State v. Riddell*, 33 Wash. 324; *State v. Ryan*, 34 Wash. 597. In an information for obtaining money under false pretenses, it is unnecessary to set out the time, character or denomination of the money obtained: *State v. Knowlton*, 11 Wash. 512; nor need it aver ownership of the money with directness and certainty, if it is made to appear from the information, considered as a whole, that the money was the property of the prosecutor: *Id.* See *infra*, § 2074.

In such an information, an allegation that the prosecutor, being induced by certain pretenses and representations, "did buy" certain bars of metal from defendant, "and did then and there pay" defendant \$5,000, is equivalent to an allegation that the defendant then and there "obtained" said sum of money: *Id.*

Although an information for obtaining \$5,000 in money for certain bars of metal, upon the false representations that they were of pure gold of the value of at least twenty dollars per ounce, alleges that the bars of metal were of no value, the variance is immaterial when the proof shows that they in fact contained copper worth about one hundred and twenty dollars, but no merchantable gold: *Id.*

In a prosecution for obtaining goods under false pretenses the information is sufficient, if it appears therefrom, though not by direct and positive averment, that a party was induced to part with his property by reason of certain specified false pretenses: *State v. Bokien*, 14 Wash. 403.

See *infra*, § 2843, obtaining money under.

FORGERY: See 1 Remington's Digest, p. 1263, § 4; *State v. Newton*, 29 Wash. 373. It is unnecessary, in an information charging the crime of forgery, to set forth a copy of the forged instrument, as the acts constituting the crime may be fully and plainly set forth otherwise by appropriate words of description: *State v. Wright*, 9 Wash. 96. See *White v. Territory*, 1 Wash. 279.

An indictment for forgery which correctly sets forth a copy of the forged draft, with the exception of the figures cut therein, is not defective, the figures cut in the draft in a legal sense being no part of the instrument: *White v. Territory*, *supra*.

An indictment charging that defendant uttered and published as true a certain false and forged writing, which is set out in full in the indictment, is sufficient to warrant proof of the alteration of an instrument originally genuine: *Id.* See *State v. Wright*, 9 Wash. 96.

See *infra*, § 2071, pleading in forgery where destroyed instrument withheld.

GAMING.—An indictment under § 2024, *infra*, charging defendant with the crime

"of unlawfully and feloniously carrying on a swindling game called twenty-one, or top-and-bottom dice," without any other or further description of these games, is too indefinite and insufficient: *Harland v. Territory*, 3 W. T. 132.

In prosecution for conducting a game of faro, as proprietor, it is unnecessary that the information name the person with whom the game was played, as the gravamen of the offense is the conducting of such prohibited game as proprietor: *State v. Wilson*, 9 Wash. 16; following *Foster v. Territory*, 1 Wash. 411.

An information charging defendant, in the language of the statute, with conducting a game of faro, is sufficient without describing the offense, under the provisions of § 2924, *infra*, as the offense is so individuated by the statute that the defendant has proper notice of what offense he is charged with, from the mere adoption of the statutory terms: *State v. Wilson*, *supra*.

The misdemeanor of dealing, carrying on, opening, or conducting, either as owner, proprietor, or employee, whether for hire or not, any game of roulette as defined by § 2924, is necessarily included in the felony of conducting, carrying on, opening or causing to be opened, either as owner, proprietor, employee or assistant, whether for hire or not, any game of roulette in any house where persons resort for the purpose of playing any such game, as defined by Laws of 1903, page 63; and a conviction of the former may be had under an information for the latter offense, charging the conducting of a gambling resort by conducting and carrying on a game of roulette in a place where persons resort for that purpose: *State v. Preston*, 49 Wash. 298.

LARCENY: See 2 Remington's Digest, pp. 1701, 1702, §§ 6-14; *State v. Smith*, 31 Wash. 245; *State v. Bliss*, 27 Wash. 463; *State v. Klein*, 38 Wash. 475; *State v. Butts*, 42 Wash. 455; *State v. Dengel*, 24 Wash. 49, 63; *State v. Morgan*, 31 Wash. 226; *State v. Barkuloo*, 18 Wash. 141; *State v. Burns*, 19 Wash. 52; *State v. Palmer*, 20 Wash. 207; *State v. Shuck*, 38 Wash. 270; *State v. Phillips*, 27 Wash. 364; *State v. Johnson*, 36 Wash. 294. A state court has jurisdiction to punish the crime of larceny committed by stealing the property of a railroad company which is in the hands of a receiver appointed by the United States court: *State v. Coss*, 12 Wash. 673.

In the indictment it is not necessary to allege in whose possession the property was at the time of the larceny, but it is sufficient to allege and prove that the property stolen was the property of another: *Id.*

Where defendant has been placed upon trial upon an information charging him with the larceny of "seventeen head of horses of the value of seven hundred dollars, being then and there the property of one William

Burbank," the name of the owner is a material allegation in the charge, and it is error for the court to allow the information to be amended by the substitution of the name of "Walter" for "William": *State v. Van Cleve*, 5 Wash. 642.

It is not necessary in an information or indictment charging the larceny of several articles to allege the value of each separate article charged to have been stolen: *State v. Brew*, 4 Wash. 95; distinguishing *McCarty v. State*, 1 Wash. 377.

An information charging defendant with the taking and stealing "ninety-three railroad tickets of the aggregate value of one hundred and twenty dollars," without alleging the value of each ticket taken and showing that they were stamped, dated and signed, does not state facts sufficient to constitute the crime of larceny: *McCarty v. State*, *supra*.

Under § 2074, *infra*, an information for grand larceny which describes the property taken as "a quantity of money of the value of seventy-seven dollars" is sufficient: *State v. Hanshew*, 3 Wash. 12.

See *infra*, § 2074, stolen money, etc., how described.

An information for the larceny of a sum of money need not contain a special allegation of the value of the money, under § 2074, *infra*: *State v. Blanchard*, 11 Wash. 116.

Under § 2805, *infra*, an indictment was held sufficient, making it larceny for any person to receive "any money or other property whatever" by falsely representing or personating another, and that it is a crime for a person by such means to receive any kind or description of property of value: *State v. White*, 12 Wash. 417.

An information based upon § 2807, *infra*, which alleges that the defendant borrowed and obtained the use of a diamond finger ring for one-half hour, and after the expiration of said time, "neglected to return said ring" and "converted and secreted same with intent to convert same to his own use," sufficiently charges possession of the ring on the part of defendant without averment in the language of the statute, that the same came "into his possession by virtue of such borrowing or hiring": *State v. Kasper*, 5 Wash. 174.

The inclusion, in an information charging the stealing of neat cattle, of an allegation that they were of the value of twenty dollars per head, does not affect the validity of the information upon the ground that it constitutes an attempt to charge grand larceny, as such allegation may be rejected as surplusage: *State v. Kyle*, 14 Wash. 550.

LIQUORS—SALE WITHOUT LICENSE. In an information charging the defendant with the sale of intoxicating liquors without a license, in violation of § 2962, *infra*, an allegation that the name of the person to whom the sale was made is unknown, is

sufficient, without specifically naming him: *State v. Bodecker*, 11 Wash. 417.

The word "knowingly" in an information charging the selling of intoxicating liquor to a minor sufficiently charges the defendant with knowledge of the purchaser's minority: *State v. De Paoli*, 24 Wash. 71.

MURDER—MANSLAUGHTER: See 1 Remington's Digest, pp. 1386, 1387, §§ 30, 31; *State v. Johnny Tommy*, 19 Wash. 270; *State v. Cronin*, 20 Wash. 512; *State v. Yandell*, 34 Wash. 409; *State v. Champoux*, 33 Wash. 339.

An indictment charging murder, as at common law, is sufficient to sustain a verdict of murder in the first degree. The peculiar circumstances distinguishing murder in the first degree, under our statutes, need not be set out; and the jury, from the evidence, are to determine the degree: *Leschi v. Territory*, 1 W. T. 13.

General intent to kill, without intent to kill a particular person, sufficient: *State v. Barr*, 11 Wash. 482.

An indictment charging that defendant "purposely and of his deliberate and premeditated malice killed one John Scherbring, then and there being, by then and there 'purposely and of his deliberate and premeditated malice, shooting and thereby mortally wounding the said John Scherbring with a revolver pistol,' is sufficient to charge the crime of murder in the first degree: *Freidrich v. Territory*, 2 Wash. 358; *Leonard v. Territory*, 2 W. T. 381; *Timmerman v. Territory*, 3 W. T. 445; *State v. Day*, 4 Wash. 104; *State v. Smith*, 9 Wash. 341.

An information charging murder in the first degree is sufficient which alleges that defendant "purposely and of his deliberate and premeditated malice killed" deceased "by then and there, purposely and of his deliberate and premeditated malice, shooting and mortally wounding deceased, etc.": *State v. Day*, 4 Wash. 104.

It is unnecessary to allege that the act was done unlawfully, feloniously and of malice aforethought, or that deceased was murdered, or that he then and there died, or that he was a human being; nor need the part of his body wounded be designated: *State v. Day*, supra; approved in *State v. Nordstrom*, 7 Wash. 506, 508; *State v. Payne*, 10 Wash. 546.

An information charged that the defendant "did feloniously, purposely and maliciously make an assault on one Edward Guthrie, and with a certain knife which he, the said defendant, then and there had and held in his hand, did then and there feloniously, purposely and maliciously strike, stab, thrust and cut at, upon and into the said Edward Guthrie, inflicting upon the said Edward Guthrie one mortal wound, of which mortal wound the said Edward Guthrie then and there died": Held, that the information was not bad for duplicity; that it charged acts constituting a crime; that it alleged the killing was done by means

of a knife in the hands of defendant, and that a knife is *prima facie* presumed to be a deadly instrument: *State v. Regan*, 8 Wash. 506.

An information charging murder in the first degree is sufficient when it charges that the accused, on a certain day, in a certain county and state, "purposely and of his deliberate and premeditated malice, unlawfully and feloniously killed the (deceased), by then and there purposely and of his deliberate and premeditated malice, shooting and cutting and mortally wounding the said (deceased) with a gun and knife, which the said (accused person) then and there held in his hand": *State v. Smith*, 9 Wash. 341.

An indictment is not sufficient to sustain a sentence of murder in the first degree, which charges the assault and shooting to have been done purposely and of deliberate and premeditated malice; but does not aver the killing itself to have been done purposely and of deliberate and premeditated malice, and only charges manslaughter; nor does the conclusion "and so the jurors do say that the said A. L. feloniously and of deliberate malice did kill and murder," etc., supply this essential averment: *Leonard v. Territory*, 2 W. T. 381; *Blanton v. State*, 1 Wash. 265; *State v. Ge*, 1 Wash. 275; *State v. Me*, 1 Wash. 276.

Indictment for murder in a particular case held insufficient in charging deliberate and premeditated malice to kill defendant and that the objection to the insufficiency of the indictment could be raised for the first time in the supreme court: *Blanton v. State*, supra.

An indictment for murder which alleges that defendant did, purposely and of his deliberate and premeditated malice, assault the deceased and that he, of his premeditated malice, fired the shot which killed the deceased, is insufficient in charging murder in either first or second degree, yet sufficiently charges the crime of manslaughter: *Id.*

Allegations of murder held sufficiently direct and certain to charge the defendant with knowledge of the presence of deceased on the premises at the time they were set fire to by defendant: *McClaine v. Territory*, 1 Wash. 345.

Under an information charging the defendant with the crime of murder in the first degree by the administration of poison, as defined in the criminal code, the defendant may be convicted of murder in the second degree, or of manslaughter, pursuant to the provisions of § 2167, infra, permitting conviction for an inferior degree when the offense consists of different degrees: *State v. Greer*, 11 Wash. 245.

The omission of the word "feloniously" in charging a homicide is not error, if the indictment follows the language of the statute: *Watts v. Territory*, 1 W. T. 409; *Schilling v. Territory*, 2 W. T. 283.

See *supra*, § 2064, use of statutory language.

An information which states, in substance, that the defendants unlawfully, willfully and feloniously inflicted a mortal wound or wounds upon deceased, and does not aver that the killing was willfully or violently done, charges involuntary manslaughter: *State v. Gile*, 8 Wash. 12; see *Blanton v. State*, *supra*.

Although an information charging manslaughter may not show that accused bore the relation to deceased of surgeon, and that death resulted from a surgical operation, evidence touching the character of the operation, the propriety of performing it, and subsequent treatment of deceased is admissible: *Id.*

An information charging a physician with manslaughter in counseling and directing the withholding of food, save water and the juices of fruit, "and such other nourishment as he, the said C. McF., might direct," is insufficient in simply alleging that his directions were followed and the food given was insufficient to sustain life, since that is in the nature of a conclusion; and it is necessary to set forth a specific statement of all his directions, showing the kind and quantity of nourishment directed to be given and that starvation was the necessary result: *State v. McFadden*, 48 Wash. 259.

PERJURY: See 2 Remington's Digest, pp. 2238, 2239, §§ 1-4; *State v. Roberts*, 22 Wash. 1; *State v. McLain*, 43 Wash. 124; *State v. Guse*, 21 Wash. 269; *State v. Donette*, 31 Wash. 6.

An indictment for perjury which does not describe the proceedings at which the alleged perjury was committed is defective: *State v. See*, 4 Wash. 344.

Under § 2851, *infra*, an information fails to charge the crime of perjury for the making of a false affidavit which does not allege that such affidavit is sworn to for the purpose of being used in an action or proceeding wherein by law the same could be material, or by using or consenting to its use, after sworn to, in such action or proceeding: *State v. Smith*, 3 Wash. 14.

See *infra*, § 2072, pleadings in.

PHYSICIAN, PRACTICING WITHOUT LICENSE.—An information under Bal. Code, § 3037, charging a physician or surgeon with practicing without a license, is defective unless it charges him or her with appending "the letter M. D., or M. B., to his or her name, or for a fee": *State v. Carey*, 4 Wash. 424-427; and as such statute is an exercise of police power it is not in violation of the state or federal constitutions: *Id.*

RESISTING OFFICER.—In a prosecution for resisting an officer in the service of a legal warrant, a statement of the facts constituting its legality is a better pleading than to allege that the warrant was a legal one: *State v. Brown*, 6 Wash. 609.

Although the information in a prosecution for resisting an officer does not allege that the defendant knew that the officer was a deputy sheriff, when he resisted him, yet, if such knowledge on the part of defendant sufficiently appears from the reading of the information as a whole, the information is sufficient, under the code, to sustain a verdict, the defendant having gone to trial without having interposed a demurrer: *Id.*

Under the provisions of our code (§ 2060 and this section) governing prosecutions by information, an allegation in the charging part of an information for murder, that the act was committed "on or about" a certain date, is not open to the objection of being indefinite and insufficient: *State v. Williams*, 13 Wash. 335.

MISCELLANEOUS MATTERS.—An information filed in the superior court of a county containing within its limits a part or the whole of an Indian reservation, against a person described as an Indian, need not, in order to confer jurisdiction, aver either that such person does not sustain tribal relations, or that the offense was not committed within the limits of such reservation: *Id.*

An indictment, charging defendant with knowingly, unlawfully, maliciously, scandalously and feloniously composing, editing, printing, selling, distributing and offering for sale, etc., a certain lewd, scandalous, obscene and indecent newspaper, sufficiently charges the commission of the offense defined by § 2911, although there is no allegation of knowledge on the part of defendant as to the character of the publication, since such knowledge must necessarily be presumed from the fact of his editing and composing the publication: *State v. Holedger*, 15 Wash. 443.

An indictment for publishing, editing and selling obscene and indecent literature, which charges defendant with editing, printing, selling, distributing and offering for sale and distribution a certain lewd, scandalous, obscene and indecent newspaper, is not objectionable on the ground that it charges the commission of more than one crime, since all are but one offense, laid as committed in different ways: *Id.* See, also, *State v. Ulsemer*, 24 Wash. 657.

An indictment for criminal libel, which sets forth the libelous article and charges defendant with "thereby intending to provoke [the person libeled] to wrath, and expose him to public hatred, contempt and ridicule and deprive him of the benefits of public confidence and social intercourse," is sufficient, under § 2056, although the statute defines libel as "the defamation of a person . . . tending to provoke him to wrath, or expose him to public hatred," etc.: *State v. Nichols*, 15 Wash. 1.

An information against defendant for the crime of rape (§ 7262, Bal. Code), committed upon a female child under the age of twelve years, sufficiently charges one crime,

and not two, when it alleges that defendant "feloniously did make an assault, and her the said [child] then and there feloniously did ravish, carnally know and abuse," etc., since the words charging assault must be construed as charging same only as included in the crime of rape: *State v. Elswood*, 15 Wash. 453.

In charging the crime of rape an information is sufficient if it conforms to the terms of the statute: *State v. Phelps*, 22 Wash. 181.

In charging the crime of accepting the earnings of a prostitute, the information is

not insufficient for failure to allege that it was knowingly done, when it is averred that the defendant committed the act willfully: *State v. Zenner*, 35 Wash. 249.

An information for conniving at the prostitution of defendant's wife sufficiently alleges that defendant knew the character of the house and nature of his act, when it states that he did feloniously connive at, consent to, and permit the placing of his wife in a house of prostitution: *State v. Barker*, 43 Wash. 69.

§ 2066. (6851.) Former Defects or Imperfections, How Regarded.

No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of any of the following matters, which were formerly deemed defects or imperfections:—

1. For want of an allegation of the time or place of any material fact, when the time and place have been once stated;

2. For the omission of any of the following allegations, namely: "With force and arms," "contrary to the form of the statute or the statutes," or "against the peace and dignity of the state";

3. For the omission to allege that the grand jury was impaneled, sworn, or charged;

4. For any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged; nor

5. For any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits. [Cf. L. '69, p. 242, § 193; Cd. '81, § 1015; L. '91, p. 52, § 30; 2 H. C., § 1245.]

See notes to last section.

Cited in 9 Wash. 99; 29 Wash. 373; 31 Wash. 248; 42 Wash. 674; 49 Wash. 294.

Surplusage and unnecessary matter: See 2 Remington's Digest, p. 1479, § 67; *State v. Bohn*, 19 Wash. 36; *State v. Fetterly*, 33 Wash. 599; *State v. Garbe*, 34 Wash. 395.

The legislature by this and the last section has intended to emancipate criminal prosecutions in this state from the enthrall-

ling technicalities of the common law: *State v. Wright*, 9 Wash. 96, 99; *State v. See*, 4 Wash. 344, 345.

An averment that a house broken into was a dwelling-house, and used as a hotel and lodging-house, is sufficient, as the descriptive words will be treated as surplusage under this section: *State v. Miller*, 3 Wash. 131, 134.

§ 2067. (6852.) Presumptions of Law, etc., Need not be Stated.

Neither presumptions of law nor matters of which judicial notice is taken need be stated in an indictment or information. [Cf. L. '69, p. 242, § 194; Cd. '81, § 1016; L. '91, p. 52, § 31; 2 H. C., § 1246.]

Matter of presumption—Judicial notice: *State v. Douette*, 31 Wash. 6; *State v. Carey*, 4 Wash. 424.
See 2 Remington's Digest, p. 1469, §§ 29, 31; *Schilling v. Territory*, 2 W. T. 283;

§ 2068. (6853.) Judgment, How Pled.

In pleading a judgment or other determination of or proceeding before a court or officer of special jurisdiction, it is not necessary to state in the indictment or information the facts conferring jurisdiction; but the judgment, determination, or proceeding may be stated to have been duly given or

made. The facts conferring jurisdiction, however, must be established on the trial. [Cf. L. '54, p. 112, § 65; L. '69, p. 242, § 195; Cd. '81, § 1017; L. '91, p. 52, § 32; 2 H. C., § 1247.]

§ 2069. (6854.) Private Statute, How Pleaded.

In pleading a private statute, or right derived therefrom, it is sufficient to refer, in the indictment or information, to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof. [Cf. L. '54, p. 112, § 66; L. '69, p. 243, § 196; Cd. '81, § 1018; L. '91, p. 53, § 33; 2 H. C., § 1248.]

§ 2070. (6855.) Pleading in Indictment, etc., for Libel.

An indictment or information for libel need not set forth any extrinsic facts, for the purpose of showing the application to the party libeled, of the defamatory matter on which the indictment or information is founded; but it is sufficient to state generally that the same was published concerning him; and the fact that it was so published must be established on the trial. [Cf. L. '69, p. 243, § 197; Cd. '81, §§ 1019, 1232; L. '91, p. 53, § 34; 2 H. C., § 1249.]

See *infra*, § 2157, truth of matter may be given in evidence.

§ 2071. (6856.) Pleading in Forgery Where Instrument Destroyed or Withheld.

When an instrument which is the subject of an indictment or information for forgery has been destroyed or withheld by the act or procurement of the defendant, and the fact of the destruction or withholding is alleged in the indictment or information, and established on the trial, the misdescription of the instrument is immaterial. [Cf. L. '54, p. 113, § 68; Cd. '81, § 1020; L. '91, p. 53, § 35; 2 H. C., § 1250.]

§ 2072. (6857.) Pleadings in Indictment, etc., for Perjury.

In an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed. [Cf. L. '54, p. 112, § 67; L. '69, p. 243, § 199; Cd. '81, § 1021; L. '91, p. 53, § 36; 2 H. C., § 1251.]

See *supra*, § 2065, and notes, "perjury."

Cited in 31 Wash. 12.

§ 2073. (6858.) Against Several—Conviction or Acquittal Against One or More.

Upon an indictment or information against several defendants, any one or more may be convicted or acquitted. [Cf. L. '69, p. 243, § 200; Cd. '81, § 1022; L. '91, p. 53, § 37; 2 H. C., § 1252.]

§ 2074. (6859.) Pleading in Indictment, etc., for Larceny or Embezzlement.

In an indictment or information for larceny or embezzlement of money, bank notes, certificates of stock, or valuable securities, or for a conspiracy to cheat or defraud a person of any such property, it is sufficient to allege the larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, bank notes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof. [Cf. Cd. '81, § 1023; L. '91, p. 53, § 38; 2 H. C., § 1253.]

See notes to § 2065, "embezzlement" and "larceny."

Cited in 11 Wash. 117; 19 Wash. 54, 412; 20 Wash. 208; 27 Wash. 366.

Under this section an information for grand larceny describing the property taken as "a quantity of money of the value of seventy-seven dollars," is sufficient: State v. Henshaw, 3 Wash. 12; State v. Burns, 19

Wash. 52; State v. Palmer, 20 Wash. 207.

An information for larceny of a sum of money need not contain a special allegation of the value, etc., under this section: State v. Blanchard, 11 Wash. 116; State v. Johnson, 19 Wash. 410; State v. Ryan, 34 Wash. 597.

§ 2075. (6860.) Pleading in Indictment, etc., for Selling Obscene Literature.

An indictment or information for exhibiting, publishing, passing, selling, or offering to sell, or having in possession with such intent, any lewd or obscene book, pamphlet, picture, print, card, paper, or writing, need not set forth any portion of the language used or figures shown upon such book, pamphlet, picture, print, card, papers, or writing, but it is sufficient to state generally the fact of the lewdness or obscenity thereof. [Cf. Cd. '81, § 1024; L. '91, p. 54, § 39; 2 H. C., § 1254.]

§ 2076. (6861.) Ownership of Property, How Pleaded—Variance.

In prosecutions under the provisions of sections 2803, 2814, 3257, where the owner of the property is unknown, such property shall, for the purpose of this code, be deemed and held to be owned by the state of Washington; and in all cases where the indictment or information alleges the state to be the owner of such property, and the proof on the trial discloses the name of the actual owner, it shall not be deemed a variance, or failure of proof, unless the defendant is the actual owner. [Cd. '81, § 1025; L. '91, p. 54, § 40; 2 H. C., § 1255.]

See infra, § 2156, variance as to ownership of property.

Cited in 46 Wash. 495.

Under this section it is not necessary to allege that the ownership is unknown in an information charging that the horse was the property of the state of Washington: State v. Eddy, 46 Wash. 494.

In such a case, the state cannot be held to have known the actual ownership because its witnesses testified that the animal bore the brand of and was owned by S., where defendant denied such fact and claimed the animal to be without brand and an "outlaw": Id.

CHAPTER XV.

PROCEEDINGS BEFORE ARRAIGNMENT.

§ 2077. (6865.) **Warrant of Arrest to Issue, When.**

When an indictment is found or an information filed, the court may direct the clerk to issue a warrant for the arrest of the defendant, returnable forthwith; if no order is made, the clerk must issue a warrant within ten days after the indictment is returned into court, or the information filed. [Cf. L. '54, p. 113, § 70; Cd. '81, § 1026; L. '91, p. 54, § 41; 2 H. C., § 1256.]

§ 2078. (6866.) **Right of Accused to Give Bail.**

Every person charged with an offense, except that of murder in the first degree, where the proof is evident or the presumption great, may be bailed by sufficient sureties, and bail shall justify and have the same rights as in civil cases, except as otherwise provided in this chapter: Provided, that all persons accused of crime in any court of this state, whether by indictment or otherwise, shall be admitted to bail by the court where the same is pending, or by a judge, when it shall appear to the court or judge that the accused has offered to go to trial in good faith and without collusion with witnesses, and has been denied a trial by the court, or that the accused is so sick or infirm that further confinement in jail would greatly endanger his life or make his sickness or infirmity permanent; and the bail bond in such cases shall be reasonable, and at the sound discretion of the court. [Cf. L. '54, p. 76, § 8; L. '69, p. 199, § 8; Cd. '81, § 778; 2 H. C., § 1375.]

As to repeal of this section, see § 2304, and note. Compare, § 2310, *infra*. See note to § 2253, *supra*.

The word "chapter" relates to chapter 66 of the Code of 1881.

See *supra*, § 748 et seq., arrest and bail.

See Const., Art. I, § 20, right to bail.

See *supra*, § 1957, bail, when and how taken.

See *infra*, §§ 2086-2089, recognizances, how taken.

See *infra*, § 2089, money in lieu of bail.

See *infra*, § 2231, forfeiture of recognizances, etc.

Cited in 20 Wash. 162.

§ 2079. (6867.) **Bail to be Indorsed on Warrant.**

The court must, at the time of directing the clerk to issue the warrant, fix the amount in which persons charged by indictment are to be held to bail, and the clerk must indorse the amount on the warrant. If no order fixing the amount of bail has been made, the sheriff may present the warrant to the judge of the court, and such judge must thereon indorse the amount of bail to be required; or if there is no such judge in the county, the clerk may fix the amount of bail. [Cf. L. '54, p. 113, § 72; Cd. '81, § 1028; L. '91, p. 54, § 42; 2 H. C., § 1257.]

§ 2080. (6868.) **Service of Criminal Process.**

All criminal process issuing out of the superior court shall be directed to the sheriff of the county in which it is to be served, and be by him executed according to law. When there is no sheriff of a county, or he is disqualified from any cause from discharging any particular duty, it shall be lawful for the officer or person commanding or desiring the discharge of that duty

to appoint some suitable person, a citizen of the county, to execute the same: Provided, that final process shall in no case be executed by any other person than the legally authorized officer, or in case he is disqualified, some suitable person appointed by the court, or judge thereof, out of which the process issues, who shall make such appointment in writing, and before such appointment shall take effect, the person so appointed shall give surety to the party interested for the faithful performance of his duties, which bonds of suretyship shall be in writing and approved by the court or judge making the appointment, and be placed on file with the papers in the case. [Cf. L. '54, p. 113, § 71; L. '60, p. 146, § 214; Cd. '81, § 1027; 2 H. C., § 1258.]

See supra, § 32, process extends to all parts of state.

See supra, § 35, process, to whom directed.

Under the Constitution (Art. IV, § 27) the style of all process shall be "The State of Washington," and all prosecutions shall be conducted in its name and by its authority.

Commitment in particular case held sufficient: *Way v. Woolery*, 6 Wash. 157.

§ 2081. (6869.) **Warrant of Arrest by Telegraph.**

Whenever any person or persons shall have been indicted or accused on oath of any public offense, or thereof convicted, and a warrant of arrest shall have been issued, the magistrate issuing such warrant, or any judge of the supreme court, or of any superior court, may indorse thereon an order signed by him and authorizing the service thereof by telegraph, and thereupon such warrant and order may be sent by telegraph to any marshal, sheriff, constable, or policeman, and on the receipt of the telegraphic copy thereof by any such officer, he shall have the same authority and be under the same obligations to arrest, take into custody, and detain the said person or persons, as if the said original warrant of arrest, with the proper direction for the service thereof, duly indorsed thereon, had been placed in his hands, and the said telegraphic copy shall be entitled to full faith and credit, and have the same force and effect in all courts and places as the original; but prior to indictment and conviction, no such order shall be made by any officer, unless in his judgment there is probable cause to believe the said accused person or persons guilty of the offense charged: Provided, the making of such order, by any officer aforesaid, shall be prima facie evidence of the regularity thereof, and of all the proceedings prior thereto. The original warrant and order, or a copy thereof, certified by the officer making the order, shall be preserved in the telegraph office from which the same is sent, and in telegraphing the same the original or the said certified copy may be used. [L. '66, p. 75, § 16; Cd. '81, § 2357; 1 H. C., § 1557.]

Cited in 20 Wash. 488.

Symes, 20 Wash. 484; *State v. Surry*, 23

Authority to arrest without warrant: See Wash. 655.

1 Remington's Digest, p. 269, § 6; *State v.*

§ 2082. (6870.) **Officer may Break Door, etc., to Make Arrest.**

To make an arrest in criminal actions, the officer may break open any outer or inner door or windows of a dwelling-house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance. [L. '54, p. 129, § 1179; Cd. '81, § 1170; 2 H. C., § 1379.]

§ 2083. (6871.) **Officer to Exhibit Warrant.**

The officer making an arrest must inform the defendant that he acts under authority of a warrant, and must also show the warrant if required. [Cf. L. '54, p. 114, § 74; Cd. '81, § 1030; L. '91, p. 55, § 43; 2 H. C., § 1259.]

Validity of, and authority under warrant: See *State v. Yourex*, 30 Wash. 611.

§ 2084. (6872.) Force may be Used.

If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest. [L. '54, p. 114, § 75; Cd. '81, § 1031; 2 H. C., § 1260.]

§ 2085. (6873.) Pursuit of Prisoner, Assistance Commanded.

If a person arrested escape or be rescued, the person from whose custody he made his escape or was rescued may immediately pursue and retake him at any time and within any place in the state. To retake the person escaping or rescued, the person pursuing has the same power to command assistance as given in cases of arrest. [L. '54, p. 114, § 76; Cd. '81, § 1032; 2 H. C., § 1261.]

§ 2086. (6874.) Taking and Entering Recognizance.

Recognizances in criminal proceedings may be taken in open court, and entered on the order-book. [L. '54, p. 114, § 77; Cd. '81, § 1033; 2 H. C., § 1262.]

See *supra*, § 1957, recognizance, when and how taken.

§ 2087. (6875.) Officer may Take Recognizances, etc.

Any officer authorized to execute a warrant in a criminal action may take the recognizance, and justify and approve the bail; he may administer an oath, and examine the bail as to its sufficiency. [L. '54, p. 114, § 78; Cd. '81, § 1034; 2 H. C., § 1263.]

Bail bond may be received and approved at chambers: *Ainsworth v. Territory*, 3 W. T. 270.

§ 2088. (6876.) Recognizance Certified and Recorded, Effect of.

Every recognizance taken by any peace-officer must be certified by him forthwith to the clerk of the court to which the defendant is recognized. The clerk must thereupon record the recognizance in the order-book, and from the time of filing it has the same effect as if taken in open court. [L. '54, p. 114, § 79; Cd. '81, § 1035; 2 H. C., § 1264.]

§ 2089. (6877.) Deposit of Money in Lieu of Bail.

The defendant may, in the place of giving bail, deposit with the clerk of the court to which he is held to answer the sum of money mentioned in the order; and upon delivering to the sheriff the certificate of deposit, he must be discharged from custody. [L. '54, p. 114, § 80; Cd. '81, § 1036; 2 H. C., § 1265.]

Cited in 23 Wash. 324.

§ 2090. (6878.) Forfeiture of Bail.

If, without sufficient excuse, the defendant neglect to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the default to be entered upon its minutes, and the recognizance of bail, or money deposited as bail, as the case may be, is thereupon forfeited. [L. '54, p. 114, § 81; Cd. '81, § 1037; 2 H. C., § 1266.]

See *infra*, § 2234, action on forfeited recognizance.

§ 2091. (6879.) Rights of Defendant in Capital Cases.

As soon as may be after the finding of an indictment or the filing of an information for a capital crime, the party charged shall be served with a copy thereof by the sheriff or his deputy, at least twenty-four hours before trial, and shall, on demand upon the clerk by himself or counsel, have a list of the petit jurors returned delivered to him at least twenty-four hours before trial, and shall also have process to summon such witnesses as are necessary to his defense, at the expense of the county. [Cf. L. '54, p. 114, § 82; Cd. '81, § 1038; L. '91, p. 55, § 44; 2 H. C., § 1267.]

See Const., Art. I, § 22, rights of accused.

Cited in 7 Wash. 509; 42 Wash. 542.

This section does not entitle the accused to be tried by a jury selected solely from the names so returned, nor to demand that

such list be exhausted before a special venire be issued, where part of such jurors are in attendance upon another department of the court: State v. Mayo, 42 Wash. 540.

§ 2092. (6880.) Rights of Defendant Charged with a Felony.

Every person indicted or informed against for an offense for which he may be imprisoned in the penitentiary, if he be under recognizance or in custody to answer for such offense, he or his attorney shall be furnished with a copy of the indictment or information, and of all indorsements thereof, without paying any fees therefor. [Cf. L. '54, p. 115, § 83; Cd. '81, § 1039; L. '91, p. 55, § 45; 2 H. C., § 1268.]

See Const., Art. I, §§ 22, 25, rights of accused.

Error cannot be predicated upon failure to furnish the defendants with a copy of the information, after plea thereto and an-

nouncement that they were ready for trial, without any demand therefor or objection to the trial: State v. Dilley, 44 Wash. 207.

CHAPTER XVI.

ARRAIGNMENT, PLEADINGS AND PROCEEDINGS THEREON.

§ 2093. (6884.) Arraignment of Defendant.

When the indictment or information has been filed the defendant, if he has been arrested, or as soon thereafter as he may be, shall be arraigned thereon before the court. [L. '91, p. 55, § 46; 2 H. C., § 1269.]

Cited in 4 Wash. 207; 5 Wash. 643; 36 Wash. 360; 44 Wash. 618.

Arraignment: See 1 Remington's Digest, p. 767, §§ 61, 62; Elick v. Territory, 1 W. T. 136; State v. Brown, 37 Wash. 106.

A court commissioner has no power to take the arraignment of a prisoner, accept a plea of guilty, and render judgment, under Con-

stitution, Art. IV, § 23, conferring upon him the power of a judge at chambers; since a judge at chambers, under Laws of 1891, p. 91, does not have the power of a court, and §§ 2093, 2110, 2187, require arraignment, plea of guilty, and sentence to be in open court: State v. Philip, 44 Wash. 615.

§ 2094. (6885.) Defendant may Appear by Counsel, When.

If the indictment or information be for a misdemeanor punishable by fine only, the defendant may appear upon arraignment by counsel. [Cf. L. '54, p. 116, § 92; Cd. '81, § 1066; L. '91, p. 55, § 47; 2 H. C., § 1270.]

See infra, § 2145, defendant's presence required during trial.

§ 2095. (6886.) Right to have Counsel.

If the defendant appear without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and he shall be asked if he desire the aid of counsel, and if it appear that he is unable to

employ counsel, by reason of poverty, counsel shall be assigned to him by the court. [Cf. L. '54, p. 116, § 89; L. '55, p. 11; L. '60, p. 149, § 232; Cd. '81, § 1063; 2 H. C., § 1271.]

See *infra*, § 2305, right to counsel.

Cited in 5 Wash. 330, 643.

It is the duty of the court, in case the accused is unable by reason of poverty to employ counsel, to assign counsel to defendant, if he so desires; but the law nowhere makes provision for payment of attorney's services rendered under such circumstances: *Presley v. Klickitat County*, 5 Wash. 329, 330.

An attorney, being an officer of the court, is obliged, when requested by the court, to conduct without compensation the defense of pauper criminals: *Id.*

Error, if any, in arraigning appellant and compelling him to enter his plea before he

could procure counsel, and without appointing counsel for him, is cured by the subsequent action of the court in allowing the plea of not guilty to be withdrawn and the validity of the information to be attacked by demurrer and motion to quash: *State v. Boyce*, 24 Wash. 514.

Error cannot be assigned on the failure to appoint counsel for accused upon their arraignment, where they were then informed of their right to counsel and stated that they did not desire any: *State v. Bush*, 41 Wash. 13.

§ 2096. (6887.) Defendant to Declare His True Name.

When the defendant is arraigned, he shall be interrogated; if the name by which he is indicted be not his true name, he shall then declare his true name, or be proceeded against by the name in the indictment or information. [Cf. L. '54, p. 116, § 90; L. '69, p. 248, § 221; Cd. '81, § 1064; L. '91, p. 55, § 48; 2 H. C., § 1272.]

See *supra*, § 2055, contents of information.

See *supra*, § 2058, name of defendant.

§ 2097. (6888.) Entry of True Name.

If he alleges that another name is his true name it must be entered in the minutes of the court, and the subsequent proceedings on the indictment or information may be had against him by that name, referring also to the name by which he is indicted or informed against. [Cf. L. '54, p. 116, § 91; Cd. '81, § 1065; L. '91, p. 56, § 49; 2 H. C., § 1273.]

§ 2098. (6889.) Pleading on Arraignment—Time for Answer.

In answer to the arraignment, the defendant may move to set aside the indictment or information, or he may demur or plead to it, and is entitled to one day after arraignment in which to answer thereto if he demand it. [Cf. Cd. '81, § 1045; L. '91, p. 56, § 50; 2 H. C., § 1274.]

See *supra*, § 2094, appearance by counsel, when.

See *infra*, § 2110, plea of guilty to be made by defendant only.

See *infra*, § 2115, plea of not guilty entered on refusal to plead.

Cited in 11 Wash. 119.

Time to plead: See 1 Remington's Digest, p. 767, § 63; *State v. Sexton*, 37 Wash. 110; *State v. Harding*, 20 Wash. 556.

Arraignment consists of three parts: 1. Calling the prisoner to the bar by his name, and requesting him to hold up his hand or do some other act of identification; 2. Reading the indictment to him in such language as to convey to his mind the nature of the charge against him; 3. Demanding of him whether he is guilty or not guilty: *Elick v. Territory*, 1 W. T. 136. A prisoner unacquainted with the English language should be arraigned through a sworn inter-

preter, and the evidence should be made known to him in the same way: *Id.*

The objection to the sufficiency of an information, if permissible to be raised by motion for the exclusion of testimony instead of the demurrer, cannot properly be raised while the plea of not guilty is pending: *State v. Blanchard*, 11 Wash. 116.

The sufficiency of an information should be challenged by motion to set aside or by demurrer, or both, prior to entry of plea of not guilty, and it is irregular and improper to permit its sufficiency to be challenged for the first time by objection to the introduction of testimony: *State v. Bodecker*, 11 Wash. 417.

§ 2099. (6890.) Grounds of Motion to Set Aside Indictment.

The motion to set aside the indictment can be made by the defendant on one or more of the following grounds, and must be sustained:—

1. When it is not indorsed “a true bill,” and the indorsement signed by the foreman of the grand jury as prescribed by this code;
2. When the names of all the witnesses examined before the grand jury are not indorsed thereon;
3. When it has not been presented, and marked “filed,” as prescribed by this code;
4. When any person, other than the grand jurors, was present before the grand jury when the question was taken upon the finding of the indictment, or when any person, other than the grand jurors, was present before the grand jury during the investigation of the charge, except as required or permitted by law;
5. That the grand jury were not selected, drawn, summoned, impaneled, or sworn as prescribed by law. [Cd. '81, § 1046; 2 H. C., § 1275.]

Cited in 1 Wash. 271; 22 Wash. 554.

An indictment will be quashed where special counsel were appointed to represent the state, and the prosecuting attorney was excluded from the deliberations of the grand jury because he had advised the dismissal of

a similar charge, the court having no power to appoint special counsel except as authorized by statute, and this being a substantial irregularity resulting in the presentment of the indictment: *State v. Heaton*, 21 Wash. 59.

§ 2100. (6891.) Grounds not Allowed, When.

The ground of the motion to set aside the indictment mentioned in the fifth subdivision of the last section is not allowed to a defendant who has been held to answer before indictment. [Cd. '81, § 1047; 2 H. C., § 1275, last pt.]

Motion to quash on the ground mentioned in the fifth subdivision of § 2099, supra, is properly overruled, where, after the grand jury was discharged, defendant committed

murder, and was in custody when the jury was resummoned, and declined to challenge the panel or the individuals: *Blanton v. State*, 1 Wash. 265.

§ 2101. (6892.) Grounds of Motion to Set Aside Information.

A motion to set aside an information can be made by the defendant on one or more of the following grounds, and must be sustained:—

1. When it is not signed by the prosecuting attorney;
2. When it is not verified;
3. When it has not been marked “filed” by the clerk;
4. When the names of the witnesses are not indorsed upon it as required by section 2050. [L. '91, p. 56, § 51; 2 H. C., § 1276.]

Cited in 32 Wash. 11.

Motion to quash or set aside: See 1 Remington's Digest, p. 1481, §§ 79-83; *State v. Bogardus*, 36 Wash. 297; *State v. Boyce*, 24 Wash. 514; *State v. Lewis*, 31 Wash.

515; *State v. Croney*, 31 Wash. 122; *State v. Melvern*, 32 Wash. 7; *State v. Heaton*, 21 Wash. 59; *State v. Douette*, 31 Wash. 6; *State v. Anderson*, 20 Wash. 193.

§ 2102. (6893.) Must Demur or Plead on Denial of Motion.

If the motion to set aside the indictment [or information] be denied, the defendant must immediately answer the indictment or information, either by demurring or pleading thereto. [Cf. Cd. '81, § 1048; L. '91, p. 56, § 52; 2 H. C., § 1277.]

§ 2103. (6894.) Effect of Order for Resubmission.

If the court direct that the case be resubmitted, the defendant, if already in custody, must so remain, unless he be admitted to bail; or if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment or information. [Cf. Cd. '81, § 1049; L. '91, p. 56, § 52; 2 H. C., § 1278.]

Cited in 11 Wash. 420.

If an information is found insufficient upon demurrer, it is error for the court to discharge the defendant from custody, un-

less the demurrer is sustained because the information contains matter which is a legal defense to the action as authorized in § 2106, infra: State v. Bodecker, 11 Wash. 417.

§ 2104. (6895.) Order No Bar to Another Prosecution.

An order to set aside the indictment or information as provided in this chapter shall be no bar to a future prosecution for the same offense. [Cf. Cd. '81, § 1050; L. '91, p. 56, § 54; 2 H. C., § 1279.]

See infra, § 2106, judgment on demurrer when final.

See infra, § 2114, judgment on demurrer not to bar another prosecution, when.

§ 2105. (6896.) Grounds of Demurrer.

The defendant may demur to the indictment or information when it appears upon its face either,—

1. That it does not substantially conform to the requirements of this code;
2. [That] more than one crime is charged;
3. That the facts charged do not constitute a crime;
4. That the indictment or information contains any matter which if true would constitute a defense or other legal bar to the action. [Cf. Cd. '81, § 1051; L. '91, p. 56, § 55; 2 H. C., § 1280.]

See supra, § 2059, charging more than one offense.

See supra, § 2065, and notes, requisites of informations, etc.

Cited in 42 Wash. 456.

Demurrer: See 2 Remington's Digest, p. 1483, §§ 86, 87; State v. Douette, 31 Wash. 6; State v. Gottfreedson, 24 Wash. 398; State v. Nelson, 36 Wash. 126; State v. Bogardus, 36 Wash. 297; State v. Riley, 36 Wash. 297.

Errors committed under an indictment discharged cannot be taken advantage of under a subsequent indictment, unless proper objection is made under the latter: Smith v. United States, 1 W. T. 262.

§ 2106. (6897.) Judgment on Demurrer Final, When.

If the demurrer is sustained because the indictment or information contains matter which is a legal defense or bar to the action, the judgment shall be final, and the defendant must be discharged. [Cf. Cd. '81, § 1052; L. '91, p. 57, § 56; 2 H. C., § 1281.]

See note to § 2103, supra, effect of order for resubmission.

See infra, § 2114, judgment on demurrer not final, when.

Cited in 11 Wash. 420.

Upon appeal from a justice's court in a criminal case, the superior court has jurisdiction of the cause for trial de novo, and

after sustaining a demurrer to the complaint below, may direct a new complaint or information to be filed: State v. Bringgold, 40 Wash. 12.

§ 2107. (6898.) Effect of Failure to Plead After Demurrer Overruled.

If the demurrer is overruled, the defendant has a right to put in a plea. If he fails to do so, judgment may be rendered against him on the demurrer,

and if necessary, a jury may be impaneled to inquire and ascertain the degree of the offense. [Cf. Cd. '81, § 1053; 2 H. C., § 1282.]

Cited in 16 Wash. 115; 20 Wash. 560.

Effect of refusal to plead after demurrer overruled: See *State v. Harding*, 20 Wash. 556.

§ 2108. (6899.) The Three Pleas of Defendant.

There are but three pleas to the indictment or information: A plea of,—

1. Guilty;
2. Not guilty;
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty. [Cf. Cd. '81, § 1054; L. '91, p. 57, § 57; 2 H. C., § 1283.]

See *infra*, § 2174, insanity how pleaded.

§ 2109. (6900.) Pleas, How Entered—Form of.

The plea may be entered on the record substantially in the following form:—

1. A plea of guilty: The defendant pleads that he is guilty of the offense charged in the indictment (or information, as the case may be);
2. A plea of not guilty: The defendant pleads that he is not guilty of the offense charged in the indictment (or information, as the case may be);
3. A plea of former conviction or acquittal: The defendant pleads that he has formerly been convicted (or acquitted, as the case may be) of the offense charged in the indictment (or information, as the case may be), by the judgment of the court of (naming it), rendered on the — day of —, A. D. 18— (naming the time). [Cf. Cd. '81, § 1055; L. '91, p. 57, § 58; 2 H. C., § 1284.]

See *supra*, § 2098, pleading on arraignment.

See *infra*, § 2123, dismissal after indictment.

See *infra*, § 2113, and notes.

Cited in 31 Wash. 86.

Pleas: See 1 Remington's Digest, p. 768, §§ 66-71; *State v. Allen*, 41 Wash. 63; *State v. Roller*, 30 Wash. 692; *State v. Williams*, 43 Wash. 505; *State v. Harding*, 20 Wash. 556; *State v. Lewis*, 31 Wash. 75.

The fact that, after reversal of judgment of conviction, a new indictment is presented against defendant, which is identical with the one upon which conviction was had, except that the Christian name of the person killed is changed from "John" to "Julius," affords no ground for plea in abatement that defendant has been once in jeopardy: *State v. Friedrich*, 4 Wash. 204.

The constitutional prohibition against placing a person twice in jeopardy for the same offense is not violated by a second prosecution of one for a separate and distinct offense based upon a different statute, the penalty prescribed for the violation of

which is different from that imposed by the statute under which the first information was laid, although the acts upon which the two prosecutions are based may have been the same: *State v. Reiff*, 14 Wash. 664.

The conviction of a defendant charged with murder in the first degree as guilty of murder in the second degree, is an acquittal of the higher charge, and in case of a new trial a plea of former acquittal of murder in the first degree should be sustained: *State v. Murphy*, 13 Wash. 229; following *State v. Freidrich*, *supra*; *State v. Robinson*, 12 Wash. 491.

Error of the court in overruling a plea of former acquittal as to the charge of murder in the first degree is not prejudicial, when, upon a retrial, the defendant is again convicted of murder in the second degree: *State v. Murphy*, *supra*.

§ 2110. (6901.) Plea of Guilty must be Put in by Defendant.

The plea of guilty can only be put in by the defendant himself in open court. [Cd. '81, § 1056; 2 H. C., § 1285.]

See *supra*, § 2094, appearance by counsel in misdemeanors.

Cited in 44 Wash. 618.

§ 2111. (6902.) Substitution of Plea.

At any time before judgment, the court may permit the plea of guilty to be withdrawn and other plea or pleas substituted. [Cd. '81, § 1057; 2 H. C., § 1286.]

A judgment and sentence entered upon a plea of guilty should be set aside and leave given to withdraw the plea, where it appears that the same was induced by promises that a light sentence would be given by the court, made by officers and detectives, who

refused to permit the accused to communicate with his friends or an attorney, and where the accused claims to be innocent and the court did not explicitly inform him, upon arraignment, of his rights as required to do by statute: *State v. Allen*, 41 Wash. 63.

§ 2112. (6903.) Plea of not Guilty, Effect of.

The plea of not guilty is a denial of every material allegation in the indictment or information; and all matters of fact may be given in evidence under it, except a former conviction or acquittal. [Cf. Cd. '81, § 1058; L. '91, p. 57, § 59; 2 H. C., § 1287.]

§ 2113. (6904.) Conviction or Acquittal Operates as a Bar, When.

A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment or information on which the conviction or acquittal took place. [Cf. Cd. '81, §§ 768, 1059; L. '91, p. 57, § 60; 2 H. C., §§ 1288, 1365.]

Compare *infra*, §§ 2271, 2272, 2316, former acquittal or conviction when a bar: See note to § 2253.

See Const. U. S., amendment 5; Const. Wash., Art. I, § 9, jeopardy.

See notes to § 2109.

See *infra*, § 2117, acquittal on account of variance no bar.

See *infra*, § 2119, discharge on failure to indict, effect of.

See *infra*, § 2122, dismissal operates as a discharge, when.

See *infra*, § 2125, dismissal in misdemeanor a bar, not in felony, when.

See *infra*, § 2166, conviction in different degree, when a bar.

Former jeopardy, see 1 Remington's Digest, p. 763, § 42 et seq.

The acquittal of a defendant of the charge of having murdered a man is no bar to a second prosecution for the murder of another man who was killed at the same time and place under the same circumstances as the one for whose killing he was acquitted:

State v. Robinson, 12 Wash. 491; followed in *State v. Murphy*, 13 Wash. 229.

The dismissal of the first information, after setting aside a conviction for error does not support a plea of former acquittal: *State v. Williams*, 43 Wash. 505.

§ 2114. (6905.) Judgment on Demurrer No Bar—Exception.

The judgment for the defendant on a demurrer to the indictment or information, except where it is otherwise provided, or for an objection taken at the trial to its form or substance, or for variance between the indictment or information and the proof, shall not bar another prosecution for the same offense. [Cf. Cd. '81, § 1060; L. '91, p. 58, § 61; 2 H. C., § 1289.]

See *supra*, § 2106, judgment on demurrer, when final.

See *infra*, § 2117, acquittal on ground of variance no bar.

A prisoner is not entitled to a discharge upon the sustaining of a demurrer to an information or to the evidence, since it is the duty of the court to correct errors and allow

an amendment, and a mistrial upon an insufficient information does not constitute jeopardy and is not a bar to another prosecution: *State v. Riley*, 36 Wash. 441.

§ 2115. (6906.) Refusal to Plead—Plea of not Guilty to be Entered.

If the defendant fail or refuse to answer the indictment or information by demurrer or plea, a plea of not guilty must be entered by the court. [Cf. L. '54, p. 116, § 88; Cd. '81, § 1061; L. '91, p. 58, § 62; 2 H. C., § 1290.]

Cited in 16 Wash. 115; 20 Wash. 560. v. United States, 1 W. T. 5; State v. Straub, 16 Wash. 111; State v. Harding, 20 Wash. 556.
Effect of refusal or failure to plead: See 1 Remington's Digest, p. 767, § 64; Palmer

§ 2116. (6907.) On Charge of Murder Jury must be Impaneled.

If, on the arraignment of any person, he shall plead guilty, if the offense charged be not murder, the court shall, in its discretion, hear testimony, and determine the amount and kind of punishment to be inflicted; but if the defendant plead guilty to a charge of murder, a jury shall be impaneled to hear testimony, and determine the degree of murder and the punishment therefor. [L. '54, p. 115, § 87; Cd. '81, § 1062; 2 H. C., § 1291.]

See infra, § 2144, submission of case to court, except in capital cases.

See infra, § 2145, personal presence of defendant necessary.

Cited in 35 Wash. 569.

§ 2117. (6908.) Acquittal on Ground of Variance No Bar.

A defendant acquitted on the ground of variance between the indictment or information and the proof may be thereafter prosecuted upon a new indictment or information. [Cf. L. '54, p. 76, § 5; Cd. '81, § 769; 2 H. C., § 1366.]

As to repeal of this section, see § 2304, and note. Compare § 2316, infra. See note to § 2253.

See supra, § 2104, order setting aside indictment no bar.

See supra, § 2113, conviction or acquittal a bar.

See supra, § 2114, judgment for variance not a bar, when.

See infra, § 2125, note, as to former conviction.

The fact that a defendant has been discharged before verdict upon a prosecution for larceny of certain property by fraudulently and falsely personating another is not a bar to a subsequent prosecution for obtaining the property under false pretenses, when the first discharge resulted from a variance between the information and the proof: State v. Reiff, 14 Wash. 664.

§ 2118. (6909.) Conviction Necessary Before Punishment.

No person charged with any offense against the law shall be punished for such offense unless he shall have been duly and legally convicted thereof in a court having competent jurisdiction of the case and of the person. [L. '54, p. 76, § 6; Cd. '81, § 770; 2 H. C., § 1367.]

See infra, § 2133, verdict or confession necessary to conviction.

§ 2119. (6910.) Discharge on Failure to Indict—Limitation.

When a person has been held to answer, if an indictment be not found or information filed against him within thirty days, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown. [Cf. L. '54, p. 76, § 7; Cd. '81, § 771; L. '91, p. 64, § 93; 2 H. C., § 1368.]

As to repeal of this section, see § 2304, and note. Identical enactment, see § 2311, infra. See note to § 2253.

See infra, § 2125, effect of dismissal.

Cited in 35 Wash. 267, 268, 270; 36 Wash. 360.

Where the accused, after being held to answer to the superior court by a justice of the peace, gives a bail bond for his appearance, and no information is filed against him for thirty days, the prosecution must be dismissed unless good cause for the delay is shown, and the burden of showing such cause is upon the state: State v. Lewis, 35 Wash. 261.

Under the statute requiring the dismissal of a criminal prosecution if an indictment is not found or information filed within thirty days after the holding of the person, the motion for dismissal must be made at the time the accused is called to plead; since such dismissal is not a bar to another prosecution, and the objection is waived by pleading and going to trial: State v. Se-right, 48 Wash. 307.

The accused is not entitled to a dismissal of the charge for failure of the prosecuting attorney to file the information within thirty days, where the delay was requested by counsel authorized to represent the accused,

such being a sufficient excuse, within this section, and within the rule that the burden of showing good cause rests upon the prosecuting attorney: *State v. Fletcher*, 50 Wash. 303.

§ 2120. (6911.) Speedy Trial—Dismissal in Sixty Days.

If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his application, be not brought to trial within sixty days after the indictment is found or the information filed, the court must order it to be dismissed, unless good cause to the contrary be shown. [Cf. Cd. '81, § 772; L. '91, p. 64, § 94; 2 H. C., § 1369.]

As to repeal of this section, see § 2304, and note. Identical enactment, see § 2312, *infra*.

See notes to previous section.

See *infra*, § 2125, dismissal except in misdemeanors not a bar.

Cited in 7 Wash. 258, 259, 443; 9 Wash. 336, 337, 339; 35 Wash. 267; 36 Wash. 360; 49 Wash. 436, 437.

Under this section a person charged with a crime is entitled to discharge on a writ of habeas corpus, where the only reason for failure to try him was that no term of court for which a jury had been called had been in session since the filing of the information: *State v. Brodie*, 7 Wash. 442. This provision, however, does not apply to a new trial: *In re Murphy*, 7 Wash. 257; nor does § 2125, *infra*, providing that such discharge shall not bar further prosecution violate the constitutional guaranty of a speedy public trial: *State v. Caldwell*, 9 Wash. 336, 339.

If an information has been quashed and a new one filed against the accused, the

fact that the accused had not been brought to trial within sixty days after the filing of the original information against him, cannot be urged as an objection to his trial upon the second one: *State v. Hansen*, 10 Wash. 235.

The object of the requirement that the accused "shall be tried at the next term after he was imprisoned," was to secure a speedy trial, and not to promote delay: *Thompson v. Territory*, 1 W. T. 547.

The amendment of this section did not work an amendment or repeal of § 2125, *infra*, although the latter section was dependent in its subject matter upon the provisions of this section: *State v. Caldwell*, 9 Wash. 336.

§ 2121. (6912.) Continuance by Court—Discharge from Custody.

If the defendant be not indicted, informed against, or tried, as provided in the last two sections, and sufficient reason therefor shown, the court may order the action to be continued from time to time, and in the meantime may discharge the defendant from custody on his recognizance or on bail for his appearance to answer the charge at the time to which the action is continued. [Cf. Cd. '81, § 773; L. '91, p. 65, § 95; 2 H. C., § 1370.]

As to repeal of this section, see § 2304, and note. See note to § 2253.

The exact subject matter of this section does not seem to be covered by the act of 1909. See note to § 2301.

Cited in 7 Wash. 260.

§ 2122. (6913.) Discharge of Defendant on Dismissal.

If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or if admitted to bail, his bail must be exonerated; and if money has been deposited instead of bail, it must be refunded to him. [Cd. '81, § 774; 2 H. C., § 1371.]

As to repeal of this section, see § 2304, and note. Identical enactment, see § 2313, *infra*.

§ 2123. (6914.) Court may Order Dismissal, When.

The court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order an action, after an

indictment or information, to be dismissed; but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record. [Cf. Cd. '81, § 775; L. '91, p. 65, § 96; 2 H. C., § 1372.]

As to repeal of this section, see § 2304, and note. Compare § 2314, *infra*. See note to § 2253.

See notes to § 2109.

Cited in 8 Wash. 14; 10 Wash. 237; 21 Wash. 61; 32 Wash. 291.

It is within the discretion of the court to allow the prosecuting attorney to withdraw an information prior to the commencement of a trial, and file another charging the same offense: *State v. Gile*, 8 Wash. 12.

This section applies only to cases which the prosecution desires to dismiss without any intention of renewing in some other form. It is a statutory prohibition against the entry of a *nolle prosequi* on motion of the prosecuting attorney, and without the assent of the court: *State v. Hansen*, 10 Wash. 235, 237.

§ 2124. (6915.) **Nolle Prosequi Abolished.**

The entry of a *nolle prosequi* is abolished, and no prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in the last section. [L. '54, p. 115, § 85; Cd. '81, § 776; 2 H. C., § 1373.]

As to repeal of this section, see § 2304, and note. See note to § 2253.

Cited in 10 Wash. 237; 21 Wash. 61.

It was held competent for the prosecuting officer of the United States to enter

a *nolle*, at any time before verdict, in *Smith v. United States*, 1 W. T. 262.

§ 2125. (6916.) **Dismissal a Bar in Misdemeanor, but not in Felony.**

An order for dismissal as provided in this chapter is a bar to another prosecution for the same offense, if it be a misdemeanor; but it is not a bar if the offense charged be a felony. [Cd. '81, § 777; 2 H. C., § 1374.]

As to repeal of this section, see § 2304, and note. Compare § 2315, *infra*. See note to § 2253.

"Chapter" refers to Chapter 66 of the Code of 1881.

See notes to § 2120, trial and dismissal.

Cited in 9 Wash. 337, 340; 29 Wash. 59; 31 Wash. 86; 40 Wash. 481, 482.

Effect of dismissal to bar another action for the same offense: See 1 Remington's

Digest, pp. 763, 765, §§ 42-51; *State v. Armstrong*, 29 Wash. 57; *State v. Campbell*, 40 Wash. 480; *State v. Durbin*, 32 Wash. 289.

§ 2126. (6917.) **Compromise of Misdemeanor, When.**

When a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed,—

1. By or upon an officer while in the execution of the duties of his office;
2. Riotously; or
3. With an intent to commit a felony. [L. '54, p. 115, § 84; Cd. '81, § 1040; 2 H. C., § 1292.]

See *supra*, § 1964, compromising certain offenses.

§ 2127. (6918.) **Compromising Criminal Actions, When and How.**

In such case, if the party injured appear in the court in which the cause is pending at any time before the final judgment therein, and acknowledge in writing, that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be discontinued and the defendant to be discharged. The reasons for making the order must be set forth therein and entered in the minutes. Such order is a

bar to another prosecution for the same offense. [Cf. L. '54, p. 115, § 84; Cd. '81, §§ 1041, 1042; L. '91, p. 58, § 63; 2 H. C., § 1293.]

See *infra*, § 2866, compounding or concealing crime.

The amendment in Law of 1891 erroneously designates § 1070 of the Code of 1881 as the section amended, instead of §§ 1041, 1042 of the Code of 1881.

§ 2128. (6919.) Offenses not to be Compromised Except as Herein Provided.

No offense can be compromised, nor can any proceedings for the prosecution or punishment thereof be stayed upon a compromise, except as provided in this chapter. [Cf. Cd. '81, § 1043; L. '91, p. 58, § 64; 2 H. C., § 1294.]

§ 2129. (6920.) Restoration of Stolen Property—Duty of Officer as to.

All property obtained by larceny, robbery, or burglary, shall be restored to the owner; and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to such property; and it shall be the duty of the officer who shall arrest any such person charged as principal or accessory in any robbery or larceny, to secure the property alleged to have been stolen, and he shall be answerable for the same, and shall annex a schedule thereof to his return of the warrant. [L. '54, p. 84, § 51; Cd. '81, § 851; 2 H. C., § 1380.]

§ 2130. (6921.) Recompense for Securing and Keeping Stolen Property.

Upon any conviction of burglary, robbery, or larceny, the court may order a suitable recompense to the prosecutor, and also to the officer who has secured and kept the stolen property, not exceeding their actual expenses, with a reasonable allowance for their time and trouble, to be paid by the county treasurer. [L. '54, p. 84, § 52; Cd. '81, § 852; 2 H. C., § 1381.]

CHAPTER XVII.

TRIALS AND VERDICTS IN CRIMINAL ACTIONS.

§ 2131. (6925.) Rights of Accused on Trial.

On the trial of any indictment or information, the party accused shall have the right to be heard by himself or counsel, to meet the witnesses produced against him face to face: Provided always, that in any case where a witness or witnesses whose deposition or depositions have been taken by a committing magistrate pursuant to law are absent, and cannot be found when required to testify in such case, so much of such deposition or depositions as the court shall decide to be admissible and competent shall be admitted and read as evidence in such case. [Cf. L. '54, p. 76, § 2; L. '73, p. 180, § 2; L. '77, p. 204, § 1; Cd. '81, § 765; L. '91, p. 63, § 89; 2 H. C., § 1362.]

As to repeal of this section, see § 2304, and note. Compare, § 2306, *infra*. See note to § 2253.

See Const., Art. I, § 22, rights of accused.

See *supra*, §§ 1244, 1962, depositions of witnesses on commitment before magistrates, and notes.

See *supra*, § 2078, rights of, under indictment, etc.

The last part of this section is believed to be in conflict with Art. I, § 22, of the state Constitution. See also 6 Am. U. S. Const., right of defendant "to be confronted with the witnesses against him."

Depositions in a criminal case tending to show good character of defendant are in- admissible: *State v. Humason*, 5 Wash. 499; *State v. Paggett*, 8 Wash. 579, 584.

Right to confront witnesses—Use of depositions: See 1 Remington's Digest, p. 802, §§ 221, 222; State v. Hunter, 18 Wash. 670; Freidrich v. Territory, 2 Wash. 358; State v. Baldwin, 15 Wash. 15; State v. Lewis, 31 Wash. 75. See, also, State v. Cushing, 17 Wash. 545.

§ 2132. (6926.) Right to Witnesses, Process and Speedy Trial.

On the trial of any indictment or information the party accused shall have the right to produce witnesses and proofs in his favor, and have compulsory process to compel the attendance of witnesses in his behalf, and to a speedy public trial by an impartial jury, and no person shall be put upon trial on an indictment or information for a felony until the expiration of five days from the day of his arrest. [Cf. L. '77, p. 205, § 2; Cd. '81, § 766; L. '91, p. 64, § 90; 2 H. C., § 1363.]

As to repeal of this section, see § 2304, and note. Compare §§ 2306, 2307, *infra*. See note to § 2253.

The Laws of 1877 provide, "or upon an indictment for murder until thirty days from his arrest without his consent thereto in open court."

See *supra*, § 2120, and notes, speedy trial, dismissal.

See Const., Art. I, § 22, rights of accused.

Cited in 5 Wash. 500; 7 Wash. 258; 13 Wash. 487.

It is not contrary to the provisions of this section for a defendant to be brought to trial within less than five days after the filing of an information against him, where he had been taken into custody before a magistrate and held for trial on the same charge more than five days prior to his trial upon the information: State v. Humason, 5 Wash. 499.

A defendant in a criminal action is not entitled to the issuance of a subpoena to

compel the attendance of witnesses without an order of the court therefor having been first obtained: State v. Graves, 13 Wash. 485; State v. Grimes, 7 Wash. 445.

It is error to require a witness for accused to appear in court fettered and manacled to another person, although he had been charged with the crime jointly with the accused and had been found guilty upon a former and separate trial: State v. Williams, 18 Wash. 47.

§ 2133. (6927.) Verdict or Confession Necessary to Conviction.

No person indicted or informed against for an offense shall be convicted thereof unless by confession of his guilt in open court, or by the verdict of a jury accepted and recorded in open court. [Cf. L. '54, p. 76, § 3; Cd. '81, § 767; L. '91, p. 64, § 91; 2 H. C., § 1364.]

As to repeal of this section, see § 2304, and note. Present law, see § 2309. See note to § 2253.

See *supra*, § 2118, conviction necessary before punishment.

See *infra*, § 2144, waiver of jury by consent, when.

Cited in 20 Wash. 561.

§ 2134. (6928.) Trial Docket.

The clerk shall, in preparing the docket of criminal cases, enumerate the indictments and informations pending according to the date of their filing, specifying opposite to the title of each action whether it be for a felony or misdemeanor, and whether the defendant be in custody or on bail; and shall, in like manner, enter therein all indictments and informations on which issues of fact are joined, all cases brought to the court on change of venue from other counties, and all cases pending upon appeal from inferior courts. [Cf. L. '54, p. 115, § 86; Cd. '81, § 1044; L. '91, p. 58, § 65; 2 H. C., § 1295.]

§ 2135. (6929.) Continuance, When Granted.

A continuance may be granted in any case on the ground of the absence of evidence, on the motion of the defendant, supported by affidavit showing

the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and place of residence of the witness or witnesses, and the substance of the evidence expected to be obtained; and if the prosecuting attorney admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the continuance shall not be granted. [L. '77, p. 206, § 7; Cd. '81, § 1077; 2 H. C., § 1296.]

See supra, § 322, and notes, continuance in civil cases.

See supra, § 2121, continuance on order of court, when.

Cited in 29 Wash. 448.

Continuance, right to and showing: See 1 Remington's Digest, pp. 553-557, §§ 1-24; State v. Newton, 29 Wash. 373; State v. Burns, 19 Wash. 52; State v. Johnny Tommy, 19 Wash. 270; State v. Harras, 22 Wash. 57; State v. Boyce, 24 Wash. 514.

The denial of an adjournment of a trial, at the close of the evidence, for the purpose of securing the attendance of a witness of whom counsel had just been advised, is not erroneous, when neither the name of the witness, his residence, nor the materiality of the testimony is made to appear: State v. Craemer, 12 Wash. 217. The application is addressed to the discretion of the trial court: Thompson v. Territory, 1 W. T. 547.

Due diligence in procuring the attendance of a witness is not established by a showing that the defendant had been in the company of the witness on the day before his arrest upon the crime charged, that he knew of the migratory habits of the witness, and that he had no fixed

abode, that a short time before the trial letters had been addressed to him at the locality where last seen and to another point to which it was supposed he had gone, and that a subpoena had been issued to the sheriff of the county in which he was presumed to be, but without any definite direction as to where the witness could be found: State v. Craemer, 12 Wash. 217.

The overruling of a motion by defendant in a criminal prosecution for a continuance because of the misspelling of the names of witnesses for the state as indorsed upon the indictment is not sufficient to base error upon, in the absence of a showing that defendant was surprised and misled: State v. Everett, 14 Wash. 574.

While the state may be permitted to contradict the testimony which it had admitted would be given by an absent witness, in order to avoid a continuance, yet it cannot impeach such witness: State v. Carter, 8 Wash. 272, 276.

§ 2136. Subpoena for State Witnesses—Continuance for State.

The clerk shall, at the time of issuing a warrant for the defendant, issue a subpoena for all the witnesses whose names are indorsed on the indictment, and any others required; but in no case shall a continuance be granted to the state on account of the absence of any witness whose name is not indorsed on the indictment. [Cd. '81, § 1068.]

The present force of this section is doubtful.

§ 2137. (6930.) Issues to be Tried by Jury—Practice as in Civil Cases.

Except as otherwise specially provided, issues of fact joined upon an indictment or information shall be tried by a jury of twelve persons, and the law relating to the drawing, retaining, and selecting jurors, and trials by jury in civil cases, shall apply to criminal cases. [Cf. L. '54, p. 118, § 101; Cd. '81, § 1078; L. '91, p. 58, § 66; 2 H. C., § 1297.]

See Const., Art. I, § 21, trial by jury.

See supra, § 94 et seq., qualifications of jurors.

See supra, § 327 et seq., causes for challenge.

See supra, § 339 et seq., and notes, manner of conducting jury trial.

See infra, § 2144, court may try by consent except in capital cases.

Cited in 8 Wash. 306; 17 Wash. 550; 22 Wash. 133.

The words "Except as otherwise specially provided," as used in this section, do not

confer the right to try a criminal case by a jury of less than twelve people: State v. Ellis, 22 Wash. 129.

§ 2138. (6931.) Peremptory Challenges, Number Allowed Defendant.

In prosecution for capital offenses, the defendant may challenge peremptorily twelve jurors; in prosecution for offenses punishable by imprisonment in the penitentiary, six jurors; in all other prosecutions, three jurors. When several defendants are on trial together, they must join in their challenges. [L. '54, p. 118, § 102; Cd. '81, § 1079; 2 H. C., § 1298.]

Peremptory challenges: See 2 Remington's Digest, p. 1659, §§ 60-62; State v. Eddon, 8 Wash. 292; State v. Vance, 29 Wash. 435; State v. Hall, 24 Wash. 255; State v. McCann, 16 Wash. 249; State v. Stentz, 30 Wash. 134; State v. Champoux, 33 Wash. 339.

Construing all the statutory provisions together on the subject of challenges to jurors, defendant must, in prosecution for homicide, exercise two peremptory challenges to one by the state, until the twelve and six peremptory challenges respectively are exhausted: State v. Eddon, 8 Wash. 292.

§ 2139. (6932.) Peremptory Challenges Allowed State.

The prosecuting attorney, in capital cases, may challenge peremptorily six jurors; in all other cases, three jurors. [L. '54, p. 118, § 103; Cd. '81, § 1080; 2 H. C., § 1299.]

§ 2140. (6933.) Challenges to Panel, When Allowed.

Challenges to the panel shall only be allowed for a material departure from the forms prescribed by law for the drawing and return of the jury, and shall be in writing, sworn to, and proved to the satisfaction of the court. [L. '54, p. 118, § 104; Cd. '81, § 1081; 2 H. C., § 1300.]

See note to § 323.

Cited in 6 Wash. 566; 29 Wash. 446.

Challenge to the panel, or to the polls for cause: See 2 Remington's Digest, p. 1657, §§ 55, 56; State v. Straub, 16 Wash. 111; State v. Lewis, 31 Wash. 75; State v. Vance, 29 Wash. 437.

Although a challenge is not taken in the manner required by this section, but is

nevertheless entertained by the court, it should be sustained where it is to the effect that the deputy sheriff, instead of the sheriff, assisted in drawing the jury, contrary to the provisions of § 59, 2 Hill's Code: State v. Payne, 6 Wash. 563, 566.

§ 2141. (6934.) Challenges for Cause.

Challenges for cause shall be allowed for such cause as the court may, in its discretion, deem sufficient, having reference to the causes of challenge prescribed in civil cases, as far as they may be applicable, and to the substantial rights of the defendant. [L. '54, p. 119, § 105; Cd. '81, § 1082; 2 H. C., § 1301.]

See supra, §§ 326-331, and notes, challenges for cause.

Cited in 3 Wash. 103, 104; 8 Wash. 14.

Competency of jurors, challenges, and exceptions: See 2 Remington's Digest, pp. 1653, 1660, §§ 40-62.

Objection to juror is waived, unless it is made at the time the jury is impaneled: Clarke v. Territory, 1 W. T. 68; Blanton v. State, 1 Wash. 265.

The trial of challenges to jurors by the court involves the trial of an issue of fact, and its determination is largely discretionary: White v. Territory, 3 W. T. 397; Blanton v. State, 1 Wash. 265.

In the examination of a juror upon his voir dire, it is improper to ask him whether he would attach more importance or credi-

bility to the testimony of a minister than to that of anyone else: State v. Holedger, 15 Wash. 443.

Questions put to a juror in a criminal prosecution, which attempt to ascertain in advance what he would think of the credibility of defendant as a witness, considering his interest in the result, are properly excluded: State v. Everett, 14 Wash. 574.

Error in overruling a challenge for actual bias interposed to a juror is without prejudice, when the juror is subsequently excluded upon the peremptory challenge of the adverse party: State v. Carey, 15 Wash. 549.

Where the examination of a juror shows that no fixed or definite opinion exists in

the mind relative to the merits of a criminal prosecution, but only a vague or merely floating impression based upon a newspaper report of the case, or heard at about the time of the commission of the supposed crime, the juror is not subject to a challenge on the ground of bias: *Id.* See, also, *State v. Straub*, 16 Wash. 111; *State v. Royce*, 24 Wash. 440.

A refusal to sustain challenges for proper cause, necessitating peremptory challenges on the part of the accused, will be considered on appeal as prejudicial, where the accused has been compelled subsequently to exhaust all his peremptory challenges before the final selection of the jury: *State v. Rutten*, 13 Wash. 203; citing *State v. Krug*, 12 Wash. 288.

Where a juror admits that he has an opinion as to the guilt of the accused, which it would take evidence to remove, that he believes there was something wrong and he could not go into the jury-box and accord the accused the presumption that he was innocent, until he was proven guilty, he should be excused upon a challenge for cause, although he may state in answer to leading questions by the court and the prosecuting attorney that if he was charged as the defendant was he would be willing under the same circumstances to have twelve men try his case who were of the same mind as he was: *State v. Rutten*, 13 Wash. supra; following *State v. Murphy*, 9 Wash. 204; *State v. Wilcox*, 11 Wash. 215. See, also, *State v. Moody*, 18 Wash. 165; *State v. Lattin*, 19 Wash. 57.

The fact that a juror is a taxpayer is not ground for challenge upon a trial of a public officer charged with embezzlement of public funds: *State v. Krug*, 12 Wash. 288; or that he has formed an impression that the defendant had loaned money, either that of his own or of the city, the juror having no idea to whom the money

belonged and having formed no opinion as to the defendant's guilt or innocence: *Id.*; or when he has formed an impression, but disclaimed having formed an opinion, he cannot be challenged for actual bias: *Id.*

A juror's name indorsed on information as witness for the state renders him incompetent: *State v. Stentz*, 30 Wash. 134.

Effect of business connections or transactions with party or attorney: See *State v. Boyce*, 24 Wash. 514; *State v. Lewis*, 31 Wash. 75.

Effect of prior service as juror, or service in same or similar cause: See *State v. Hall*, 24 Wash. 255; *State v. Van Watters*, 36 Wash. 358.

Bias or prejudice: See *State v. Boyce*, 24 Wash. 514.

Formation and expression of opinion: See 2 Remington's Digest, pp. 1654-1656, §§ 46-48; *State v. Royce*, 24 Wash. 440; *State v. Boyce*, 24 Wash. 514; *State v. Farris*, 26 Wash. 205; *State v. Croney*, 31 Wash. 122; *State v. Harras*, 22 Wash. 57; *State v. Riley*, 36 Wash. 441; *State v. Kenney*, 45 Wash. 165.

Personal opinion and scruples: See 2 Remington's Digest, p. 1656, §§ 49, 50; *State v. Croney*, 31 Wash. 122; *State v. Royce*, 24 Wash. 440; *State v. Boyce*, 24 Wash. 514.

Waiver of right to object or challenge: See 2 Remington's Digest, p. 1657, § 53; *State v. Lewis*, 31 Wash. 75; *State v. Clark*, 34 Wash. 485.

A juror will not be found to be disqualified by actual bias, as defined by § 329, supra, by reason of answers to questions based on assumption of facts not supported in the record, where he had no knowledge of the case and no opinion as to the guilt or innocence of the accused, and, considering his examination as a whole, the trial judge could not be said to have abused the discretion reposed in him by such statute: *State v. Gohl*, 46 Wash. 408.

§ 2142. (6935.) Conscientious Scruples of Juror as to Capital Punishment.

No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death shall be compelled or allowed to serve as a juror on the trial of any indictment or information for such an offense. [Cf. L. '54, p. 119, § 106; Cd. '81, § 1083; L. '91, p. 59, § 67; 2 H. C., § 1302.]

See *State v. Boyce*, 24 Wash. 514.

§ 2143. (6936.) Oath to Jury, Form of.

The jury shall be sworn or affirmed well and truly to try the issue between the state and defendant, according to the evidence; and in capital cases, to well and truly try, and true deliverance make between the state and the prisoner at the bar, whom they shall have in charge, according to the evidence. [Cf. L. '54, p. 119, § 107; Cd. '81, § 1084; L. '91, p. 59, § 68; 2 H. C., § 1303.]

Cited in 16 Wash. 426; 18 Wash. 144.

Oath of jury: See 2 Remington's Digest, p. 1660, § 63; *State v. Gin Pon*,

16 Wash. 425; *State v. Johnny Tommy*, 19 Wash. 270.

It is sufficient if the substance of the oath administered to the jurors is in consonance with the statute; yet it is better to follow the prescribed formula: *Leonard v. Territory*, 2 W. T. 381, 395; *Har- rington v. Territory*, 1 W. T. 447; see *Leschi v. Territory*, 1 W. T. 13.

§ 2144. (6937.) Jury may be Waived Except in Capital Cases.

The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in capital cases. [L. '54, p. 119, § 108; Cd. '81, § 1085; 2 H. C., § 1304.]

See Const., Art. I, §§ 21, 22, constitutionality of this section doubtful.

§ 2145. (6938.) Personal Presence of Defendant During Trial.

No person prosecuted for an offense punishable by death, or by confinement in the penitentiary or in the county jail, shall be tried unless personally present during the trial. [L. '54, p. 119, § 109; Cd. '81, § 1086; 2 H. C., § 1305.]

See next section.

See supra, § 2094, defendant may appear by counsel, when.

See infra, § 2196, presence upon judgment.

The objection that defendant in a criminal case had been absent during the examination of a portion of the jury cannot be raised in the supreme court by affidavits, when there is nothing in the record as certified showing such fact: *State v. Holmes*, 12 Wash. 169.

It is error to keep the accused in manacles during the progress of the trial and

in the presence of the jury, unless it plainly appears that the prisoner is such a dangerous character as to warrant such precaution: *State v. Williams*, 18 Wash. 47.

Personal presence of accused: See 1 Remington's Digest, p. 842, § 405; *State v. Costello*, 29 Wash. 366; *State v. Howard*, 33 Wash. 250.

§ 2146. (6939.) Trial in Defendant's Absence, When.

No person prosecuted for an offense punishable by a fine only shall be tried without being personally present, unless some responsible person, approved by the court, undertakes to be bail for stay of execution and payment of the fine and costs that may be assessed against the defendant. Such undertaking must be in writing, and is as effective as if entered into after judgment. [L. '54, p. 119, § 110; Cd. '81, § 1087; 2 H. C., § 1306.]

See notes to last section.

§ 2147. (6940.) Competency of Witnesses—Exceptions.

Witnesses competent to testify in civil cases shall be competent in criminal prosecutions, but regular physicians or surgeons, clergymen or priests, shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character; Indians shall be competent as witnesses hereinbefore provided, or in any prosecutions in which an Indian may be a defendant. [L. '54, p. 117, § 95; L. '73, p. 233, § 231; Cd. '81, § 1069.]

See supra, § 1210 et seq., competency of witnesses in civil cases.

See infra, § 2290, convict as witness.

§ 2148. (6941.) Compelling Attendance of Witnesses—Defendant as Witness—Failure to Testify.

Witnesses may be compelled to attend and testify before the grand jury; and witnesses on behalf of the state, or of the defendant in a criminal prosecution, may be compelled to attend and testify in open court, if they have been subpoenaed, without their fees being first paid or tendered, unless

otherwise provided by law; the court may recognize witnesses, with or without sureties, to attend and testify at the same or the next session of the court, or at the term of a court within the state, and any person accused of any crime in this state by indictment, information, or otherwise, may, in the examination or trial of the cause, offer himself or herself as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examinations of other witnesses: Provided, that nothing in this code shall be construed to compel such accused person to offer himself or herself as a witness in such case: And provided further, that it shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf. [Cf. L. '54, p. 116, § 93; L. '71, p. 105, § 2; Cd. '81, § 1067; L. '91, p. 59, § 69; 2 H. C., § 1307.]

See *infra*, notes to § 2158, "defendant as witness."

See *infra*, § 2864, failure to attend as witness, misdemeanor.

See *infra*, §§ 2338, 6938, refusing to attend before legislature or committee.

See *infra*, § 6067, refusing to obey subpoena of insurance commissioner.

See *infra*, § 6555, refusing to obey subpoena of labor commissioner.

See *infra*, § 7324, refusing to appear before military court.

See *infra*, § 9085, refusing to obey subpoena of tax commissioner.

Cited in 7 Wash. 339; 8 Wash. 181, 185; 13 Wash. 486; 32 Wash. 26, 65; 35 Wash. 334.

Instruction as to failure of accused to testify: See 1 Remington's Digest, p. 817, § 291; *State v. Detherage*, 35 Wash. 326; *State v. Mitchell*, 32 Wash. 64.

When defendant in a criminal prosecution takes the witness-stand, he assumes the character of a witness; and as such may be contradicted, disputed, or impeached, the same as any other witness; and such examination does not infringe the constitutional provision that "no person shall be compelled in any criminal case to give evidence against himself": *State v. Duncan*, 7 Wash. 336; *Thompson v. Territory*, 1 W. T. 547.

Although the accused offers himself as a witness, it is an invasion of his constitutional rights to compel him to give evidence against himself on cross-examination, where the state had been unable to secure the evidence in any other way: *State v. O'Hara*, 17 Wash. 525.

If the whole purpose of defendant's testimony is to show that he is not guilty, although not asked the direct question, it is proper cross-examination, as tending to affect his credibility, to question him in reference to his flight soon after the crime was committed: *State v. Duncan*, *supra*.

Where defendant was not sworn as a witness in his own behalf, it was error for the court not to instruct the jury that from such fact no inference of guilt should be

drawn against defendant; and the fact that defendant remained silent does not constitute a waiver of such right: *Linebeck v. State*, 1 Wash. 336; *State v. Myers*, 8 Wash. 177.

The spirit of this provision is, that such failure shall not operate to defendant's disadvantage in any branch or aspect of the case: *Leonard v. Territory*, 2 W. T. 381, 399.

It is not permissible, on the cross-examination of the accused's wife for the state to show that the accused had been convicted of another crime some years before, and before their marriage, in order to affect the credibility of the wife, since the fact tends directly to prejudice the accused, and only remotely, if at all, to discredit the witness: *State v. Eder*, 36 Wash. 482.

An attempt to obtain a flashlight photograph of the defendant in a compromising position with a female under the age of consent, whom it was alleged he had assaulted and raped, would not be a conspiracy to fabricate testimony, in case he voluntarily assumed the position: *State v. Griffin*, 43 Wash. 591.

It is error to require a witness for accused to appear in court fettered and manacled to another person, although he had been charged jointly with defendant and had been found guilty upon a former and separate trial: See *State v. Williams*, 18 Wash. 47.

§ 2149. Immunity of Witnesses in Cases of Bribery, Grafting, etc.

Any person offending against any provisions of the common law or statutes of the state of Washington or any ordinances of any municipality thereof, relating to bribery, grafting or corrupt solicitation, shall be a competent witness against any other person so offending, and may be compelled

to attend and testify upon any trial, hearing, proceeding or investigation in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying shall not thereafter be liable to indictment, information, prosecution, or punishment for such offense. [L. '07, p. 99, § 1.]

Compare § 2330, *infra*. See note to § 2253.

This act is pursuant to the provisions of Article 2, § 30, of the state Constitution relative to the compulsory testimony of parties to corrupt solicitation of public officers.

§ 2150. Not Applicable to Proceedings Before Committing Magistrate or Justice.

The provisions of § 2149 shall not be applicable to any prosecution or proceeding before a committing magistrate or justice of the peace. [L. '07, p. 99, § 2.]

See notes to last section, and § 2291, conflicting with this section.

§ 2151. (6942.) Confession as Evidence.

The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony. [L. '54, p. 117, § 96; Cd. '81, § 1070; 2 H. C., § 1308.]

Cited in 3 Wash. 110; 7 Wash. 240; 12 Wash. 676; 13 Wash. 6; 18 Wash. 396; 21 Wash. 68; 25 Wash. 349; 36 Wash. 488.

Admissions: See 1 Remington's Digest, p. 782, §§ 131-134; State v. Poole, 42 Wash. 192; State v. McFadden, 41 Wash. 1; State v. Lyts, 25 Wash. 347; State v. Bringgold, 40 Wash. 12; State v. Webster, 21 Wash. 63; State v. Gates, 28 Wash. 689; State v. Lewis, 31 Wash. 75.

Inculpatory declarations made by defendant charged with a crime are admissible in evidence when not caused by duress or fear produced by threats: State v. Munson, 7 Wash. 239; and are also admissible as against an accomplice: State v. Coss, 12 Wash. 673.

Admissions made by a defendant in a civil action, when not given under compulsion, may be put in evidence in a criminal prosecution against him: State v. Hopkins, 13 Wash. 5.

If a defendant, after having been shot down by the officers sent to arrest him, but apparently ignorant that they were officers, and without any threats being made against him, confesses that he killed decedent, the confession is voluntary and admissible: State v. Coella, 3 Wash. 99.

As preliminary to the introduction of admissions of a prisoner, the public are not compelled to show that the whole conversation in which it was made is recollected by the witness. Cross-examination affords the means of obtaining a full statement: *Yelm Jim v. Territory*, 1 W. T. 63.

If a portion of a conversation has been drawn out in the examination of a witness the opposing party has a right to have the whole of it placed before the jury: State v. Regan, 8 Wash. 506.

Admission by defendant that he knew a certain larceny had been committed is not evidence that he had actually participated in its commission: State v. Payne, 6 Wash. 563.

If it is shown that a defendant accused of the burglary of certain moneys surrenders to the officer a sum which he had secreted, which corresponds in amount, kind and denomination with that stolen, and accounts for its possession by an extremely improbable explanation, and when accused of the offense makes inculpatory admissions, his guilt is proved beyond a reasonable doubt: State v. Munson, 7 Wash. 239.

On a trial for murder, it is error to admit evidence that the defendant had stated, at the close of the preliminary examination, that his son had confessed to him the commission of the murder, as the accused was not on trial charged with knowingly concealing a murder committed by another: *Rose v. State*, 2 Wash. 310.

In a prosecution for embezzlement, error in the admission of testimony tending to prove the crime is not prejudicial when the admissions of the accused, that he had converted certain of the moneys to his own use, are alone sufficient to authorize a finding of guilty: State v. Whiteman, 9 Wash. 402.

Evidence of conversations had between witnesses in the absence of defendant is

incompetent: *State v. Halbert*, 14 Wash. 306; cited in *Speck v. Gray*, 14 Wash. 589.

Confessions: See 1 Remington's Digest, pp. 789, 790, §§ 165-171; *State v. Newton*, 29 Wash. 373; *State v. Carpenter*, 32 Wash. 254; *State v. Washing*, 36 Wash. 485; *State v. Royce*, 38 Wash. 111; *State v. Mann*, 39 Wash. 144; *State v. McCullum*, 18 Wash. 394; *State v. Marselle*, 43 Wash. 273; *State v. Poole*, 42 Wash. 192.

In a prosecution for murder, where the plea of self-defense is set up, the admission in evidence of the statement of defendant that he killed the deceased is harmless error, though the confession is made as the result of fear produced by threats, when

no further particulars than the mere killing are wrung from the defendant while under the influence of fear: *State v. Coella*, 8 Wash. 513.

Where it is sought to deny defendant's admissions tending to show guilt were produced by threats, the admission of the question, "Did you make any threats to him?" is not prejudicial error, when all that was done or said to defendant, or by him, was subsequently stated in detail: *State v. Munson*, 7 Wash. 239.

Voluntary testimony made under inducement to escape liability in a civil action for embezzlement is admissible in a criminal prosecution therefor: *State v. Hopkins*, 13 Wash. 5.

§ 2152. (6943.) Rules of Evidence Same as in Civil Actions.

The rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions. [L. '54, p. 117, § 97; Cd. '81, § 1071; 2 H. C., § 1309.]

See supra, § 282, pleadings not evidence, use prohibited.

See supra, § 339, and notes, evidence in civil cases.

See supra, §§ 2059, 2065, and notes.

See notes to § 2148, defendant as witness.

See notes to last section, "confessions."

Cited in 15 Wash. 18.

BEST AND SECONDARY EVIDENCE: See 1 Remington's Digest, p. 781, §§ 127-130; *State v. Erving*, 19 Wash. 435; *State v. Champoux*, 33 Wash. 339; *State v. McCauley*, 17 Wash. 88; *State v. Druxinman*, 34 Wash. 257.

ARTICLES, ETC., ADMISSIBLE: See 1 Remington's Digest, p. 780, § 124; *State v. Cushing*, 14 Wash. 527; *State v. Royce*, 38 Wash. 111.

Personal effects of every kind belonging to a prisoner may be taken from his person and used upon the trial for what they may be worth as criminating evidence: *State v. Nordstrom*, 7 Wash. 506.

In a case of forgery, it is not error to exclude photographs of the disputed signatures and of certain genuine signatures when the originals thereof are presented in court: *Crane v. Dexter Horton & Co.*, 5 Wash. 479.

In a prosecution upon a charge of embezzlement it is erroneous to admit in evidence the complaint and answer on which a former civil action, involving the same property in question had been tried: *State v. Hopkins*, 13 Wash. 5; or the correspondence of third parties, when no ground has been shown therefor: *Id.*

Maps, etc.: See 1 Remington's Digest, p. 785, § 145; *State v. Hunter*, 18 Wash. 670.

The admission of certain maps in evidence upon identification of a witness hostile to defendant is not error when there is no showing of inaccuracy in the maps: *State v. White*, 10 Wash. 611.

A map containing much explanatory matter in nature of hearsay evidence should not

be admitted in evidence in a criminal case: *Leonard v. Territory*, 2 W. T. 381.

A stenographer's notes of evidence, taken at a former trial, cannot be introduced for the purpose of impeaching the testimony of a witness on the second trial regarding matters alleged to have been testified to by him at such former trial: *State v. Freidrich*, 4 Wash. 205.

The fact that stolen money is not exhibited in court on the trial for its larceny is not ground for rejecting testimony offered concerning it: *State v. Munson*, 7 Wash. 239.

Petitions addressed to county commissioners asking employment of counsel to assist in prosecuting defendant, etc., inadmissible: *State v. Humason*, 5 Wash. 499.

Upon the trial of a defendant charged with killing an officer while resisting arrest, where the officer had cause to suspect the defendant, evidence that the defendant was innocent of the crime for which the arrest was attempted is inadmissible: *State v. Symes*, 20 Wash. 484.

In a prosecution for murder, the clothing worn by deceased at the time he was shot, and the gun with which the shooting was done, are admissible in evidence, and may properly be taken by the jury to their room when they retire to consider their verdict: *State v. Cushing*, 14 Wash. 527; *Doctor Jack v. Territory*, 2 W. T. 101.

Admissibility in evidence of means of committing offense and articles connected therewith: See 1 Remington's Digest, p. 773, § 93; *State v. Cushing*, 17 Wash. 544; *State v. Burns*, 19 Wash. 52; *State v. Lattin*, 19 Wash. 57; *State v. Surry*,

23 Wash. 655; *State v. Costello*, 29 Wash. 366; *State v. Romano*, 41 Wash. 241.

DOCUMENTARY EVIDENCE: See 1 Remington's Digest, p. 785, §§ 142-146; *State v. Symes*, 20 Wash. 484; *State v. Champoux*, 33 Wash. 339; *State v. Yourex*, 30 Wash. 611.

As to letters and telegrams, see *State v. Wilson*, 10 Wash. 402; *State v. Nelson*, 9 Wash. 221.

A letter written by one of the conspirators suggesting the line of evidence to be used by the two other defendants on the defense of the writer, which letter fell from her room, is sufficiently identified from its contents without proof of the handwriting or signature, and it is admissible against the other defendants in case attempted correspondence was going on between them at the time, and the other defendants were concerned in the offense, although the letter alone was not sufficient evidence of the conspiracy: *State v. Dille*, 44 Wash. 207.

In such a case there is sufficient prima facie evidence of a conspiracy to necessitate the submission of the question to the jury: *Id.*

Where the accused denied the writing of a note tacked upon the cabin of the deceased the morning after he was last seen alive, samples of the accused's handwriting, identified by competent evidence of their genuineness, are admissible in evidence as exhibits for comparison by experts, although the accused did not himself admit their genuineness on the stand: *State v. Fillpot*, 51 Wash. 223.

BURDEN OF PROOF, ETC.: See 1 Remington's Digest, p. 770, §§ 79-83; *State v. Lawson*, 40 Wash. 455; *O'Neill*, *In re*, 41 Wash. 174; *State v. Eubank*, 33 Wash. 293; *State v. Poole*, 42 Wash. 192; *State v. Clark*, 34 Wash. 485.

The burden of proof can never be cast upon the defendant in a criminal prosecution of showing the nonexistence of facts constituting the crime with which he is charged: *State v. Conahan*, 10 Wash. 268.

No man ought to be convicted of a crime upon mere suspicion, or because he may have had an opportunity to commit it, or even because of bad character, and where circumstances are relied on for conviction they ought to be of such a character as to negative every reasonable hypothesis, except that of defendant's guilt: *State v. Payne*, 6 Wash. 563, 574.

In a prosecution for bigamy, the burden of proof is upon the defendant to show that the former marriage, proven by the state, was invalid by reason of the incompetence of the wife to enter into the relation: *State v. Kniffen*, 44 Wash. 485.

The prosecution is not required to produce for the consideration of the jury all the evidence within its knowledge which would have a tendency to throw light upon the matter in issue, irrespective of its tendency to acquit or convict the defendant.

but may confine its efforts to bringing out the facts favorable to its side: *State v. Payne*, 10 Wash. 546.

In a prosecution upon an information charging grand larceny, the evidence is sufficient to uphold a conviction when it appears that defendant, while pretending to play a game of cards, snatched the money of the prosecuting witness, claiming that it had been won by gambling: *State v. Reis*, 9 Wash. 329.

If the information alleges the ownership of the building burned in one Klingman, the ownership is sufficiently proven when the only evidence on the subject is in response to the question, "Do you know who the owner of the premises was or is?" to which the witness answered, "Yes, sir: Mr. C. E. Klingman": *State v. Meyers*, 9 Wash. 8.

Weight and sufficiency of the evidence: See 1 Remington's Digest, pp. 791-794, §§ 175-185; *State v. Smith*, 40 Wash. 615; *State v. Williams*, 36 Wash. 143; *State v. Romano*, 41 Wash. 241; *State v. Fair*, 35 Wash. 127; *State v. Roller*, 30 Wash. 692; *State v. Fetterly*, 33 Wash. 599; *State v. Patchen*, 37 Wash. 24; *State v. Eubank*, 33 Wash. 293; *State v. Johnson*, 36 Wash. 294; *State v. Detherage*, 35 Wash. 326.

The evidence in a criminal case cannot be said to be insufficient to warrant a conviction because based upon the evidence of a prosecuting witness who was a prostitute, as such fact only affects her credibility, which is a question for the jury, especially where the witness was corroborated: *State v. Hill*, 45 Wash. 694.

CIRCUMSTANTIAL EVIDENCE.—In a prosecution for homicide, resting on circumstantial evidence, in rebuttal of the circumstances offered by the territory to fix guilt upon defendant, it is error not to allow the prisoner to show that at the time of decedent's death there was a person in the neighborhood hostile to and who had threatened to kill deceased: *Leonard v. Territory*, 2 W. T. 381.

A conviction of the crime of murder, based upon circumstantial evidence, will not be set aside when all the facts and the circumstances appearing in evidence warrant the conclusion that the accused was guilty of the crime charged: *State v. Smith*, 9 Wash. 341.

Evidence chiefly circumstantial held insufficient to support a verdict of murder in the first degree: *Miller v. Territory*, 3 W. T. 554.

A verdict of murder is sufficiently sustained by evidence showing that a murder had been committed and a house robbed; that defendant was seen in the bushes less than an hour before its commission, as well as some days prior, watching the house; that part of the handle of the hammer with which the homicide had been done and most of the stolen money was found on his premises; that he had been in straitened circumstances, but had given

his wife some money on the day of the homicide, claiming it as a portion of a payment made him on that day by a certain person, whose testimony was not produced at the trial, and that an alibi set up by him was not clearly established: *State v. Craemer*, 12 Wash. 217.

A conviction for arson is not sustained by purely circumstantial evidence creating a suspicion against the accused, unless he is connected with the crime beyond a reasonable doubt, or the circumstances are irreconcilable with his innocence; and where such evidence is consistent with the hypothesis of his innocence, and absolutely no motive was shown, the corpus delicti was not established beyond a reasonable doubt and the supreme court will reverse the judgment; although the trial court refused to set aside a verdict of guilty: *State v. Pienick*, 46 Wash. 522.

In a prosecution for murder, the defendant is entitled to a discharge where the evidence shows that by reason of the defendant's relation with deceased he had an opportunity to commit the crime, but that others had an equal opportunity; that the hatchet with which the crime was probably committed had been used in the fruit-stand formerly belonging to defendant, but at the time was in the actual occupancy of another; that defendant had stains, apparently of blood, around his finger nails, upon his arms and upon his shoes, but which were not proved to have been made by human blood; that his conduct on the day following the night of the murder, considered in the light of his personal peculiarities and the circumstances surrounding him, might be better explained upon the theory of his innocence than that of his guilt; and that a piece had been cut from his vest, not, as claimed by the prosecution, for the reason that it was covered with blood stains, but to serve as a patch for his trousers: *State v. Pagano*, 7 Wash. 549. See, also, *State v. Downing*, 24 Wash. 340.

Upon the trial of a person charged with the crime of murder committed in the perpetration of arson, he is not entitled to introduce proof showing the whereabouts, at the time of the fire, of a certain person hostile to the accused, when neither such proof nor the other circumstances in evidence tend to show the commission of the crime by such person: *State v. Meyers*, 12 Wash. 77.

Evidence is admissible in a murder trial to show that a third party had told defendant that the decedent threatened to kill defendant, if he kept on talking about his owing him money, as a circumstance tending to show the danger defendant believed himself to be in at the time of the murder: *State v. Coella*, 3 Wash. 99.

Evidence of a letter in a prosecution for murder, from deceased to a third person, asserting defendant's indebtedness to deceased is properly admitted, when it has already been shown that defendant made in-

quiries in regard to it prior to the time of its receipt: *State v. Wilson*, 10 Wash. 402.

Testimony of accomplices and codefendants: See 1 *Remington's Digest*, p. 788, §§ 160-164; *State v. Concannon*, 25 Wash. 327; *State v. Pearson*, 37 Wash. 405; *State v. Mann*, 39 Wash. 144.

The evidence of an accomplice, uncorroborated in material matters, is insufficient to authorize a verdict of guilty, except in those cases where, from all the circumstances, the honest judgment is satisfied of guilt beyond a reasonable doubt. Under the facts in this case, it is held that the testimony of the accomplice in the murder is untrustworthy, and the facts claimed to be in corroboration of his story are wholly immaterial: *Edwards v. State*, 2 Wash. 291; *Rose v. State*, 2 Wash. 311.

Corroborating circumstances: See 1 *Remington's Digest*, p. 775, § 100; *State v. Cushing*, 17 Wash. 544; *State v. Fetterly*, 33 Wash. 599.

Although an information charging manslaughter may not show that accused bore the relation to the deceased of surgeon, and that death resulted from a surgical operation, evidence touching the character of the operation, the propriety of performing it, and subsequent treatment of deceased is admissible: *State v. Gile*, 8 Wash. 12; and proof of the consent of deceased to the operation causing death is a good defense only where the operation is performed with due care and skill: *Id.*

The reasonable necessity of employing spring-guns and other defensive machinery for the protection of property, which has resulted in death of a trespasser, is a question of fact which should be left to the jury: *State v. Barr*, 11 Wash. 482.

In a prosecution for homicide by the rigging of a spring-gun in a trunk, evidence that the defendant warned the deceased of the gun, while not a defense unless deceased deliberately attempted suicide, might be material on the question of malice: *State v. Marfaudille*, 48 Wash. 117.

In such a case, defendant's offer to prove that he did not intend to kill the deceased is inadmissible, since any intent was necessarily general and would not be disproved by intent as to any particular person: *Id.*

In such a case, it is error to assume that the law prohibited the setting of a spring-gun except when necessary to prevent a capital crime; since homicide for the prevention of any forcible and atrocious crime is justifiable: *Id.*

In a prosecution for cattle-stealing it is competent for a witness, in testifying as to the identity of the animal alleged to have been stolen, to state that it was such animal "to the best of his judgment and belief," as the question of the force to be given to his testimony is for the jury: *State v. Murphy*, 15 Wash. 98.

Although the evidence in a criminal case may not have been of the most satisfactory and convincing kind, yet the verdict of the jury should not be disturbed on appeal, if there was evidence tending to establish every material fact necessary to show the guilt of the defendant (*State v. Kroenert*, 13 Wash. 644, followed): *Id.*

In a prosecution for an assault with an attempt to commit sodomy upon the person of another, perpetrated upon a moving train, evidence is admissible of a prior assault committed upon the same train a couple of hours previously, although made in another state, for the purpose of showing the defendant's real intention in making the second assault: *State v. Place*, 5 Wash. 773. See further as to evidence of acts showing intent or malice or motive, *State v. Oppenheimer*, 41 Wash. 630.

Where inducements for sexual intercourse are held out by a man to a girl of twelve years of age, consisting in kissing her and fondling her and feeling of her person, and in representations to her that it was not wrong to have sexual intercourse, and that he would not hurt her, these representations being made and his conduct occurring upon a number of occasions when he attempted to have intercourse with her without accomplishing penetration, and also thereafter when he succeeded, they are sufficient, in view of the girl's tender age, to constitute the offense of seduction: *State v. Carter*, 8 Wash. 272.

Other offenses as evidence of offense charged: See 1 Remington's Digest, p. 776, § 107; *State v. Marselle*, 43 Wash. 273; *State v. Carpenter*, 32 Wash. 254; *State v. Fetterly*, 33 Wash. 599; *State v. Gottfreedson*, 24 Wash. 398; *State v. Wood*, 33 Wash. 290; *State v. Nelson*, 39 Wash. 221; *State v. Strodemier*, 40 Wash. 608; *State v. Mobley*, 44 Wash. 549.

In a prosecution for rape, it is error to admit in evidence over objection testimony of a conversation had with defendant, in which he was alleged to have said, referring to the prosecutrix, "I suppose you want to get me in the same trouble with that old lady as you did with the little girl," and to permit the witness to answer the further question, "whether or not that trouble with the little girl, referred to in that conversation, related to some sexual matter between himself and the little girl": *State v. Thompson*, 14 Wash. 285.

In a prosecution for obtaining goods under false pretenses by the giving of a check upon a bank in which the defendant had no funds, it is error to allow the prosecution to introduce testimony of other checks having been given by defendant to other persons when he had no funds on deposit: *State v. Bokien*, 14 Wash. 403.

Upon trial of defendant for larceny of certain cattle, which the evidence shows had been slaughtered by him and the carcasses and hides fully disposed of, evidence is admissible that he had tried to conceal from

the sheriff a sack containing ears cut from the heads of certain other cattle, which it was shown had been stolen, and which were not included in the issue on which he was being tried: *State v. Humason*, 5 Wash. 499.

If a defendant charged with stealing cattle has sought to show that the person alleged in the information as owner had sold the same, evidence of conversations between owner and parties to whom he had made a conditional sale, although not in the presence of defendant, may be given to show that such sale had been rescinded: *Id.*

Where the substance of the charge in an information for maintaining a nuisance is that the defendant unlawfully maintained a powder magazine in a thickly settled neighborhood, evidence is admissible for the purpose of showing that the explosives stored therein had been recklessly managed while being carried from vessel to magazine, and while being loaded upon cars for transportation: *State v. Pagget*, 8 Wash. 579.

HOMICIDE—SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE: See 1 Remington's Digest, pp. 1399-1401, §§ 83-85; *State v. Carey*, 15 Wash. 549; *State v. Vance*, 29 Wash. 435; *State v. Clark*, 34 Wash. 485; *State v. Erving*, 19 Wash. 435; *State v. Manderville*, 37 Wash. 365; *State v. McPhail*, 39 Wash. 199.

CORPUS DELICTI: See 1 Remington's Digest, p. 792, § 181; *Id.*, p. 1388, § 34; *Id.*, p. 1397, §§ 75, 76; *State v. Nichols*, 28 Wash. 628; *State v. Gates*, 28 Wash. 689; *State v. Downing*, 24 Wash. 340.

While in capital cases the corpus delicti, like every other material fact, must be proved beyond a reasonable doubt, it need not be proved by direct evidence. The law is satisfied when so proved by either circumstantial or direct evidence: *Timmerman v. Territory*, 3 W. T. 445.

In a prosecution for murder the corpus delicti is sufficiently proven when it is shown that the charred corpse of a man, with throat cut and bullet holes through his head and abdomen, was found among the burned ruins of a barn, that from certain physical peculiarities of teeth and hair, and also from the shape of the head and face, neighbors and friends recognized the corpse as being that of the owner of the premises, with whose murder the accused was charged: *State v. Smith*, 9 Wash. 341.

For proofs of corpus delicti, see *State v. Munson*, 7 Wash. 239.

In a prosecution for murder to which the defense of justifiable homicide was interposed, the facts of the case held to sufficiently prove the cause of the death: *State v. Moody*, 7 Wash. 395.

In a prosecution for arson the corpus delicti is not established by the fact of the burning of a building, as the presumption is that it was by accident or natural causes: *State v. Pienick*, 46 Wash. 522.

DYING DECLARATIONS: See 1 Remington's Digest, pp. 1395-1397, §§ 64-67;

State v. Power, 24 Wash. 34; State v. Mayo, 42 Wash. 540; State v. Moody, 18 Wash. 165; State v. Crawford, 31 Wash. 260; State v. Baldwin, 15 Wash. 15.

Whether statements claimed to be dying declarations were such is to be decided by the judge presiding at the trial. The showing upon which the dying declarations were made in this case is not disclosed by the record. The presumption, therefore, is that such showing was sufficient: Thompson v. Territory, 1 W. T. 548.

See notes, *infra*, "Res Gestae."

If, in a trial for murder, the dying declarations of the deceased are offered in evidence, and a preliminary examination is made to determine whether such declarations were made by deceased in view of speedy death, the extent of such preliminary hearing is within the discretion of the trial court, and reviewable only when it appears that such discretion has been abused: Klehn v. Territory, 1 Wash. 584.

Where it is shown by competent testimony that after deceased had lost all hope or expectation of recovery, and while under a solemn sense of impending death, he stated that he had been "butchered" by the doctors, the evidence is admissible as a dying declaration, as to the cause of his death: State v. Gile, 8 Wash. 12.

If one witness has been improperly allowed to testify that in a conversation with a murdered man, the latter said he did not know who shot him, the testimony of another witness, who was present at the conversation, that the deceased, in answer to the inquiry who shot him, mentioned the name of defendant, is admissible as rebuttal, on the ground that it calls for a full conversation, of which a part only had been given: State v. Friedrich, 4 Wash. 205.

Dying declarations cannot be excluded on account of constitutional right of defendant to meet his witnesses face to face: State v. Baldwin, 15 Wash. 15.

Proof of conviction of an infamous crime may be given to affect the credibility of one making dying declarations, but cannot be urged as a ground for their exclusion: *Id.*; and the fact that, for some days after deceased had been shot, he had no fear of impending death, is not ground for their exclusion, when it appears that at the time they were made, his condition had grown more serious, and he had been told by the doctors he was about to die, and had said that he realized it: *Id.*

Where a dying declaration has been made to an attorney, who afterward, not in the presence of the deceased, reduced it to writing, but not always in the language of the deceased, even including incorrect statements in one or two minor matters, and the declaration is subsequently read to the deceased and signed by him, it is still admissible in evidence, as a question for the jury to pass upon: *Id.*

INSANITY: See 1 Remington's Digest, p. 771, § 83; *Id.*, p. 774, § 96; *Id.*, p. 770.

§ 77; State v. Clark, 34 Wash. 485; State v. Glindemann, 34 Wash. 221; State v. Vance, 29 Wash. 435; State v. Stockhammer, 34 Wash. 262; State v. Smith, 26 Wash. 354; State v. Champoux, 33 Wash. 339.

Insanity is a matter of independent defense, and as such must be proven to the satisfaction of the jury, unless the facts upon which it is based are a part of the *res gestae*: McAllister v. Territory, 1 W. T. 360.

A mere blow inflicted upon defendant, nothing appearing to show its severity or other physical consequences resulting from it, is not evidence upon which insanity may be inferred: *Id.*

Upon a defense of insanity, where the state sought to show a rational state of mind at a certain time, by a particular statement made by defendant to his daughter, it is error to exclude evidence offered by the defendant as to his daughter's statement to him immediately preceding: State v. Constantine, 48 Wash. 218.

Upon an issue as to the sanity of the accused, a nonexpert witness may give his opinion as to the mental condition of the defendant in his own language; and it is error to strike out an answer that witness could not say whether he was sane or insane but that "his mind was disordered I should say": *Id.*

Upon the defense of insanity claimed to have been brought about by complaints made to him by the defendant's daughter respecting trouble with her husband, it is error to refuse to permit the daughter, who had detailed certain complaints made, to state whether that was the first time she had ever complained to defendant about such troubles: *Id.*

Upon an issue as to the sanity of the accused, after the admission of evidence as to statements made by defendant to his attorney just before the commission of the offense, which tended to show defendant's physical and mental condition, it is error to exclude evidence of what the attorney stated to the defendant: *Id.*

In a prosecution for homicide, committed by defendant after he had been drinking intoxicating liquor, opinions of a physician testifying as an expert, as to the probable effect thereof upon his mind, are admissible upon an issue as to defendant's sanity: State v. Bridgham, 51 Wash. 18.

Upon the defense of insanity it is proper to refuse to instruct that if the defendant's evidence raises a reasonable doubt as to his sanity, the state must remove the doubt by the preponderance of the evidence: State v. Craig, 52 Wash. 66. It is competent to prove insanity by the testimony of nonexpert witnesses: *Id.*

RES GESTAE: See 1 Remington's Digest, pp. 775, 776, §§ 101-106; State v. Burton, 27 Wash. 528; State v. Moody, 18 Wash. 165; State v. Hyde, 22 Wash. 551; State v. Webster, 21 Wash. 63; State v. Fal-

setta, 43 Wash. 159; State v. Webster, 21 Wash. 63; State v. Power, 24 Wash. 34; State v. Smith, 26 Wash. 354; State v. Ripley, 32 Wash. 182.

In a prosecution for conducting a game of faro, testimony that chips and money were played for on a particular day, and that certain named persons were in the game, is competent as part of the *res gestae*: State v. Wilson, 9 Wash. 16.

The dying declarations of deceased calling witnesses to note the fact that he was unarmed is inadmissible as part of the *res gestae*: State v. Eddon, 8 Wash. 292.

In a prosecution for murder it is not error to allow a witness to testify that, at the time of the homicide, the deceased and two other persons were walking together on the sidewalk, and that, as they passed defendant, he suddenly drew a revolver from his pocket and shot the deceased, and almost immediately turned and fired at the two persons with him, such evidence being admissible as part of the *res gestae*: Blanton v. State, 1 Wash. 265.

In a prosecution for obtaining money under false pretenses, the question for the jury is not whether a person exercising ordinary prudence and caution would have been misled, but what was the effect of the false misrepresentations upon the mind of the person defrauded, and what was the result: State v. Knowlton, 11 Wash. 512; that other considerations mingled with the false pretense, having no influence upon the mind and conduct of the prosecutor, is immaterial, if the false pretense is the operative, moving cause of his parting with his property: *Id.*

Ante-mortem statements of deceased relating to the issues, made in the presence of the accused, are admissible, where she was at home in another room with the door open within easy hearing, and were made under such circumstances that she would without doubt have replied thereto if she did not wish to acquiesce therein; but statements made after the door between the rooms was closed, while the accused was engaged in conversation, although she might have heard and denied the same, are not made in her presence or under circumstances calling for a reply: State v. Baruth, 47 Wash. 283.

Ante-mortem statements of deceased, made in the presence of the accused, are admissible only so far as they relate to the shooting from which death resulted, its immediate cause, and the conduct of the parties at the time which was part of the *res gestae*; and statements of conduct at other times, or irrelevant to the issue, are inadmissible: *Id.*

Where two persons have been killed in an affray, statements of persons appearing on the scene shortly after and making an examination thereof, showing the conditions surrounding the bodies at the place

of killing, are admissible in evidence: State v. Robinson, 12 Wash. 491.

Evidence relevant to offense charged also proving other crimes: See 1 Remington's Digest, p. 777, § 108; State v. Hyde, 22 Wash. 551; State v. Norris, 27 Wash. 453; State v. Strodemier, 40 Wash. 608; State v. Dalton, 43 Wash. 278; State v. Patchen, 37 Wash. 24.

On the trial for the murder of a woman, evidence of the killing of her infant child is admissible, where the two homicides were committed at the same time and place, and by the same instrument: State v. Craemer, 12 Wash. 217.

Where the theory of the state in a prosecution for murder is that robbery is the motive, testimony is admissible to show the presence of defendant in the bushes near deceased's residence some thirteen days before the murder, and the finding of the defendant's revolver upon the premises some eighteen days after the crime: *Id.*

In a prosecution for murder, where the theory of the state is that the motive for the crime was robbery, it is not error to sustain an objection to the question as to what was the largest sum deceased ever had in the bank at one time, although the object is to show the habit of deceased to keep his money in bank and not in his room: State v. Coella, 8 Wash. 512.

In a prosecution for an assault with an intent to commit murder, evidence of quarrels and disputes between defendant and the person assaulted is competent as tending to show ill-will and motive: State v. Ackles, 8 Wash. 462.

Upon a prosecution for arson, evidence that the accused shipped merchandise from the building, five and seven days before the fire, is admissible to show motive and to connect the accused with the crime: State v. Mann, 39 Wash. 144.

To warrant a conviction under an information charging an assault with force with intent to rape a female under the age of sixteen years, an assault with force must be proved; and an instruction that the fact that she consented to the advances made constitutes no defense is erroneous: Whitcher v. State, 2 Wash. 286. [Overruled—State v. Hunter, 18 Wash. 674.]

Acts and declarations of conspirators and codefendants: See 1 Remington's Digest, p. 784, §§ 140, 141; State v. McCann, 16 Wash. 249; State v. Mann, 39 Wash. 144.

Upon a joint prosecution for robbery under claim that a conspiracy existed between defendant D. and the other defendants, conversations between D. and the prosecuting witness, had while the other defendants were not present, are properly admitted in evidence against D., and against the others if further evidence show

concerted action between them: *State v. Dilley*, 44 Wash. 207.

There is sufficient evidence of concerted action on the part of defendants, jointly prosecuted for robbery, to admit evidence of conversations had with one of the defendants while the others were not present, where it appears that by such conversations the prosecuting witness was lured to the home of the defendants; where he was attacked and robbed by all of the defendants actively participating therein: *Id.*

In a prosecution for murder, wherein it is sought to show that the crime was the result of a concert of action among four persons to terrorize the community, the acts and statements of the defendant on trial and those of the others in his presence, prior to the commencement of the assault, are admissible in evidence for the purpose of placing the jury in possession of the circumstances leading up to the assault: *State v. Payne*, 10 Wash. 546.

FACTS in issue and relevant to issues: See 1 Remington's Digest, pp. 771-775, §§ 84-100; *State v. McCann*, 16 Wash. 249; *State v. Farris*, 26 Wash. 205; *State v. McGilvery*, 20 Wash. 240; *State v. Riddell*, 33 Wash. 324; *State v. Fetterly*, 33 Wash. 599; *State v. Nelson*, 39 Wash. 221; *State v. Johnson*, 36 Wash. 294; *State v. Weisenberger*, 42 Wash. 426; *State v. Dolan*, 17 Wash. 499; *State v. Oppenheimer*, 41 Wash. 630.

Acts part of series showing system or habit: See 1 Remington's Digest, p. 778, § 111; *State v. Bokien*, 14 Wash. 403; *State v. Pittam*, 32 Wash. 137.

MATERIALITY AND COMPETENCY IN GENERAL: See 1 Remington's Digest, pp. 779-781, §§ 118-126; *State v. Farris*, 26 Wash. 205; *State v. Melvern*, 32 Wash. 7; *State v. Dix*, 33 Wash. 405; *State v. Weisenberger*, 42 Wash. 426.

Hearsay: See 1 Remington's Digest, p. 783, § 139; *State v. Hunter*, 18 Wash. 670; *State v. Champoux*, 33 Wash. 339; *State v. Royce*, 38 Wash. 111; *State v. McLain*, 43 Wash. 124; *State v. Weisenberger*, 42 Wash. 426; *State v. Ripley*, 32 Wash. 182.

It is inadmissible, as hearsay, for a prosecutrix to testify that a third person told her that the accused had said he would not continue relations with her: *State v. Craig*, 52 Wash. 66.

Variance: See 2 Remington's Digest, pp. 1483-1485, §§ 91-99; *State v. Mendenhall*, 24 Wash. 12; *State v. Hoshor*, 26 Wash. 643; *State v. Anderson*, 30 Wash. 14; *State v. Stewart*, 32 Wash. 103; *State v. Morgan*, 21 Wash. 355; *State v. Cox*, 39 Wash. 345; *State v. Dolson*, 22 Wash. 259; *State v. Johnson*, 36 Wash. 294; *State v. Oleson*, 35 Wash. 149; *State v. Burns*, 19 Wash. 52; *State v. Phillips*, 27 Wash. 364.

In a prosecution upon an information charging certain defendants with having killed the deceased by the use of a knife

held by them, there is not a material variance when the proof shows that the knife was held and the blow struck by another than is charged in the information, it further appearing that defendant aided and abetted such person, and that the blow was in pursuance of a conspiracy on their part to terrorize the community: *State v. Payne*, 10 Wash. 545.

In a case for resisting an officer, where the information alleges that the warrant was issued by a justice of the peace for a certain precinct and county for the arrest of the defendant, the fact that in the warrant offered in evidence there were other names mentioned in addition to the defendant does not constitute a prejudicial variance: *State v. Brown*, 6 Wash. 609.

If the information in a prosecution for murder charges that the homicide was committed by means of striking and beating the deceased with "a heavy blunt instrument, a more particular description of which is to the prosecuting attorney unknown," the introduction in evidence of a broken oar, which had been found in the possession of the defendant, is not objectionable on the ground of variance, when it is not established on the trial what instrument it was that caused the death, other than it was a heavy blunt one, and it is not shown that a description of the instrument was known by the prosecuting attorney at the time of filing the information: *State v. Carey*, 15 Wash. 549.

As to ownership of property, see *infra*, § 2156, and notes.

In a prosecution for maintaining a nuisance on certain premises, it is not error to admit evidence of a flow of putrid matter from said premises onto a public highway, where it tends to show the maintenance of the nuisance at the place alleged, and the jury was instructed to confine their deliberations to a nuisance maintained on said premises: *State v. Schaefer*, 45 Wash. 9.

VENUE: See 1 Remington's Digest, p. 793, § 182; *State v. Michel*, 20 Wash. 162; *State v. Fetterly*, 33 Wash. 599. See note to § 2013, *supra*.

It is not to the prejudice of the defendant that the lower court allowed the statute defining the boundaries of the county wherein the offense was committed to be admitted in evidence: *Watts v. Territory*, 1 W. T. 409.

In a prosecution for embezzlement, where there is proof that the moneys came into the hands of the accused in a certain county, and that his duties growing out of his trust were confined to that county, the proof is sufficient to *prima facie* establish the fact that his conversion of the funds was in the same county: *State v. Whiteman*, 9 Wash. 402.

The venue of a forgery is sufficiently established, although no witness testified

directly that the crime was committed at a designated place, where there were many inferences from the testimony and a great deal of direct proof that it was committed in a certain county: *State v. Gilluly*, 50 Wash. 1.

REPUTATION OR CHARACTER OF DEFENDANT: See 1 Remington's Digest, p. 779, §§ 113-117; *State v. Surry*, 23 Wash. 655; *State v. Carpenter*, 32 Wash. 254; *State v. Coates*, 22 Wash. 601.

Evidence of good character is always admissible in a criminal case; and, if it is sufficient to raise a reasonable doubt in the minds of the jury as to the guilt of the accused, it is their duty to acquit: *Klehn v. Territory*, 1 Wash. 584.

Evidence tending to show good reputation should be confined to a time not too remote from the date of the commission of the crime: *State v. Barr*, 11 Wash. 481.

General reputation cannot be proved by the testimony of a witness whose information is based on the story of one person: *State v. Regan*, 8 Wash. 506.

Evidence of the reputation of defendant for peace and quietude is admissible, in a prosecution for murder, on the question as to who was the aggressor in the affray in which the homicide was committed; and defendant is entitled to have the jury charged as to the weight to be given to such evidence: *State v. Cushing*, 14 Wash. 527.

It is not error to restrict the examination of the accused as to particular matters concerning his previous occupations for the purpose of establishing good character, where accused had been allowed to state the same generally and go as far as circumstances required: *State v. Clem*, 49 Wash. 273.

Evidence offered by the accused concerning his family and of whom it consisted is properly excluded when it would only distract the attention of the jury from the issue: *Id.*

Upon a prosecution for homicide, evidence that the defendant, had never before been arrested or accused is inadmissible to establish his general reputation for peace and quiet: *State v. Marfaudille*, 48 Wash. 117.

REPUTATION OR CHARACTER OF DECEASED: See 1 Remington's Digest, p. 1390, § 41; *Id.*, p. 1394, § 60; *State v. Cushing*, 17 Wash. 544; *State v. Lattin*, 19 Wash. 57; *State v. Crawford*, 31 Wash. 260; *State v. Ellis*, 30 Wash. 369.

Evidence of the dangerous character of the deceased not admissible where there is no evidence tending to show an assault or threatened assault on his part: *Smith v. United States*, 1 W. T. 262.

In a prosecution for homicide it is not competent to show the peaceable disposition or character of deceased, or good reputation, unless assailed by the defense, although proof of good character of de-

fendant may have been put in evidence: *State v. Eddon*, 8 Wash. 292.

WITNESSES, DEFENDANT AS.—If the prisoner testifies upon the trial, he subjects himself to the rules controlling other witnesses: *Thompson v. Territory*, 1 W. T. 548.

Instructions, see notes to § 2158, *infra*.

In a prosecution for forgery, where defendant testified that he had spent part of the money obtained after arrival at V. in payment of the prosecuting witness' obligations, it is proper to ask on cross-examination if he had not gambled it away en route to V., and whether he had not so stated to a certain person: *State v. Hill*, 45 Wash. 694.

Where the evidence in a prosecution for murder tends to show that the person who committed the crime had worn a certain pair of rubber boots at the time, and the defendant testifies that he cannot get the boots upon his feet and makes apparently extraordinary effort to put them on in the presence of the jury, it is not error to allow a shoemaker to measure defendant's feet and the boots and testify that a foot of defendant's size could wear the boot; nor is it improper to call other witnesses to put the boots on in the presence of the jury, and allow the shoemaker, after measuring their feet, to testify that he finds them as large as defendant's: *State v. Nordstrom*, 7 Wash. 506.

HUSBAND OR WIFE AS WITNESS.—In an action by a husband for the seduction of his wife, she cannot testify except with the consent of the husband: *Speck v. Gray*, 14 Wash. 589.

Bigamy is not an offense committed by one spouse against another; hence the first wife is not a competent witness in a prosecution against the husband under *Balinger's Code*, § 1214, disqualifying a wife except in prosecutions for a crime committed by one spouse against another: *State v. Kniffen*, 44 Wash. 485.

INTERPRETER AS WITNESS.—When an interpreter is necessary in the trial of a criminal case, he should be neither a witness nor an interested party: *State v. Thompson*, 14 Wash. 285.

It is no objection to the competency of the interpreter that he was subpoenaed as a witness, when it appears that he was subpoenaed for the purpose of having him available as an interpreter: *State v. Michel*, 20 Wash. 162.

OPINIONS, ETC.: See 1 Remington's Digest, pp. 786, 787, §§ 147-154; *State v. Gates*, 28 Wash. 689; *State v. Anderson*, 30 Wash. 14; *State v. Stockhammer*, 34 Wash. 262; *State v. Rutledge*, 37 Wash. 523; *State v. Melvern*, 32 Wash. 7; *State v. Cushing*, 17 Wash. 544; *State v. Falsetta*, 43 Wash. 159.

A witness in a murder trial testified that defendant said that "unless someone paid him he would take his life," and added,

"I often thought of what he said at the saloon, and one day, while in my room, I said to myself, 'My God! he said he would kill that man, and he did it'"; held incompetent as expression of opinion of defendant's guilt: *State v. Coella*, 3 Wash. 99.

The refusal of the court to permit an answer to a question, which merely asks for a conclusion of the witness, is not error: *State v. Coella*, 8 Wash. 512.

Where defendant charged with murder attempts to prove an alibi by testifying that he was in a certain saloon on the night of the murder, and the state places the saloon-keeper on the stand to rebut defendant's proof, and, for the purpose of proving that the witness had a real recollection that the defendant was not there, rather than a mere absence of recollection as to whether or not he had visited the saloon, it is not error when there is no other objection than the leading character of the question, for the saloon-keeper to testify that he knew on the day following the crime that defendant was suspected by the people of his locality: *State v. Nordstrom*, 7 Wash. 507.

If a witness has denied having a conversation with certain persons, in which he refused to tell where defendant was concealed for fear defendant would kill him, it is incompetent as hearsay evidence to allow such person to testify that the witness said, "he could not tell where the defendant was, for the Italians who were the friends of the defendant would kill him": *State v. Coella*, supra.

EXPERTS: See 1 Remington's Digest, p. 787, §§ 155-159; *State v. Gates*, 28 Wash. 689; *State v. Boyce*, 24 Wash. 514; *State v. Melvern*, 32 Wash. 7; *State v. Underwood*, 35 Wash. 558.

The testimony of nonexpert witness as to his opinion of defendant's sanity is inadmissible, unless he has first testified as to acts and conduct within his own knowledge which led him to form an opinion in the matter: *State v. Brooks*, 4 Wash. 328.

Expert testimony is inadmissible for the purpose of showing the effects upon the veracity of a witness occasioned by the daily use by him of a certain quantity of morphine: *State v. Robinson*, 12 Wash. 491.

The testimony of an opium consumer, while unreliable, is competent, but juries should be cautioned as to the credence to be given to it: *State v. White*, 10 Wash. 611.

IMPEACHING, ETC.—Statements of a witness, made out of court, cannot be offered in evidence to impeach his testimony, unless his attention be first directed to the time, place and person involved in the supposed contradiction: *Thompson v. Territory*, 1 W. T. 547.

It is not error to allow impeaching testimony when a witness has been asked if he

had any conversation with a certain person at a given saloon in the month of July in reference to the case, and if he did not at that time make certain statements, which the counsel repeated and which the witness denied that he made, as the witness' attention must have been so directed to the particular statements in regard to which he was interrogated that he was in no way prejudiced, although the exact time was not called to his attention: *State v. Walters*, 7 Wash. 246.

If it is sought to impeach a witness by proof that the testimony given by him on the trial as to a certain matter was at variance with the statement made by him prior to the trial, the evidence of others who heard his statement is admissible, in rebuttal of the impeaching testimony: *State v. Manville*, 8 Wash. 523.

A witness may be asked on cross-examination, in order to impeach her credibility, whether she is a prostitute, and it is error to sustain an objection thereto, unless she claims the privilege of refusing to answer on the ground of criminating herself: *State v. Coella*, 3 Wash. 99.

Proof that defendant in a criminal prosecution has formerly been confined in a county jail is irrelevant; and a former conviction of a witness for the commission of a misdemeanor cannot be proved for the purpose of affecting his credibility: *State v. Payne*, 6 Wash. 563. See, also, *State v. Gottfreedson*, 24 Wash. 398.

Evidence tending to establish a different state of facts from that testified to by a witness is not such impeaching testimony as will permit the introduction of testimony in rebuttal to sustain the witness who has been contradicted: *State v. Nelson*, 13 Wash. 523.

Exclusion of impeaching testimony is not prejudicial error when the facts to which the witness has testified are testified to by a number of other witnesses: *State v. Holmes*, 12 Wash. 169.

Proof of the reason why the state does not, in a second trial, call a witness who testified for the state upon a former trial is immaterial: *State v. Coella*, supra.

Evidence of the reputation of a witness for truth and veracity in a city five or six miles from his residence may be shown in rebuttal of evidence attacking his character in that respect, where he does business in such city and has acquired a reputation for truth and veracity therein: *State v. Cushing*, 14 Wash. 527.

In a prosecution for rape where the prosecutrix is uncorroborated except by her evident condition of pregnancy, it is prejudicial error to exclude evidence offered by the defendant tending to show that, at the time of the alleged acts and while she was a member of his household, the prosecutrix was habitually away at night from 12 to 4 o'clock, as tending to account for her condition and reflecting

upon her credibility: *State v. Mobley*, 44 Wash. 549.

EXCLUSION OF: See 1 Remington's Digest, p. 803, § 223; *State v. Armstrong*, 37 Wash. 51; *State v. Dalton*, 43 Wash. 278; *State v. Ilomaki*, 40 Wash. 629.

If a witness for defendant in a criminal prosecution remains in the courtroom and hears the other witnesses testify, after an order for the separation of witnesses, defendant, if without fault, is entitled to the testimony of such witness, but the fact may be commented on to the jury as affecting witness' credibility: *State v. Lee Doon*, 7 Wash. 308; and it is not incumbent on defendant under such circumstances, in order to avoid the exclusion of his witnesses, to show that his evidence is material: *Id.*

See *supra*, § 1212, exclusion of witnesses, effect of.

Testimony, as to threats made by accused, is admissible even though general in character: See 1 Remington's Digest, p. 1390, § 43; *State v. Nichols*, 28 Wash. 628; *State v. Crawford*, 31 Wash. 260.

THREATS MADE BY DECEASED against defendant in a prosecution for murder, whether uncommunicated or made directly to defendant, are admissible upon the question whether or not deceased was the first assailant and whether or not he so acted at the time of the shooting as to induce in the mind of defendant an honest belief that deceased intended to kill him or do him great bodily harm: *State v. Cushing*, 14 Wash. 527; *White v. Territory*, 3 W.

T. 397; but are inadmissible where it is clear that the threats could have had no possible effect on his mind, so far as creating a fear of the other person is concerned, and that his assault was not made in self-defense: *State v. McGonigle*, 14 Wash. 594; distinguishing *State v. Coella*, 3 Wash. 99; see *Leonard v. Territory*, 2 W. T. 381.

Evidence of threats or of the dangerous character of deceased is inadmissible until there has been proof made of an overt act of attack on the part of the deceased, and that defendant's life was in apparent imminent danger therefrom: *State v. Cushing*, 17 Wash. 544.

Evidence of statements of the deceased, communicated to the defendant, as to his intention to enter upon land at all hazards, is admissible upon an issue as to self-defense: *State v. Lattin*, 19 Wash. 57.

DELIBERATION AND PREMEDITATION: See 1 Remington's Digest, p. 1389, §§ 37-39; *Id.*, p. 1398, § 77; *State v. Webster*, 21 Wash. 63; *State v. Weisenberg*, 42 Wash. 426; *State v. Boyce*, 24 Wash. 514; *State v. Crawford*, 31 Wash. 260.

Evidence of, on the question of murder in the first degree, sufficient to go to the jury is given by testimony that the accused, after some trouble with a person, went to a barn several hundred feet away, armed himself, and returning, deliberately fired upon such person or a man mistaken for him: *State v. McGonigle*, 14 Wash. 594.

§ 2153. (7232.) **Proof of Marriage in Adultery, Bigamy, etc.**

A recorded certificate of marriage, or a certified copy thereof, there being no decree of divorce, proves the marriage of a person for the purposes of this chapter. [L. '95, p. 372, § 5.]

"This chapter," L. '95, chapter 149, relating to incest, adultery and bigamy: See *infra*, § 2889 et seq.

§ 2154. (7117.) **Receiving Stolen Property—Averments and Proof Necessary.**

In any prosecution for the offense of buying, receiving, or aiding in the concealment of stolen property, money, or goods, known to have been stolen, or for bringing or aiding in bringing into this state any such property, money or goods, known to have been stolen, it shall not be necessary to aver, nor on the trial thereof to prove, that the person who stole such property has been convicted, nor that the larceny of such property, nor that any conspiracy or agreement between the defendant and any other person or persons concerning the stealing, buying, receiving, concealing, or bringing of such stolen property, was committed or entered into within the jurisdiction of the court trying the case. [Cf. L. '54, p. 84, § 50; Cd. '81, § 850; L. '90, p. 129, § 1; 2 H. P. C., § 69.]

§ 2155. Corroborating Evidence in Case of Rape or Seduction.

No conviction shall be had for the offense of rape, or seduction, in this state upon the testimony of the female raped, or seduced, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense. [L. '07, p. 396, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2443. See note to §§ 2253 and 2301.

There is sufficient corroborative evidence, within the meaning of this section, where, in addition to evidence of similar acts during several years, circumstances and conditions showing opportunity at the time in question, and testimony of a physician establishing the fact of intercourse for a considerable period, it appeared that the defendant advised his wife to induce the prosecuting witness to leave the state, and his admissions showed that he had often taken liberties with the person of the prosecutrix: *State v. Jonas*, 48 Wash. 133.

Evidence of complaint made by the prosecutrix, soon after a rape, is admissible only as corroborative proof that the complainant was raped, and it is not such corroboration as "tends to convict the defendant of the commission of the offense," within the requirement of this section, since some substantial fact or circumstance independent of the statement of the prosecutrix is required: *State v. Stewart*, 52 Wash. 61.

Instructions singling out complaint made, when erroneous: *Id.*

§ 2156. (6944.) Variance as to Ownership of Property.

In the prosecution of any offense committed upon or in relation to or in any way effecting any real estate, or any offense committed in stealing, embezzling, destroying, injuring, or fraudulently receiving or concealing any money, goods, or other personal estate, it shall be sufficient, and shall not be deemed variance, if it be proved on trial that, at the time when such offense was committed, either the actual or constructive possession, or the general or special property, in the whole or any part of such real or personal estate, was in the person or community alleged in the indictment or other accusation to be the owner thereof. [L. '54, p. 99, § 133; Cd. '81, § 963; 2 H. C., § 1377.]

See supra, § 2076, variance as to ownership of property, when.

Cited in 6 Wash. 189; 35 Wash. 134.

Ownership, possession, or custody of property: See 2 Remington's Digest, p. 1485, § 99; *State v. Fair*, 35 Wash. 127; *State v. Smith*, 40 Wash. 615; *State v. Wilson*, 42 Wash. 56.

If the actual or constructive possession of a building is in a person alleged in the

information for arson to be the owner, it is no variance if it be proved on the trial that he was in such possession at the time of the offense, although the actual ownership be shown to be in another: *State v. Biles*, 6 Wash. 186.

§ 2157. (6945.) Truth of Matter Charged as Libel a Defense.

In prosecution for libel, the truth thereof may be given in evidence to the jury, and if it appear to them that the matter charged as libelous was a crime punishable by a fine or imprisonment, and was true, and that the same was published with good motives and justifiable ends, the defendant shall be acquitted. [Cf. L. '69, p. 384, § 3; L. '79, p. 144, § 4; Cd. '81, § 1233; 2 H. C., § 1378.]

As to repeal of this section, see § 2304, and note. See note to § 2253.

See supra, § 292, requisites of pleading in civil action.

See supra, § 2070, sufficiency of charge in libel.

§ 2158. (6946.) Court to Decide Questions of Law, Rules of Practice.

The court shall decide all questions of law which shall arise in the course of the trial, and the trial shall be conducted in the same manner as in civil actions. [Cf. L. '54, p. 119, § 111; Cd. '81, § 1088; L. '91, p. 60, § 70; 2 H. C., § 1310.]

See *supra*, § 339, and notes, manner of conducting jury trials in civil cases.

See *supra*, § 351, what may be taken to jury-room.

See *supra*, Title III, chapter 7, exceptions.

See Const., Art. IV, § 16, "judges shall not charge juries with respect to matters of fact nor comment thereon, but shall declare the law."

See *infra*, § 2167, and notes, duty to define degrees of offense.

See *infra*, § 2175, trial of question of insanity by jury; *infra*, § 2259, insanity no defense; and *infra*, § 2283, determination of insanity by court and medical experts.

Counsel for prosecution: See 1 Remington's Digest, p. 798, §§ 206, 207; *State v. Hawkins*, 27 Wash. 375; *State v. Hoshor*, 26 Wash. 643.

Where private counsel of the state dental board assisted in prosecutions instituted by the board, it will be presumed that the prosecuting attorney consented thereto: *Stern v. State Board of Dental Examiners*, 50 Wash. 100.

It is within the discretion of the court to allow special counsel to aid the prosecuting attorney in the prosecution of a case, and such discretion will only be interfered with upon a showing of an abuse thereof: *State v. Elswood*, 15 Wash. 453.

Errors arising upon a ruling in regard to the right of argument cannot be urged upon appeal after waiver at the trial: *State v. Ackles*, 8 Wash. 462.

Query: Whether defendant by waiving argument, after the opening argument has been made, can cut off plaintiff's closing argument? *Id.*

Under § 339, *supra*, the accused has no option to refuse to state his defense upon the close of the plaintiff's case: *State v. King*, 50 Wash. 312.

Time for sessions and adjournments: See 1 Remington's Digest, p. 799, § 211; *State v. Craemer*, 12 Wash. 217; *State v. McCann*, 16 Wash. 249; *State v. Ripley*, 32 Wash. 182.

ARGUMENTS AND CONDUCT OF COUNSEL: See 1 Remington's Digest, pp. 805-807, §§ 235-244; *State v. Boyce*, 24 Wash. 514; *State v. Hawkins*, 27 Wash. 375; *State v. Stentz*, 30 Wash. 134; *State v. Patchen*, 37 Wash. 24; *State v. Mayo*, 42 Wash. 540; *State v. Armstrong*, 37 Wash. 51; *State v. Wong Tung Hee*, 41 Wash. 623; *State v. Costello*, 29 Wash. 366; *State v. Ulsemer*, 24 Wash. 657; *State v. Smokalem*, 37 Wash. 91.

The mere calling attention to how the defendant looks by the prosecuting attorney in his argument to the jury does not overstep the limits of fair debate and constitute prejudicial misconduct: *State v. Bokien*, 14 Wash. 403; and no valid objection can be made to remarks of counsel on evidence that has been admitted by the court, although it was improperly admitted: *Id.*

Remarks of the prosecuting attorney, apparently of a character amounting to misconduct on his part, will not warrant a reversal, when the record is fragmentary and indefinite on the subject and does not disclose under what circumstances the remarks were tendered: *State v. Young*, 13 Wash. 584.

The action of the court in allowing leading questions is a matter so largely within its discretion as to call for the interference of the appellate court only in extreme cases: *State v. Elswood*, *supra*.

As to right of counsel to read law to the jury, see *State v. Coella*, 3 Wash. 99, 116.

It is not reversible error for the prosecuting attorney to read a correct copy of the evidence to the jury, where the court at the time instructed that the jury were the exclusive judges of what the testimony was: *State v. Churchill*, 52 Wash. 210.

Although incompetent questions are asked by prosecuting attorney, for the purpose of prejudicing the jury against the accused, the refusal of the court to rebuke the attorney is not error, when, at the time objection thereto is taken, the court states to the jury that "they are to give no weight to that testimony which is ruled out": *State v. Manville*, 8 Wash. 523.

In a prosecution for seduction, in which three witnesses for the defendant testified that they previously had had sexual intercourse with the prosecutrix, it is an abuse of discretion and prejudicial error, depriving the defendant of a fair trial, to permit cross-examination to proceed to the extent of asking whether one of such witnesses had broken an engagement with another woman, whether one of them had been accused of bastardy, and allowing questions implying that they had had sexual intercourse with other women: *State v. Belknap*, 44 Wash. 605.

Refusal of the court upon its own motion to permit defendant's counsel in a murder case to ask a witness on cross-examination whether he is testifying by guess or by his own knowledge is prejudicial error, when the case is close to the border line between murder and manslaughter, and the witness was careless in his manner of testifying, often using the words "I guess," when rehearsing statements of fact: *State v. Rutten*, 13 Wash. 203.

The fact that the court asked counsel for defendant, in the presence of the jury, whether they had any objection to the separation of the jury before verdict, is not ground for reversal, in the absence of any proof that defendant was prejudiced thereby: *State v. Holedger*, 15 Wash. 443.

In the trial of a murder case, an exhibition on the part of the court, in the presence of the jury, of strong feeling against counsel for defense, culminating in a fine for contempt, occasioned merely by counsel's insisting on a right to be heard concerning an objection to the relevancy of the question

propounded upon examination is such misconduct of the court as to constitute prejudicial error: *State v. White*, 10 Wash. 611.

A motion requiring the prosecution in a criminal case to call certain specified persons, who are alleged to have equal or superior knowledge of the facts with the witnesses already called by the prosecution, is a matter addressed to the discretion of the trial court, and its ruling thereto will not be disturbed unless a clear abuse of discretion is shown: *State v. Payne*, 10 Wash. 545.

Under § 351, *supra*, and the rule of liberal construction prescribed by § 144, *supra*, it was not error to permit the jury to take to their room a hat and blood-stained garments that had been admitted in evidence, and by necessary implication § 2181, *infra*, authorizes the court to permit such evidence to be taken to the jury-room: *Doctor Jack v. Territory*, 2 W. T. 101.

The distinction between an exhibit and the testimony of a witness, whether oral or in writing, pointed out: *Id.*

The jury is the tribunal instituted by law to pass upon questions of fact, and, where there is a conflict of testimony, the verdict will not be disturbed: *State v. Manville*, 8 Wash. 523.

When there is evidence tending to show every fact necessary to establish the guilt of defendant, the court is not warranted in taking the case from the jury: *State v. Elswood*, *supra*.

CONDUCT OF TRIAL IN GENERAL.—

Presence and conduct of witnesses, bystanders, or of others under indictment: See 1 Remington's Digest, pp. 799-801, §§ 214-219; *State v. Dalton*, 43 Wash. 278; *State v. Anderson*, 20 Wash. 193; *State v. McGilvery*, 20 Wash. 240; *State v. Eubank*, 33 Wash. 293; *State v. Hyde*, 22 Wash. 551; *State v. Mann*, 39 Wash. 144.

Error cannot be assigned on failing to grant a motion to view premises in a prosecution for a homicide, when the court delayed ruling "until later in the case," no exception was then taken, and the motion was not renewed, nor anything further done except the noting of an exception after the jury was instructed and had retired: *State v. Fillpot*, 51 Wash. 223.

Province of the court and jury—Questions of law or fact, weight and effect of, and inferences from, evidence, degree of offense: See 1 Remington's Digest, pp. 807, 808, §§ 247-253; *State v. Cushing*, 17 Wash. 544; *State v. Crawford*, 31 Wash. 260; *State v. Eubank*, 33 Wash. 293; *State v. Yourex*, 30 Wash. 611; *State v. Boyse*, 24 Wash. 514.

Direction of verdict: See 1 Remington's Digest, p. 808, § 254; *State v. O'Hara*, 17 Wash. 525; *State v. McCullum*, 18 Wash. 394; *State v. Hyde*, 22 Wash. 551; *State v. Eubank*, 33 Wash. 293; *State v. Stockhammer*, 34 Wash. 262.

If defendant interposes a motion for a directed verdict in his favor, at the close of plaintiff's case, it is the duty of the court to deny it unless from a superficial examination it appears that the evidence is clearly insufficient to sustain the charge: *State v. Wilson*, 10 Wash. 402.

Scope of evidence—In chief: See 1 Remington's Digest, p. 803, §§ 228, 229; *State v. Kasper*, 5 Wash. 174; *State v. Burton*, 27 Wash. 528; *State v. Ripley*, 32 Wash. 182; *State v. Carpenter*, 32 Wash. 254; *State v. Fetterly*, 33 Wash. 599; *State v. Armstrong*, 37 Wash. 51; *State v. McPhail*, 39 Wash. 199.

The order of admitting proof, before establishment of the corpus delicti, is within the discretion of the trial court: *State v. Gohl*, 46 Wash. 408.

Admission in rebuttal of evidence proper in chief—Reopening case for further evidence: See 1 Remington's Digest, p. 804, §§ 230, 231; *State v. Nelson*, 13 Wash. 523; *State v. Druxinman*, 34 Wash. 257; *State v. Sexton*, 37 Wash. 110; *State v. Constantine*, 43 Wash. 102.

It is error to refuse to allow the defendant to contradict substantive evidence offered by the state as impeaching evidence, but which should have been introduced as part of the state's case in chief: *State v. Constantine*, 48 Wash. 218.

Objections to evidence—Waiver, time, sufficiency: See 1 Remington's Digest, p. 805, §§ 232-234; *State v. Yourex*, 30 Wash. 611; *State v. Melvern*, 32 Wash. 7; *State v. Douette*, 31 Wash. 6.

Remarks and conduct of judge: See 1 Remington's Digest, p. 800, §§ 215-217; *State v. Burns*, 19 Wash. 52; *State v. Coates*, 22 Wash. 601; *State v. Surry*, 23 Wash. 655; *State v. Boyce*, 24 Wash. 514; *State v. Eubank*, 33 Wash. 293; *State v. Glinde-man*, 34 Wash. 221; *State v. Hyde*, 20 Wash. 234; *State v. Crotts*, 22 Wash. 245; *State v. Pasquale*, 39 Wash. 260; *State v. Priest*, 32 Wash. 74.

CHARGING JURY.—Remarks of court, etc. See *supra*, § 339, notes, on instructions; etc.

Subdivision 6 of § 339, *supra*, requires the court, in charging the jury, to state to them all matters of law necessary for their information in finding a verdict, with only such allusions to the evidence as may be necessary; but the court oversteps the bounds of a legal charge, though telling them the facts are for their decision alone, where, under the guise of an illustration of the meaning of circumstantial evidence, it devotes a long oral charge to an argument of the very facts of the case, taking up the material constituents of the territory's case, dovetailing the facts together, and deducing and announcing a conclusion to the jury: *Freidrich v. Territory*, 2 Wash. 358.

The fact that the court explains to the jury the nature and legal effect of defendant's plea is not open to the objection that it is a judicial comment on the facts instead of the law: *State v. Carter*, 15 Wash. 121.

The remark of the court to the jury preliminary to instructing them, that "you will be left to the determination between the demands of public justice and the defense of the prisoner at the bar," does not authorize the inference that public justice demands the defendant's conviction, and is not error: *State v. Brooks*, 4 Wash. 328.

The remark of the trial judge, while attempting to convey to the minds of the jury that it is not necessary to prove that a crime was committed on the exact day alleged in the information, that "it is only necessary to allege the date in order to identify the crime," does not assume that a crime has been committed: *State v. Walters*, 7 Wash. 246. See, also, *State v. Straub*, 16 Wash. 111.

Where the court, in excluding as exhibits in evidence certain boxes filled with dirt in which appeared impressions made by the feet of horses, referred thereto as "manufactured testimony," the language must be construed as applying to the manner in which the exhibit had been manufactured, and not to the course of the defense in conducting the cause: *State v. Meyers*, 12 Wash. 77.

Where the state's evidence fixed the date of an offense as being between the 12th and 15th of a certain month, and upon the defense of an alibi there was evidence that the defendant was home, sick in bed, during that period, it is misleading and error, instructing upon the subject of the alibi, to state that the exact date is immaterial and it is sufficient if the defendant committed the crime at any time within three years, etc.: *State v. King*, 50 Wash. 312.

Instructions invading province of jury—Comments on facts and evidence, assumptions, etc.: See 1 Remington's Digest, pp. 809-811, §§ 255-268; *State v. Mitchell*, 22 Wash. 64; *State v. Vance*, 29 Wash. 435; *State v. Fenton*, 30 Wash. 325; *State v. Eubank*, 33 Wash. 293; *State v. Detherage*, 35 Wash. 326; *State v. McCann*, 16 Wash. 249; *State v. Carey*, 15 Wash. 549; *State v. Gates*, 28 Wash. 689; *State v. Howard*, 33 Wash. 250; *State v. Straub*, 16 Wash. 111; *State v. Stentz*, 33 Wash. 444; *State v. Manderville*, 37 Wash. 365; *State v. Williams*, 36 Wash. 143; *State v. Newton*, 29 Wash. 373; *State v. McPhail*, 39 Wash. 199.

An instruction defining what would be employing an armed body of men, and authorizing the jury to find the defendant guilty if they believed that he committed specified acts constituting the offense within the definition, is not objectionable as a comment on the facts: *State v. Gohl*, 46 Wash. 108.

Instruction stating the evidence which had been introduced by the parties in support of their claims is a comment on the facts, and reversible error, if prejudicial: *Id.*

An instruction assuming as a fact that defendant had fled is not an unlawful comment on the evidence, where the defendant admitted and himself testified to the fact: *State v. Belknap*, 44 Wash. 605.

Requests for instructions: See 1 Remington's Digest, pp. 823, 824, §§ 313-318; *State v. Johnson*, 19 Wash. 410; *State v. Douette*, 31 Wash. 6; *State v. Armstrong*, 37 Wash. 51; *State v. Weisenberger*, 42 Wash. 426; *State v. Messner*, 43 Wash. 206; *Smith v. United States*, 1 W. T. 262; *State v. Freidrich*, 4 Wash. 204; *State v. Murphy*, 13 Wash. 229; *State v. Webb*, 20 Wash. 500; *State v. Clark*, 34 Wash. 485; *State v. Wilson*, 42 Wash. 56; *State v. Rutten*, 13 Wash. 203; *State v. Cushing*, 17 Wash. 544; *State v. McCann*, 16 Wash. 249; *State v. Klein*, 19 Wash. 368; *State v. Vance*, 29 Wash. 435; *State v. Baldwin*, 15 Wash. 15; *State v. Anderson*, 30 Wash. 14; *State v. Churchill*, 52 Wash. 210.

INSTRUCTIONS, GENERAL PRINCIPLES: See 1 Remington's Digest, pp. 812-823, §§ 270-312.

The jury are to be charged collectively, and not individually: *State v. Robinson*, 12 Wash. 191; *State v. Williams*, 13 Wash. 335; *State v. Cushing*, 17 Wash. 544; *State v. Armstrong*, 37 Wash. 51.

An instruction is not erroneous for the reason that it does not state all the elements necessary to warrant a conviction, if, taken in connection with what was said in immediate connection therewith, the law is fully stated: *State v. Wilson*, 9 Wash. 16, 21.

The attempt to define a crime is erroneous, if any of the essential elements thereof be omitted or any legal defense to which defendant is entitled ignored, and such omission is not cured by reason of other portions of the charge correctly stating the law: *McClaine v. Territory*, 1 Wash. 345, 353; citing *People v. Wong Ah Ngow*, 54 Cal. 151.

In charging the jury, when so requested, the court must define terms such as "malice" and "premeditation" in stating the statutory requisites of a crime: *State v. Coella*, 3 Wash. 99.

It is not error in instructing that it is the duty of the jury to give proper weight to the testimony of each witness to fail to give any definition of the meaning of proper weight: *State v. Druxinman*, 34 Wash. 257.

It is not error to refuse a request for instructions relative to a lesser degree of the offense charged, when there is no evidence tending to establish it: *Smith v. United States*, 1 W. T. 262.

See *infra*, § 2167, and notes, duty to define degrees of offense.

If the court in charging the jury reads the statute under which the information was drawn, the complete sense of which cannot be determined except by reading the whole thereof, inclusive of the penalty attached to the offense, it is not error: *State v. John Port Townsend*, 7 Wash. 462.

Subdivision 4 of § 339, *supra*, makes it reversible error for the court to refuse an instruction which is pertinent and consistent with the law and evidence, provided the refusal has worked an injury to the party requesting, but this would be the law without the statute: *State v. Freidrich*, 4 Wash. 204, 214. But if already given it need not be repeated: *Leonard v. Territory*, 2 W. T. 381.

It is not error to refuse an instruction defining and explaining circumstantial evidence in scientific legal terms drawn from text-writers, when an instruction given covers the material points in plainer language: *State v. Freidrich*, *supra*. Nor to refuse to give requested instructions when the court has fully and correctly stated the law of the case in the charge given: *State v. Murphy*, 13 Wash. 229; and see *State v. Ruten*, 13 Wash. 203; *State v. Baldwin*, 15 Wash. 15.

And if an instruction in a case is asked, which refers to facts of which there is no evidence to prove, it is error to give it: *Miller v. Territory*, 3 W. T. 554. If misleading, however, the judgment will be reversed: *Id.*; *State v. Jones*, 3 Wash. 175.

An instruction which does not correspond with the law is erroneous and should be refused: *Leonard v. Territory*, *supra*.

It is not error to refuse a charge containing abstract propositions not bearing upon the case at issue: *Yelm Jim v. Territory*, 1 W. T. 63; *State v. Cushing*, 17 Wash. 544.

In the prosecution of a police officer for shooting a person whom he suspected of having committed a crime and whom he was attempting to arrest, an instruction by the court on the right to arrest without warrant is not erroneous on the ground of being inapplicable to the evidence in the case: *State v. Surry*, 23 Wash. 655.

Construction of charge as a whole—Error cured by withdrawal or giving other instructions: See 1 Remington's Digest, p. 822, §§ 311, 312; *State v. Carter*, 15 Wash. 121; *State v. Crawford*, 31 Wash. 260; *State v. Surry*, 23 Wash. 655; *State v. Riddell*, 33 Wash. 324; *State v. Manderville*, 37 Wash. 365; *State v. Clark*, 34 Wash. 485.

In a criminal prosecution, in which the only testimony introduced is on the part of the state, and there is no substantial conflict in that, but the proofs conclusively show the guilt of the defendant, errors committed in charging the jury are without prejudice: *State v. Witherow*, 15 Wash. 562.

It is not error for the judge, in charging the jury, to mention as a fact a thing which

has been proved beyond all controversy: *Edwards v. Territory*, 1 W. T. 195.

The court may, after the return of the jury with its verdict, but before its reception, correct a mere erroneous instruction, and send the jury back for further deliberation: *Doctor Jack v. Territory*, 2 W. T. 101.

It is error for the court, in a criminal case, upon the request of the jury, but in the absence of the defendant, to repeat to the jury certain instructions given and orally explain the meaning thereof, although defendant's attorney was present and made no objection: *Linbeck v. State*, 1 Wash. 336. But see *State v. Yourex*, 30 Wash. 611.

The fact that oral instructions were given to the jury in the absence of defendant cannot be urged on appeal when it does not appear from the record what the instructions were, nor from any source that they were prejudicial, nor that the matter was called to the attention of the court upon a motion for a new trial: *State v. Nichols*, 15 Wash. 1.

Objections to instructions cannot be made in the appellate court unless excepted to below: *Smith v. United States*, 1 W. T. 262.

The refusal of the court to allow counsel to except orally in the presence of the jury to the instructions given is not error: *State v. Coella*, 8 Wash. 512.

Although there is no exception to the whole or a part of the charge on the ground that it is an argument upon the facts, yet, in a capital case, if there is prejudicial error, patent upon the face of the record, denying the accused a fair and impartial trial, these technical objections will not deprive defendant of a new trial: *Freidrich v. Territory*, 2 Wash. 358.

Where an instruction is a requested one, with only slight modifications made by the court, a general exception to the refusal as requested is insufficient, as the exception should be to the modification of the instruction: *State v. Robinson*, 12 Wash. 491.

Sufficiency of instructions as to corpus delicti, intent and malice, deliberation and premeditation, insanity: See 1 Remington's Digest, p. 812, §§ 270-274; *Id.*, p. 1404, § 101; *State v. Burton*, 27 Wash. 528; *State v. Dolan*, 17 Wash. 499; *State v. Surry*, 23 Wash. 655; *State v. Straub*, 16 Wash. 111; *State v. Gin Pon*, 16 Wash. 425; *State v. Moody*, 18 Wash. 165; *State v. Hawkins*, 23 Wash. 289; *State v. Romano*, 41 Wash. 241; *State v. Williams*, 36 Wash. 143; *State v. Champoux*, 33 Wash. 339.

Sufficiency of instructions as to intoxication, alibi, character: See 1 Remington's Digest, p. 813, §§ 275-277; *State v. Hawkins*, 23 Wash. 289; *State v. Burton*, 27 Wash. 528; *State v. Cushing*, 17 Wash. 544; *State v. Stentz*, 33 Wash. 444; *State v. Underwood*, 35 Wash. 558.

Sufficiency of instructions as to presumptions and burden of proof: See 1 Remington's Digest, pp. 814, 815, §§ 278-284; *State*

v. Melvern, 32 Wash. 7; State v. Stentz, 33 Wash. 444; State v. Cushing, 17 Wash. 544; State v. Mayo, 42 Wash. 540; State v. Nichols, 15 Wash. 1; State v. Williams, 36 Wash. 143; State v. Dolan, 17 Wash. 499; State v. Romano, 41 Wash. 241; State v. Power, 24 Wash. 34; State v. Hoshor, 26 Wash. 643.

Sufficiency of instructions as to declarations of conspirators and codefendants, and testimony of accomplices: See 1 Remington's Digest, p. 815, §§ 285, 286; State v. Johnny Tommy, 19 Wash. 270; State v. Coates, 22 Wash. 601; State v. Concannon, 25 Wash. 327; State v. Pearson, 37 Wash. 405; State v. Harras, 25 Wash. 416.

Sufficiency and requisites of instructions as to grade or degree of offense: See 1 Remington's Digest, p. 819, § 297; State v. Dolan, 17 Wash. 499; State v. Young, 22 Wash. 273; State v. Dengel, 24 Wash. 49; State v. Fenton, 30 Wash. 795; State v. Bailey, 31 Wash. 89; State v. McPhail, 39 Wash. 199; State v. Lindgrind, 33 Wash. 440; State v. Underwood, 35 Wash. 558.

Error cannot be predicated upon the failure of the court to instruct the jury as to lesser offenses included in the charge, in the absence of specific requests therefor: State v. Parsons, 44 Wash. 299.

Written instructions—Form and language—Repetition: See 1 Remington's Digest, p. 820, §§ 300-302; State v. Champoux, 33 Wash. 339; State v. Mayo, 42 Wash. 540; State v. Cushing, 17 Wash. 544; State v. Harras, 25 Wash. 416; State v. Clark, 34 Wash. 485.

REASONABLE DOUBT: See 1 Remington's Digest, p. 818, §§ 292-294. All that is meant by the term "reasonable doubt" is that, considering all the circumstances in the case and all the testimony, both state's and defendant's, the jury must be satisfied beyond a reasonable doubt of the guilt of the defendant: State v. Kasper, 5 Wash. 174, 177.

A reasonable doubt is never an absolute, but always a relative, question. A reasonable doubt for a trial juror is such a doubt as a man of ordinary prudence, sensibility and decision, in determining an issue of like concern to himself as that before the jury to the defendant, would allow to have any influence whatever upon him, or make him pause or hesitate in arriving at his determination: Leonard v. Territory, 2 W. T. 381; criticised in State v. Gile, 8 Wash. 12, 23; see State v. Krug, 12 Wash. 288; State v. Harras, 25 Wash. 416.

Where the court charges the jury that "a doubt, to justify acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence. If, after considering all the evidence in the case, you can say that you have an abiding conviction of the truth of the charge, then you are satisfied beyond a reasonable doubt, and should convict; if you have not such a conviction, you should acquit," it is not

error to refuse an instruction on the same subject: State v. Gile, 8 Wash. 13; see State v. Krug, *supra*.

An instruction defining a reasonable doubt which is possibly open to the objection that it recognizes the right of the jury to require less positive proof of facts in cases of minor importance than those of a graver nature, is not prejudicial, when the instruction, taken as a whole, defines such doubt as one which would make a man of common prudence pause or hesitate to act thereon: State v. Rosener, 8 Wash. 42; State v. Carpenter, 32 Wash. 254.

The error of instructing a jury that proof beyond a reasonable doubt to warrant a conviction "does not require that the jury should be satisfied beyond a reasonable doubt, of each link of the chain of circumstances relied on to establish defendant's guilt," is not cured by the further instruction, "it is sufficient, if taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that the defendant is guilty": Leonard v. Territory, *supra*.

Where the court has rightfully and fully instructed the jury upon the question of reasonable doubt, to which no exception was taken, it is not error for the court to refuse an instruction upon the same subject asked for by defendant, although the latter is correct in law: Timmerman v. Territory, 3 W. T. 445.

It is not error to fail to define reasonable doubt in the absence of any request therefor: State v. Johnson, 19 Wash. 410.

DYING DECLARATIONS.—An instruction that dying declarations are to be treated as other evidence in the case is erroneous, as the same weight cannot be given to such testimony as when the witness is subject to cross-examination: State v. Ed-don, 8 Wash. 292; see State v. Powers, 24 Wash. 34.

CREDIBILITY of witnesses: See 1 Remington's Digest, p. 816, §§ 287-289; State v. Hawkins, 23 Wash. 289; State v. Hoshor, 26 Wash. 643; see, also, State v. Fenton, 30 Wash. 325; State v. Patchen, 37 Wash. 24; State v. McPhail, 39 Wash. 199; State v. Ilomaki, 40 Wash. 629; State v. Rutledge, 37 Wash. 523. An instruction that "if you believe that any witness has sworn falsely in this case in regard to any material matter to the issue, you should distrust all his evidence," is properly refused. The jury must believe the testimony willfully false, and such instruction should also contain a modification, "except so far as it may be corroborated by other evidence in the case": State v. Freidrich, 4 Wash. 204.

A charge to the jury that they are warranted in disregarding the testimony of any witness if they believe that he has willfully testified falsely to any matter is not prejudicial, when the error of the court in not stating that the falsity should be in a material matter was not raised by the exception taken, nor the court's attention called

to the inadvertence at the time: *State v. Carter*, 15 Wash. 121.

The failure to insert the word "willfully" before "falsely," in charging as to the effect upon the credibility of a witness who has testified falsely as to a material fact, does not constitute reversible error, as a witness does not testify falsely unless he makes a willful misstatement: *State v. Kyle*, 14 Wash. 550.

CIRCUMSTANTIAL EVIDENCE.—An instruction to the jury, that the fact that the prisoner does not disprove circumstances proven before them will give additional weight to such circumstances as are proved, if the jury believes the defendant has the means of disproving them if false, is erroneous: *Leonard v. Territory*, 2 W. T. 382.

An instruction was rightfully refused which was, "when circumstances alone are relied upon for conviction, each and every circumstance must be consistent with the other and with the whole chain; and each must point to the defendant exclusively as the guilty agent, and every link of the chain of circumstances must be so complete and consistent with the guilt of the defendant as to exclude every reasonable hypothesis of his innocence and so perfect and complete as to establish his guilt to a moral certainty": *Timmerman v. Territory*, 3 W. T. 445; see *State v. Myers*, 12 Wash. 77.

DEFENDANT AS WITNESS, ETC.: See 1 Remington's Digest, p. 817, §§ 290, 291; *State v. Ulsemer*, 24 Wash. 657; *State v. Melvern*, 32 Wash. 7. Where the defendant in a criminal prosecution was not sworn as a witness in his own behalf, it is error for the court to fail to instruct that no inference of guilt should be drawn therefrom: *Linbeck v. State*, 1 Wash. 336; *State v. Myers*, 8 Wash. 177. See supra, § 2147, and notes.

In charging the jury as to the inference of guilt from defendant's silence, it is not erroneous to employ the words "no inference of guilt should arise in the minds of the jury," instead of the words used in the statute: *State v. Krug*, 12 Wash. 289.

Although it is proper to charge the jury that they have a right to consider the interest of the accused in the verdict, it is error to distinguish his testimony by further charging that they "are not required to receive blindly the testimony of such accused person as true; but you are to consider whether it is true and made in good faith or only for the purpose of avoiding conviction": *State v. White*, 10 Wash. 611.

Where a defendant, in a trial for murder, is a witness, it is proper to refuse to instruct: "In criminal cases and especially in cases of homicide, the statements made by defendant are of the utmost and essential importance": *State v. Freidrich*, 4 Wash. 204.

Where the accused appears as a witness in his own behalf, it is not error to charge

that "in case of defendant you have a right to consider the great interest he has in your verdict": *State v. Nordstrom*, 7 Wash. 506. See supra, § 2147 and notes. See, also, *State v. McCann*, 16 Wash. 249; *State v. Carey*, 15 Wash. 549.

An instruction in a criminal trial calling the attention of the jury to the personal appearance and demeanor of defendant during the trial is improper: *State v. Freidrich*, supra.

If the evidence is of such a nature as to clearly warrant the verdict in a prosecution for murder, it will not be disturbed on account of an erroneous instruction as to the weight to be given to proof of good character of defendant: *State v. Wilson*, 10 Wash. 402.

It is prejudicial error, in giving an instruction as to an alibi, to preface the same by a remark that the court did not think it necessary, where the credibility of the accused on that point was directly in issue, as the same disparages the defense and infringes upon the province of the jury: *State v. King*, 50 Wash. 312.

IN PARTICULAR OFFENSES—ARSON. An instruction in a prosecution for arson where death ensues, under Code 1881, § 823, that "you must find from the evidence that the deceased was in the house at the time of the fire; that defendant knew he was there, and that the deceased came to his death in said house by reason of the burning of the house," is erroneous: *McClaine v. Territory*, 1 Wash. 345.

ASSAULT: See 1 Remington's Digest, p. 275, § 16; *State v. Dunn*, 22 Wash. 67; *State v. Surry*, 23 Wash. 655. Under an information charging an assault with intent to commit murder in the second degree, it is not error to refuse to charge the jury that before they could find the defendant guilty, they must find that the shooting was done purposely and of his premeditated malice, as premeditation is not an element of the crime charged: *State v. Ackles*, 8 Wash. 462.

GAMING: See 1 Remington's Digest, p. 1320, § 14; *State v. Fountain*, 14 Wash. 236. An instruction held to properly state the law when it charges that it was not necessary that the jury find that the offense was committed upon the specific day charged in the information, but that it was sufficient if they found it was committed on any specific day within one year preceding the filing of the information: *State v. Wilson*, 9 Wash. 16.

EMBEZZLEMENT: See 1 Remington's Digest, p. 1022, § 20; *State v. Boggs*, 16 Wash. 143; *State v. Lewis*, 31 Wash. 75. In charging embezzlement by a public officer for a misuse of public funds, it is not error to charge the jury that the purpose of the statute, under which the prosecution was had, was to restrain public officers from using for their own profit or in any other manner than is authorized and directed by

law, the public money intrusted to them for safekeeping: *State v. Krug*, 12 Wash. 288.

In charging a public officer with embezzlement for the misuse of public funds for his individual profit, it is not error to charge that, if the defendant drew an instrument, signing the same as city treasurer, directing a bank in which money was deposited to the credit of the city to pay a given sum to a certain individual, and that the bank obeyed the direction and charged on its books the money to the city and lessened its credit in said sum, that such was a payment of money, and that the jury should construe the check or instrument merely as the instrumentality by which the city's money was transferred from the possession of the defendant to another, and, if the transfer was a profit, they must find the defendant guilty: *Id.*

Where a prosecution of a public officer for the embezzlement of public funds is had under § 2812, making the offense a felony, an instruction to the jury based on that theory is not erroneous, although another statute may provide for the punishment of such acts as misdemeanors: *State v. Downing*, 15 Wash. 413.

LARCENY: See 2 Remington's Digest, pp. 1706-1708, §§ 34-39; *State v. Harras*, 25 Wash. 416; *State v. Eubank*, 33 Wash. 293; *State v. Phillips*, 37 Wash. 364; *State v. Washing*, 36 Wash. 485; *State v. Skilbrick*, 25 Wash. 555; *State v. Bliss*, 27 Wash. 463. In a trial for larceny, an instruction is erroneous which charges that there is no longer any such offense as being an accessory to a felony after the fact, and authorizes the jury to consider, as substantive proof of the crime charged in the indictment, such acts of defendant after its commission as, at common law, would only have tended to show that defendant was an accessory after the fact: *State v. Jones*, 3 Wash. 175.

LIBEL.—In a prosecution for criminal libel it is not error for the court to charge the jury that "the publisher of a libel is presumed to intend what the publication is likely to produce," although § 2777, *infra*, defining libel, may omit any reference to the matter of malice or intention constituting an element of the crime: *State v. Nichols*, 15 Wash. 1.

MAYHEM.—In a prosecution for mayhem for biting off a man's ear, in which the defendant's own testimony showed that he was engaged in a fight with the injured party, that the fight was being waged by such party without the use of weapons and without any attempt on his part to inflict great bodily injury, an instruction that the burden of proof was upon the defendant to show that he could not defend himself from bodily harm without resorting to such acts, while clearly erroneous, cannot be said to be prejudicial: *State v. Conahan*, 10 Wash. 268.

HOMICIDE: See 1 Remington's Digest, pp. 1402-1409, §§ 90-111. It is not error to refuse to charge that a failure to prove

a motive for the commission of the murder alleged would raise a strong presumption of the innocence of the accused: *State v. Nordstrom*, 7 Wash. 505.

A charge to the jury that if the killing of deceased has been proved beyond a reasonable doubt, the law pronounces such killing murder, is erroneous, although the court may have elsewhere defined murder in first and second degree: *State v. White*, 10 Wash. 611.

If the theory of the prosecution in trial for murder is that defendant procured, counseled, aided and abetted the killing, and the evidence all tends to support that position, it is error to charge that if the jury believe that defendant fired the fatal shot they may find him guilty: *Id.*

If the theory of the defense is that, while defendant was defending himself against assault, some person, unsolicited by him, and unknown to him, fired and killed his assailant in his defense, it is error to refuse a request that "if the jury believe from the evidence that the defendant did not procure or incite the person firing such shot to do so, then the jury must find the defendant not guilty": *Id.*

The refusal to instruct the jury as requested, upon defendant's theory of the case that death had been occasioned by a severe fall and not by the means charged in the information, is not erroneous, when the subject matter is covered by the general charge that, if it is possible to account for the death of the deceased upon any reasonable hypothesis other than that of the guilt of the defendant, it is their duty to do so and find the defendant not guilty, and by the further charge that, if the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the offense, it is their duty to acquit him: *State v. Carey*, 15 Wash. 549.

An instruction in a murder case, that "in the case of the defendant you have the right to consider the great interest he has in the result of your verdict," is not objectionable on the ground of being a judicial comment upon the evidence: *Id.*

It is not error for the court to refuse to instruct the jury to find a verdict of not guilty in a prosecution for murder, when the state has proven the killing by defendant of deceased, the weapons used, and the condition in which the body was found, and has shown a motive for the killing: *State v. Coella*, 8 Wash. 512.

Where the court, in an instruction to the jury, has correctly defined a deadly weapon as one likely to produce death or "great bodily injury," it is not error for the court later in the same instruction to refer to such deadly weapon as one likely to produce death or "injury" upon the complaining witness, as the omission of the words "great bodily" in the second definition is not misleading to the jury nor contradic-

tory of the first definition: *State v. Rose-ner*, 8 Wash. 42.

Province of court and jury in general: See 1 Remington's Digest, pp. 1402, 1403, §§ 93-98; *State v. McCann*, 16 Wash. 249; *State v. Mayo*, 42 Wash. 540; *State v. Yourex*, 30 Wash. 611.

Refusal of an instruction defining communicated and uncommunicated threats, in a case of felonious homicide, when prisoner pleads self-defense and evidence tends to show such threats, is error: *White v. Territory*, 3 W. T. 397.

Whether defendant had time to cool his passions between the quarrel and the killing, a charge that "they must take into consideration the mental power, habits, circumstances and situation in which the defendant was at the time, and the jury must believe beyond a reasonable doubt that the defendant under the circumstances did cool his passions before they can find him guilty of murder in the first degree," is erroneous: *State v. Holmes*, 12 Wash. 170.

In murder causing death by a discharge of a heavily loaded spring-gun, caused by pushing open the door of a dwelling-house, the defendant is not entitled to an instruction that he had an absolute right to set the gun as he did, when there was no one in the dwelling-house whose life could have been endangered by any burglary committed therein: *State v. Barr*, 11 Wash. 482.

Grade or degree of offense: See 1 Remington's Digest, pp. 1408, 1409, §§ 116-121; *State v. Clark*, 34 Wash. 485; *State v. Young*, 22 Wash. 273; *State v. Dolan*, 17 Wash. 499; *State v. Melvern*, 32 Wash. 7; *State v. McPhail*, 39 Wash. 199; *State v. Cushing*, 17 Wash. 544; *State v. Howard*, 33 Wash. 250; *State v. Lindgrind*, 33 Wash. 440; *State v. Underwood*, 35 Wash. 558; *State v. Yourex*, 30 Wash. 611.

Held, not error for the court to withhold from the jury instructions relative to manslaughter in a case charging murder, telling them, however, that if, having deliberated, they desire instruction on that subject, the court would so instruct them: *Smith v. United States*, 1 W. T. 262.

It is not error to refuse a request to instruct to the effect that where one of two combatants kills a third person, who interferes, without reasonable notice, to prevent one of the contestants from killing the other, such killing cannot be murder in the first degree: *McAllister v. Territory*, 1 W. T. 360.

A request to instruct that if, while two persons are engaged in fighting, a third person assaults one of the combatants and is killed by him, such killing is no more than manslaughter, is properly refused: *Id.*

Under an information for murder in the second degree, there being no evidence tending to show that the fatal blow was accidental or in self-defense, it was not necessary, in charging the jury, to so qualify the instructions as to meet a case of accident or

self-defense: *Doctor Jack v. Territory*, 2 W. T. 101.

An instruction that does not leave the jury to find that the homicide, if committed, was justifiable or excusable, that does not make malice essential to murder in either degree, nor inform the jury, in order to constitute murder in either degree, that malice, and not merely the killing, must be deliberate and premeditated, does not correspond with the law: *Leonard v. Territory*, 2 W. T. 382.

If the court has charged that the statements made by the injured party hours after the receipt of his injury are incompetent and inadmissible, but that when statements are made by the injured party in the presence or hearing of defendant, it is the acts, words and conduct of accused, and not statements of deceased, that are evidence, it is not error to refuse to add that "if the injured party, prior to death, is confronted with the defendant and accuses him of having committed the act, and the defendant immediately denies it, the statements of deceased are to be wholly disregarded": *State v. Freidrich*, 4 Wash. 204.

It seems that an instruction in a prosecution for murder which informs the jury that it is not necessary to constitute murder in the first degree that any appreciable space of time should elapse between the formation of the intention to kill and the killing, but they may be as instantaneous as successive thoughts, is erroneous under our statutes, as it eliminates the element of deliberation which distinguishes murder in the first degree from murder in the second degree: *State v. Rutten*, 13 Wash. 203.

SELF-DEFENSE: See 1 Remington's Digest, pp. 1407, 1408, §§ 111-114; *State v. Ellis*, 30 Wash. 369; *State v. Stockhammer*, 34 Wash. 262; *State v. Manderville*, 37 Wash. 365; *State v. McCann*, 16 Wash. 249; *State v. Stentz*, 33 Wash. 444; *State v. Weisenberger*, 42 Wash. 426.

The rule of self-defense is, that if a man is placed in such a position that a reasonably prudent man by the circumstances surrounding him, would have in good faith a well-founded belief that his life was in peril, he will be justified in using such means in self-defense, and to such an extent as may fairly appear to be necessary in such defense: *White v. Territory*, 3 W. T. 397.

An instruction as to the appearance of danger justifying the taking of life approved: *Watts v. Territory*, 1 W. T. 409.

If the court in the course of a charge to the jury states plainly and emphatically that the defendant might invoke the law of self-defense to protect his life or person from great "bodily harm," it is not prejudicial error to also charge that "there can be no successful setting up of self-defense by a defendant unless to save his own life or his person from dreadful harm or severe calamity": *State v. Carter*, 15 Wash. 121.

While an instruction may be so inapt as to imply that it was the duty of defendant

to have retreated when assaulted, unless it would have been more hazardous to have done so, it cannot be held prejudicial when the jury are also charged "that a person being where he had a right to be and without fault is violently assaulted, may, without retreating, repel force by force": *Id.*; citing *State v. Cushing*, 14 Wash. 527.

The fact that the court charges the jury in one place in its instructions that the defendant claims the homicide was in self-defense on the part of defendant, "to prevent death to himself or serious bodily injury," is not prejudicial when other parts of the instructions make it clear that the defendant had the right to act upon apparent, as distinguished from actual, danger: *State v. Carter*, *supra*.

An instruction upon self-defense directing the jury to consider "all" the facts and circumstances bearing on the question and surrounding defendant at the time, sufficiently includes defendant's "knowledge derived from personal observation": *State v. Churchill*, 52 Wash. 210.

INSANITY OR INTOXICATION.—Instructions as to good character, insanity or intoxication: See 1 Remington's Digest, p. 1406, §§ 105-107; *State v. Stentz*, 33 Wash. 444; *State v. Hawkins*, 23 Wash. 289; *State v. Clark*, 34 Wash. 485; *State v. Champoux*, 33 Wash. 339.

Upon the defense of insanity, an instruction is contradictory and misleading where the jury is told that the defendant would not be accountable for his crime if he was suffering from mental disease so complete that every faculty and power of his mind was affected by it, and that in consequence he was not capable of a single sound, healthy mental action, although other instructions favorable to the defendant were given; since it denies to him the defense of partial insanity: *State v. Craig*, 52 Wash. 66.

The jury should be instructed that the test of defendant's sanity is whether he had sufficient capacity at the time to distinguish between right and wrong with reference to the act charged: *Id.*

Upon the defense of insanity, the power to choose between right and wrong being a relative question of fact to be determined by the jury, any instruction that invites the jury to go further than to answer the question, Had the accused sufficient capacity at the time to distinguish between right and wrong with reference to the act committed? or that leads the jury into unknown paths,

is prejudicially erroneous, even though involved instructions may be regarded as more favorable to the accused than those requested; since he was non compos mentis and entitled to the protection of the law if he did not have the mental power to choose between right and wrong with reference to the act charged, and if such affection was the efficient cause of the act: *Id.*

POSSESSION OF STOLEN PROPERTY: See 2 Remington's Digest, p. 1707, § 39; *State v. Harras*, 25 Wash. 416; *State v. Bliss*, 27 Wash. 463; *State v. Eubank*, 33 Wash. 293.

Where defendant requests a charge that "the bare possession of stolen property alone is not sufficient to sustain a verdict of guilty," it is not error, within the constitutional prohibition, to add, "it is only a circumstance tending to show guilt": *State v. Duncan*, 7 Wash. 336. See *State v. Walters*, 7 Wash. 246, where the law on this subject is enunciated and instruction criticised.

A charge that possession of recently stolen property, if unexplained, might be taken as conclusive evidence of guilt of accused, is erroneous, where it is not claimed by the prosecution that defendant stole the property, and the only ground of accusation is the possession of the stolen property: *State v. Humason*, 5 Wash. 499.

RAPE: See 1 Remington's Digest, p. 2457, § 35; *State v. Hunter*, 18 Wash. 670; *State v. Patchen*, 37 Wash. 24; *State v. Griffin*, 43 Wash. 591.

Although an instruction to the jury in the prosecution for an assault with intent to commit rape may improperly charge them, "the law presumes that a person intends all the natural, probable and usual consequences of his acts," still such charge is harmless error when coupled with an admonition to acquit "unless the assault was made under such circumstances as show beyond a reasonable doubt that he intended to accomplish his purpose, at all events, against any resistance which she might offer": *State v. Courtemarch*, 11 Wash. 446.

In a prosecution for rape it is proper to refuse an instruction cautioning the jury against conviction upon the uncorroborated evidence of the prosecutrix: *State v. Mobley*, 44 Wash. 549.

ROBBERY.—Upon a prosecution for robbery it is proper to instruct that the degree of force is immaterial if it was sufficient to compel the prosecuting witness to part with his money: *State v. Parsons*, 44 Wash. 299.

§ 2159. (6947.) Custody of Jury.

Juries in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney, but shall be kept together, without meat or drink, unless otherwise ordered by the court, to be

furnished at the expense of the county. [L. '54, p. 119, § 114; Cd. '81, § 1089; 2 H. C., § 1311.]

This section seems to be superseded, except in felony cases, by § 346, supra; and especially as to the last clause.

See supra, § 345, separation of jury in civil cases, admonition.

See supra, § 349, manner of keeping jury while deliberating.

See supra, § 352, return of jury for further instructions.

See supra, § 353, discharge without verdict.

Cited in 2 Wash. 185, 563; 5 Wash. 775; 12 Wash. 54; 18 Wash. 46; 25 Wash. 407; 34 Wash. 263; 38 Wash. 273.

Custody, conduct, and deliberation of jury: See 1 Remington's Digest, p. 825, §§ 321-330; State v. Stockhammer, 34 Wash. 262; State v. Rogan, 18 Wash. 43; State v. Barkuloo, 18 Wash. 141; State v. Mason, 19 Wash. 94; State v. Harras, 22 Wash. 67; State v. Johnny Tommy, 19 Wash. 270; State v. Burns, 19 Wash. 52; State v. Boyce, 24 Wash. 514; State v. Cushing, 14 Wash. 527; State v. Yourex, 30 Wash. 611; State v. Webster, 21 Wash. 63; State v. Moody, 18 Wash. 165; State v. McCormick, 20 Wash. 94; State v. Champoux, 33 Wash. 339; State v. Parker, 25 Wash. 405.

This section is only applicable to juries sworn to try a cause, and not to jurors sworn on their voir dire to answer touching their qualifications to serve, although they may have been passed for cause: State v. Voorhies, 12 Wash. 53.

It is reversible error to allow the jury, in a prosecution of a criminal offense, to separate without the consent of defendant, during the progress of the trial: State v. Place, 5 Wash. 773.

The separation of the jury in capital cases, after final submission and before verdict, is error, though verdict may have been signed and sealed before separation, and defendant's counsel may have consented thereto; the provision of this section

only authorizes separation during the progress of the trial: Anderson v. State, 2 Wash. 183.

The fact that the bailiff informed the jury that, if they did not return a verdict by a certain hour, he would keep them locked up all night, does not amount to misconduct when the statement was made, not for the purpose of influencing the jury in their action, but to inform them that it was the intention of the court to go home at that hour, and that, if the verdict was not returned before that time, it could not be till morning: State v. Zettler, 15 Wash. 625.

Defendant cannot afterward complain if he consented to the separation of the jury in a capital case: Hartigan v. Territory, 1 W. T. 447.

Allowing one or more jurors to retire for a necessary purpose under direct supervision of a sworn officer is not a separation of the jury: Edwards v. Territory, 1 W. T. 195.

Misconduct in separating must, under § 401, supra, be shown by affidavit: Lybarger v. State, 2 Wash. 552.

They may take the written charge of the judge, and a copy of the statutes: Edwards v. Territory, 1 W. T. 195; but taking papers or documents not allowed by court, and to the prejudice of the substantial rights of defendant, is ground for a new trial: See § 2181, infra.

§ 2160. (6948.) Court may Order View of Place of Crime.

The court may order a view by any jury impaneled to try a criminal case. [L. '54, p. 120, § 115; Cd. '81, § 1090; 2 H. C., § 1312.]

See supra, § 344, and notes, jury may view premises.

Cited in 18 Wash. 674.

If there is no material controversy with regard to the premises where a homicide has been committed, it is not error to refuse to allow the jury to view the scene: State v. Coella, 8 Wash. 512.

It is not error to allow the jury in a criminal case to view the premises where the

alleged crime was committed without the presence of the defendant: State v. Lee Doon, 7 Wash. 308.

The refusal of the court to direct a view of the premises by the jury is not error, when there is no showing of an abuse of the discretion given the trial judge by this section: State v. Hunter, 18 Wash. 670.

§ 2161. (6949.) Separate Trial.

When two or more defendants are indicted or informed against jointly, any defendant requiring it shall be tried separately. [Cf. L. '54, p. 120, § 116; Cd. '81, § 1091; L. '91, p. 60, § 71; 2 H. C., § 1313.]

See supra, § 2175, trial of question of insanity.

Cited in 19 Wash. 95; 48 Wash. 75.

Under this section a defendant is entitled as of right to a severance up to the assign-

ment of the cause for trial, from which time until the jury is sworn to try the cause the matter of granting a severance is within the

discretion of the court: *State v. Mason*, 19 Wash. 947.

After the jury has been called, it is too late to demand, as a matter of right, separate trials of defendants jointly charged: *State v. Bush*, 41 Wash. 13.

One jointly indicted has no right to demand that he be jointly tried with his co-defendant, especially where it appears that he was the only real party defendant: *State v. Merchant*, 48 Wash. 69.

§ 2162. (6950.) Discharging One Defendant to Give Evidence—Effect of.

When two or more persons are included in one prosecution, the court may, at any time before the defendant has gone into his defense, direct any defendant to be discharged, that he may be a witness for the state. A defendant may also, when there is not sufficient evidence to put him on his defense, at any time before the evidence is closed, be discharged by the court, for the purpose of giving evidence for a codefendant. The order of discharge is a bar to another prosecution for the same offense. [L. '54, p. 120, § 117; Cd. '81, § 1092; 2 H. C., § 1314.]

Cited in 2 Wash. 294.

It is not error, under this section, to allow one indicted with the prisoner, but not

put upon trial with him, to be used as a witness for the state prior to his discharge: *Edwards v. State*, 2 Wash. 291.

§ 2163. (6951.) Mistake in Charge, Defendant to be Held, When.

When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant shall not be discharged if there appear to be good cause to detain him in custody; but the court must recognize him to answer the offense shown, and if necessary, recognize the witnesses to appear and testify. [L. '54, p. 120, § 118; Cd. '81, § 1093; 2 H. C., § 1315.]

Cited in 10 Wash. 238; 14 Wash. 666.

The only purpose of the proceeding authorized by this section is to allow the filing of a new information covering the actual offense: *State v. Hansen*, 10 Wash. 235, 238.

The order on motion of the state quashing an information, and for leave to file a new one, will not work a loss of jurisdiction over the person of defendant, although the record does not disclose the grounds of the court's action, but under the recital "The

court after having been fully advised in the premises grants said motion," it will be presumed that sufficient cause existed to warrant the action of the court, as under this section, when it appears at any time before judgment that a mistake has been made in charging the proper offense, the defendant shall not be discharged, if there be good cause to detain him, but the court must recognize him to answer the offense shown: *Id.*; *State v. Reiff*, 14 Wash. 664.

§ 2164. (6952.) Venue may be Corrected and Action Certified to Proper County.

When it appears, at any time before verdict or judgment, that the defendant is prosecuted in a county not having jurisdiction, the court may order the venue of the indictment or information to be corrected, and direct that all papers and proceedings be certified to the superior court of the proper county, and recognize the defendant and witnesses to appear at such court, on a day specified in the order, and the prosecution shall proceed in the latter court in the same manner as if it had been there commenced. [L. '54, p. 120, § 119; Cd. '81, § 1094; L. '91, p. 60, § 72; 2 H. C., § 1316.]

See *supra*, § 2012, to be tried in county where crime committed.

§ 2165. (6953.) Discharge of Jury Without Prejudice to Further Prosecution.

When a jury has been impaneled in either case contemplated in the last two preceding sections, such jury may be discharged without prejudice to the

prosecution. [L. '54, p. 120, § 120; Cd. '81, § 1095; L. '91, p. 60, § 73; 2 H. C., § 1317.]

§ 2166. (6954.) When Conviction or Acquittal a Bar.

When the defendant has been convicted or acquitted upon an indictment or information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein. [L. '54, p. 120, § 121; Cd. '81, § 1096; L. '91, p. 60, § 74; 2 H. C., § 1318.]

See supra, § 2113, conviction or acquittal a bar, when.

See infra, § 2316, same subject.

A defendant has been once in jeopardy and cannot be tried again for the same offense, when he has been arraigned upon an information sufficiently charging the crime of which he is accused, a lawful jury has

been impaneled and sworn, and a court of competent jurisdiction has ordered the discharge of the accused at the close of the case made by the state: *State v. Hubbell*, 18 Wash. 482.

§ 2167. (6955.) Jury may Find Any Degree of Offense.

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense. [L. '54, p. 120, § 122; Cd. '81, § 1097; L. '91, p. 60, § 75; 2 H. C., § 1319.]

See supra, § 2158, and notes, court to determine law, etc.

See infra, § 2263, convictions for lesser degrees or attempts.

Cited in 11 Wash. 247; 12 Wash. 351; 17 Wash. 599; 21 Wash. 285; 22 Wash. 276; 32 Wash. 302; 39 Wash. 203; 43 Wash. 227.

Conviction of offense included in charge: See 2 Remington's Digest, pp. 1485-1487, §§ 100-106; *State v. Klein*, 19 Wash. 368; *State v. Michel*, 20 Wash. 162; *State v. Snider*, 32 Wash. 299; *State v. Marselle*, 43 Wash. 273; *State v. Keen*, 10 Wash. 93; *State v. Dingle*, 24 Wash. 49; *State v. Cronin*, 20 Wash. 512; *State v. Howard*, 33 Wash. 250; *State v. Underwood*, 35 Wash. 558; *State v. Yandell*, 34 Wash. 409; *State v. Romans*, 21 Wash. 284.

Under this section, it is the duty of the jury to determine the degree, and the supreme court cannot reduce it for insufficiency of the evidence: *State v. Symes*, 17 Wash. 596.

The jury are to determine from the evidence the degree of murder: *Leschi v. Territory*, 1 W. T. 13.

The court should define the degrees of the crime and give the jury the liberty of saying which degree is proved by the facts: *Freidrich v. Ty.*, 2 Wash. 358, 369.

One charged with murder in the first degree as an accessory before the fact cannot be properly convicted of manslaughter, the legal character of the offense of manslaughter being such as to exclude the possibility of an accessory before the fact: *State v. Robinson*, 12 Wash. 349; see, also, *State v. Robinson*, 12 Wash. 491.

If defendant is indicted under § 2808, infra, defining embezzlement, and declaring the offender guilty of larceny, a verdict that defendant is not guilty of the offense charged, but guilty of petit larceny, is equivalent to acquittal: *State v. Weydeman*, 3 Wash. 399.

Upon a charge of larceny from the person, defendant may be convicted of petit larceny, as the same is but a lesser degree of the same offense: *State v. Clem*, 49 Wash. 273.

§ 2168. (6956.) In Other Cases Degree of Guilt.

In all other cases, the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information. [Cf. L. '54, p. 120, § 123; Cd. '81, § 1098; L. '91, p. 61, § 76; 2 H. C., § 1320.]

See last section and notes.

Cited in 17 Wash. 511; 20 Wash. 164; 32 Wash. 303.

Under the information charging accused with an assault with intent to commit

murder, a verdict of "guilty of assault with a deadly weapon with an intent to do bodily harm," is erroneous, as such verdict convicts him of an offense other than the one alleged in the information: *State v. Ackles*, 8 Wash. 462; *State v. Largent*, 9 Wash. 691; *State v. Manning*, 9 Wash. 695.

Where defendant is charged with "assault with intent to kill," a verdict of guilty of a part of the crime charged must specify the particular offense of which the accused

is found guilty: *State v. Snider*, 32 Wash. 299.

The jury may find a defendant guilty of any offense which is necessarily included in the charge in the indictment: *Clarke v. Territory*, 1 W. T. 68; *Timmerman v. Territory*, 3 W. T. 445.

Thus a conviction for manslaughter may be had under an indictment charging murder in the first degree: *White v. Territory*, 3 W. T. 397.

§ 2169. (6957.) Verdict as to One or More Where Several are Charged.

On an indictment or information against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly. [Cf. L. '54, p. 120, § 124; Cd. '81, § 1099; L. '91, p. 61, § 77; 2 H. C., § 1321.]

§ 2170. (6958.) Reconsideration Where Jury Mistakes the Law.

When there is a verdict of conviction in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider the verdict; and if after such reconsideration they return the same verdict, it must be entered, but it shall be good cause for new trial. When there is a verdict of acquittal, the court cannot require the jury to reconsider it. [Cf. L. '54, p. 121, § 125; Cd. '81, § 1100; L. '91, p. 61, § 78; 2 H. C., § 1322.]

See *supra*, §§ 359, 361, polling jury and receiving verdict.

§ 2171. (6960.) Rendition of Verdict.

When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all appear, their verdict must be rendered in open court; and if all do not appear, the rest must be discharged without giving a verdict, and the cause must be tried again. [Cf. L. '54, p. 121, § 127; Cd. '81, § 1102; L. '91, p. 61, § 80; 2 H. C., § 1324.]

See *infra*, § 2176, verdict on defense of insanity.

Cited in 18 Wash. 46.

If at the time of a verdict the defendant is in court, and makes no objection to the form of the verdict and takes no exception to its reception by the court, it must be presumed, in aid of the judgment, that the defendant consents to the verdict, and error cannot be subsequently assigned on account thereof: *State v. Greer*, 11 Wash. 245.

Jury may be discharged on a holiday on account of inability to agree: *State v. Lewis*, 31 Wash. 515.

A verdict may be received on a nonjudicial day: *State v. Straub*, 16 Wash. 111.

A verdict of guilty upon an insufficient information, set aside at the instance of the defendant, is a mistrial and does not constitute jeopardy: *State v. Riley*, 36 Wash. 441.

§ 2172. (6961.) Form of Verdict, Punishment Fixed by Court.

When the defendant is found guilty, the court, and not the jury, shall fix the amount of fine and the punishment to be inflicted. The verdict of the jury may be substantially in the following form:—

"We, the jury, in the case of the state of Washington, plaintiff, against —, defendant, find the defendant (guilty or not guilty, as the case may be).

(Signed) A. B. Foreman."

[Cf. L. '54, p. 121, § 128; L. '65, p. 101, § 1; Cd. '81, § 1103; 2 H. C., § 1335.]

See *infra*, § 2176, verdict on plea of insanity.

Cited in 3 Wash. 673; 14 Wash. 418; 20 Wash. 516.

The jury in a criminal case are in the box for but one purpose, viz., to say whether or not the accused is guilty, and this section prescribes the form of verdict covering but one alternative, which they must decide: *In re Permstick*, 3 Wash. 672, 673.

In case of murder, a verdict against the prisoner of "guilty as charged, and that he suffer death," will be treated as a verdict of murder in the first degree: *Leschi v. Territory*, 1 W. T. 13.

If some counts in an indictment are good and some bad, a verdict is presumed to be based on the good counts: *Id.*

Objections against form of verdict held insufficient in *State v. Bokien*, 14 Wash. 403, 418.

"We, the jury in the case of the Territory of Washington against J. H. T., find the defendant guilty," is a substantial compliance with the above section, and is good as a verdict of guilty of murder in the first degree: *Timmerman v. Territory*, 3 W. T. 445.

The form of verdict, prescribed by this section is directory merely, and any verdict which clearly indicates the conclusion reached is sufficient: *State v. Cronin*, 20 Wash. 512.

Error cannot be assigned in that the clerk prepared the form of the verdict, as it is immaterial who prepares the form: *State v. Klein*, 38 Wash. 475.

§ 2173. "Criminally Insane," Defined—Mental Irresponsibility.

Any person who shall have committed a crime while insane, or in a condition of mental irresponsibility, and in whom such insanity or mental irresponsibility continues to exist, shall be deemed criminally insane within the meaning of this act. No condition of mind induced by the voluntary act of a person charged with a crime shall be deemed mental irresponsibility within the meaning of this act. [L. '07, p. 33, § 1.]

"Act," in this section, refers to §§ 2173-2176, and § 5974 et seq.

See *infra*. §§ 2259, 2283, insanity no defense, and notes to those sections.

This section was not expressly repealed or covered by the act of 1909: See notes to §§ 2253, 2301.

§ 2174. Insanity—How Pleaded.

When it is desired to interpose the defense of insanity or mental irresponsibility on behalf of one charged with a crime, the defendant, his counsel or other person authorized by law to appear and act for him, shall at the time of pleading to the information or indictment file a plea in writing in addition to the plea or pleas required or permitted by other laws than this, setting up (1) his insanity or mental irresponsibility at the time of the commission of the crime charged, and (2) whether the insanity or mental irresponsibility still exists, or (3) whether the defendant has become sane or mentally responsible between the time of the commission of the crime and the time of the trial. The plea may be interposed at any time thereafter, before the submission of the cause to the jury, if it be proven that the insanity or mental irresponsibility of the defendant at the time of the crime was not before known to any person authorized to interpose a plea. [L. '07, p. 33, § 2.]

§ 2175. Special Verdict on Acquittal, When Plea of Insanity Interposed.

If the plea of insanity or mental irresponsibility be interposed, and evidence upon that issue be given, the court shall instruct the jury when giving the charge, that in case a verdict of acquittal of the crime charged be returned, they shall also return special verdicts finding (1) whether the defendant committed the crime and if so, (2) whether they acquit him because of his insanity or mental irresponsibility at the time of its commission, (3) whether the insanity or mental irresponsibility continues and exists at the time of the trial, and (4) whether, if such condition of insanity or mental

irresponsibility does not exist at the time of the trial, there is such likelihood of a relapse or recurrence of the insane or mental irresponsible condition, that the defendant is not a safe person to be at large. Forms for the return of the special verdicts shall be submitted to the jury with the forms for the general verdicts. [L. '07, p. 33, § 3.]

Under the constitution a person cannot be put on trial while insane: *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248.

Under Bal. Code, § 6959, requiring insane unsafe to be at large to be confined after acquittal, an acquittal on the ground of insanity is conclusive that defendant is "manifestly dangerous," and the condition

is presumed to continue: *State ex rel. Thompson v. Snell*, 46 Wash. 327.

Commitment of such a person does not deprive him his liberty without due process of law, and is not contrary to the humane spirit of the laws: *Id.*

Insanity is a question for the jury: *State v. Churchill*, 52 Wash. 210.

Instructions on the subject of insanity: See *Id.*

§ 2176. Verdict—Findings—Discharge or Commitment.

If the jury find by their special verdicts that the defendant committed the crime charged, that he is acquitted because of his insanity or mental irresponsibility at the time of its commission, and that before the trial he has become a sane or mentally responsible person, and is not liable to a relapse or recurrence of the insane or mentally irresponsible condition, and is a safe person to be at large, he shall be discharged. If the jury find that the defendant committed the crime charged, that he is acquitted because of his insanity or mental irresponsibility at the time of its commission, and that the insanity or mental irresponsibility still exists, or, if it does not exist, that he is so liable to a relapse or recurrence of the insane or mentally irresponsible condition as to be an unsafe person to be at large, the court shall enter judgment in accordance therewith, and shall order the defendant committed as a criminally insane person until such time as he shall be discharged as hereinafter provided. [L. '07, p. 34, § 4. Cf. L. '54, p. 121, § 126; Cd. '81, § 1101; L. '91, p. 61, § 79; 2 H. C., § 1323.]

Compare, § 2283, *infra*. See note to § 2253.

See *infra*, §§ 5974-5978, confinement and discharge of the criminal insane. Compare § 2283, *infra*.

See *infra*, § 8520, rules for insane convicts.

The state has power to confine dangerous insane persons: *In re Brown*, 39 Wash. 160.

§ 2177. Trial for Second Offense—Felonies.

It shall be the duty of the prosecuting attorney of any county, as soon as he has knowledge that a person indicted or informed against for felony, has been once or twice before convicted of any crime which under the laws of this state would amount to a felony, either within this state or elsewhere, to file and serve upon such person another information, setting forth [forth] the fact of such former conviction or convictions, with the time and place when and where such former convictions occurred. [L. '03, p. 125, § 1.]

Compare, §§ 2285, 2286, *infra*, on this subject. See note to § 2253.

See *infra*, § 8554, second term convicts.

§ 2178. Trial of Fact of Former Conviction.

If the defendant pleads guilty to the principal charge, or, if after trial, he shall be found guilty of such principal charge by a jury, unless the defendant admit the fact of such former conviction or convictions, the court

shall immediately, if such further information was served before the trial upon the principal charge, or if served after the commencement of the trial then within five days and before sentence, impanel a jury to try the fact of such former conviction or convictions, and if such jury find, from the record thereof, or other competent evidence that such person has been once or twice before convicted of a crime, which under the laws of this state would amount to a felony, such jury shall make a return of such fact to the court. In case that such jury find that such person has been but once before convicted of a felony, the return shall show the time of his sentence under such former conviction. [L. '03, p. 126, § 2.]

See note to last section.

§ 2179. Cumulative Sentence for Felonies.

In every case where a person is convicted of a felony and the jury impaneled for that purpose, in the manner provided in section 2178, find that the person has been once before convicted of a crime, either in this state or elsewhere, which under the laws of this state would amount to felony, or if such person admit the fact of such former conviction in open court, he shall be sentenced to a term in the penitentiary of not less than double the time of the sentence upon the former conviction; and in case that such jury find or the said person admits in open court that he has been twice before convicted of crimes, either within or without this state, which under the laws of this state would amount to felony, he shall be sentenced to the penitentiary for the term of his natural life. [L. '03, p. 126, § 3.]

See note to § 2177, supra.

See infra, § 8554, second term convicts.

Under this section, one who is charged and found guilty of having been twice before convicted of felonies and sentenced therefor, must on the third conviction be punished by life imprisonment: *State v. Bush*, 41 Wash. 13.

§ 2180. Trial for Second Offense—Petit Larceny, etc.—Cumulative Sentence.

It shall be the duty of the prosecuting attorney of any county, as soon as he has knowledge that a person charged with the offense of petit larceny has been once or twice before convicted of the offense of petit larceny or of any crime which under the laws of this state would amount to a felony, either within this state or elsewhere, to file in the superior court an information charging said person with petit larceny and another information charging said person with having been before convicted of petit larceny, or a crime amounting to a felony, and serve copies of such informations upon such person, and if such person has been charged with said offense of petit larceny before any magistrate, upon said magistrate; and thereupon such magistrate shall certify all proceedings in the case to the superior court; and such proceedings shall be had as provided in section 2178 of this code. In case upon the trial and proceedings had in the superior court the defendant shall be found guilty of petit larceny and the jury impaneled for that purpose shall fail to find the fact of such former conviction, the court shall sentence the defendant as in other cases of petit larceny; in case the jury impaneled for that purpose shall find the fact of such former conviction the court shall sentence the defendant to the penitentiary for any term provided by law as the punishment for the crime of grand larceny. [L. '03, p. 126, § 4.]

See note to § 2177, supra.

CHAPTER XVIII.

NEW TRIAL AND ARREST OF JUDGMENT.

§ 2181. (6965.) When New Trial may be Granted.

An application for a new trial must be made before judgment, and may be granted for the following causes materially affecting a substantial right of the defendant:—

1. When the jury has received any evidence, paper, document, or book not allowed by the court;
2. Misconduct of the jury;
3. Newly discovered evidence material for the defendant, which he could not have discovered with reasonable diligence, and produced at the trial;
4. Accident or surprise;
5. Error of law occurring at the trial and excepted to by the defendant;
6. When the verdict is contrary to law and evidence; but not more than two new trials shall be granted for these causes alone. [Cf. L. '54, p. 121, § 130; Cd. '81, § 1105; L. '91, p. 61, § 81; 2 H. C., § 1326.]

See *supra*, § 399, and notes, grounds for new trial in civil cases.

See notes to § 2159, misconduct of jury, etc.

See *infra*, § 2183, and notes, arrest of judgment.

Cited in 25 Wash. 415; 42 Wash. 61; 47 Wash. 6.

NEW TRIAL: See 1 Remington's Digest, pp. 829-834, §§ 342-367.

The provisions of chapter 8, title 29, of Code of Civil Procedure respecting new trials does not apply to criminal cases: *Thompson v. Territory*, 1 W. T. 547.

Granting or refusing a new trial is a matter within the discretion of the lower court: *Smith v. United States*, 1 W. T. 262.

A new trial should not be granted when made apparent by the proofs that it would avail nothing: *Tolmie v. Dean*, 1 W. T. 46. The hearing and denial of motions for a new trial and in arrest of judgment may be had in the absence of defendant: *State v. Greer*, 11 Wash. 244.

A motion for a new trial failing to point out definitely any statutory grounds should be overruled: *Bradshaw v. Territory*, 3 W. T. 265; see *State v. Largent*, 9 Wash. 691.

Disqualification of jurors—Misconduct of or affecting jurors: See 1 Remington's Digest, pp. 830, 831, §§ 346-351; *State v. Hall*, 24 Wash. 255; *State v. Parker*, 25 Wash. 405; *State v. Druxinman*, 34 Wash. 257; *State v. Underwood*, 35 Wash. 558; *State v. Strodemier*, 41 Wash. 159; *State v. Shuck*, 38 Wash. 270; *State v. Hunter*, 18 Wash. 670; *State v. Smokalem*, 37 Wash. 91.

MISCONDUCT OF COURT: See 1 Remington's Digest, p. 800, § 215; *State v. Wroth*, 15 Wash. 621.

The supreme court will grant a new trial for gross misconduct of the trial court: *State v. Coella*, 3 Wash. 99; *Id.*, 8 Wash. 513.

A verdict in a prosecution for murder cannot be impeached for misconduct of the

jury by an affidavit of defendant based upon information and belief as to the facts charged: *State v. Murphy*, 13 Wash. 229.

ERROR OF LAW.—The exclusion of testimony of the prisoner on account of drunkenness, will not justify a new trial, unless the materiality of the testimony is first shown: *Fox v. Territory*, 2 W. T. 297.

SURPRISE: See 1 Remington's Digest, p. 831, § 353; *State v. John Port Townsend*, 7 Wash. 462; *State v. Hunter*, 18 Wash. 670.

A hypothetical opinion expressed by a juror prior to trial and not made known at trial, that if what he had read about the case was true the accused ought to be convicted on general principles, is not alone sufficient cause for granting a new trial: *State v. Gile*, 8 Wash. 12.

VERDICT CONTRARY TO LAW.—A new trial should be granted when a conviction is had on evidence not connecting defendant with the crime beyond a reasonable doubt: *State v. Payne*, 6 Wash. 563, 574.

VERDICT CONTRARY TO EVIDENCE: See 1 Remington's Digest, p. 831, § 352; *State v. Smith*, 9 Wash. 341; *State v. Symes*, 17 Wash. 596.

Where it is evident from the verdict that the jury has made a mistake in the name of the only defendant found guilty, it is not error to require the three defendants to stand up and be identified: *State v. Moran*, 46 Wash. 596.

NEWLY DISCOVERED EVIDENCE: See 1 Remington's Digest, pp. 831, 832, §§ 354-360; *State v. Power*, 24 Wash. 34; *State v. Vance*, 29 Wash. 435; *State v.*

Webb, 20 Wash. 500; *State v. Hyde*, 22 Wash. 551; *State v. Detherage*, 35 Wash. 326; *State v. Hunter*, 18 Wash. 670.

If a new trial is claimed on the ground of newly discovered evidence, the application should not be granted when the legitimate effect of the whole evidence would not require the jury to find a different verdict: *Leschi v. Territory*, 1 W. T. 13, 29.

Although the refusal to grant a new trial on the ground of newly discovered evidence is largely within the discretion of the trial court, yet, if it appears that the evidence is material, and could not have been discovered with reasonable diligence, the ruling will be reversed: *State v. Stowe*, 3 Wash. 206.

If a defendant has been misled into not making proper preparation for his defense by the statement of the prosecuting attorney that he did not intend to further prosecute the defendant, the defendant will be entitled to a new trial upon a showing of newly discovered evidence: *State v. John Port Townsend*, 7 Wash. 463.

It is not an abuse of discretion for the trial court to refuse a new trial upon the ex parte affidavit of a man who confesses the commission of the crime, of which defendant is convicted, when there is no attempt to show affiant's residence or whether defendant could procure his attendance at court at a future time, or whether affiant would swear to the matters set forth in the affidavit if he should attend: *State v. Miller*, 3 Wash. 131.

Where the defendant had sworn on the trial that he could not get on certain rubber boots, he is not entitled to a new trial on the ground of newly discovered evidence showing that, while it was possible for him to get the boots on, he could not have worn them: *State v. Nordstrom*, 7 Wash. 507.

Where the testimony adduced at the trial was exclusively that of Indians given through interpreters, defendant is entitled on a proper showing to a new trial on the ground of newly discovered evidence, although cumulative in character, when the newly discovered evidence is shown to be that of a white witness: *State v. John Port Townsend*, 7 Wash. 463.

If the object of evidence is to prove an alibi, the ruling making newly discovered cumulative evidence insufficient to com-

mand a new trial has no application: *State v. Stowe*, 3 Wash. 206.

The fact that a portion of a jury were induced to unite upon a verdict of murder in the first degree, upon the representation of another juror that the judge might sentence the prisoner thereunder to imprisonment for life instead of imposing the death sentence, does not constitute misconduct of the jury, as the jury have nothing to do with the penalty to be imposed: *State v. Holmes*, 12 Wash. 169.

It is an abuse of discretion and error to deny a new trial, asked on the ground of newly discovered evidence, after conviction of statutory rape upon a female under the age of consent, where the conviction rested almost entirely upon the evidence of the prosecutrix, and she subsequently made affidavit, and testified in court on the hearing of the motion for new trial, that her testimony was false and that defendant had never had sexual intercourse with her, explaining that she was coerced to give false testimony: *State v. Powell*, 51 Wash. 372.

The general rule that a new trial will not be granted for newly discovered evidence to impeach a witness applies in a prosecution for burglary, where the newly discovered evidence merely tended to contradict the owner's identification of the property, and the owner did not assume to positively identify it, identification having been made by another witness: *State v. Beeman*, 51 Wash. 557.

A new trial for newly discovered evidence is properly denied where the same is merely cumulative: *State v. Bridgham*, 51 Wash. 18.

A new trial will not be granted in a criminal case to secure the evidence of a witness now a resident in the east, when it is only shown that counsel believe he will be present at the new trial; nor when his evidence would be only cumulative: *State v. Beeman*, 51 Wash. 557.

WRIT OF CORAM NOBIS.—When writ of coram will not lie, see 1 Remington's Digest, p. 835, § 376; *State ex rel. Davis v. Superior Court*, 15 Wash. 339; *State v. Armstrong*, 41 Wash. 601; *Wilson v. State*, 46 Wash. 416.

§ 2182. (6966.) Application, How Made.

When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the preceding section, the facts on which it is based shall be set out in an affidavit. [L. '54, p. 122, § 131; Cd. '81, § 1106; 2 H. C., § 1327.]

Cited in 42 Wash. 61; 25 Wash. 415.

Application for new trial: See Remington's Digest, p. 833, §§ 361-365; *State v. Webb*, 20 Wash. 500; *State v. Wilson*, 42 Wash. 56; *State v. Miller*, 3 Wash. 131; *State v. Parker*, 25 Wash. 405.

Under § 401, supra, the question of the misconduct of the jury on motion for a new trial can only be raised by affidavit: *Lybarger v. State*, 2 Wash. 552, 562.

§ 2183. (6967.) Judgment may be Arrested, When.

Judgment may be arrested on the motion of the defendant for the following causes:—

1. No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court;

2. That the facts as stated in the indictment or information do not constitute a crime or misdemeanor. [Cf. L. '54, p. 122, § 132; Cd. '81, § 1107; L. '91, p. 62, § 82; 2 H. C., § 1328.]

Cited in 22 Wash. 554.

Arrest of judgment: See 1 Remington's Digest, p. 834, §§ 366, 367; State v. Hyde, 22 Wash. 551.

Under this section, subdivision 2, the rule of aider by verdict does not apply to such defect: State v. Carey, 4 Wash. 424.

A motion in arrest of judgment on the ground that the information does not state facts sufficient to constitute a crime may be interposed by defendant even after having gone into two trials of the case on the

merits without objection: State v. Feamster, 12 Wash. 461.

Where there is nothing in the record to show the absence of the conditions which must exist in order to warrant the prosecution of a public offense by information, the accused cannot complain of the overruling of his motion in arrest of judgment, made on the insufficiency of the information in that regard: State v. Smith, 9 Wash. 341.

Right to move, lost when: State v. Barkuloo, 18 Wash. 52.

§ 2184. (6968.) Judgment Arrested Without Motion, When.

The court may also, on its views of any of these defects, arrest the judgment without motion. [L. '54, p. 122, § 133; Cd. '81, § 1108; 2 H. C., § 1329.]

§ 2185. (6969.) Defendant may be Recommitted After Arrest of Judgment.

When judgment is arrested in any case, and there is reasonable ground to believe that the defendant can be convicted of an offense, properly charged, the court may order the defendant to be recommitted, or admitted to bail anew, to answer a new indictment [or information]. [L. '54, p. 122, § 134; Cd. '81, § 1109; 2 H. C., § 1330.]

§ 2186. (6970.) Exceptions as in Civil Cases.

Exceptions may be taken by the defendant, as in civil cases, on any matter of law by which his substantial rights are prejudiced. [L. '54, p. 122, § 135; Cd. '81, § 1110; 2 H. C., § 1331.]

See supra, § 381 et seq., exceptions in civil cases, and notes.

See infra, § 2224, final record to contain what.

Bill of exceptions—Statement of facts: See 1 Remington's Digest, pp. 842, 843, §§ 408-413; State v. Johnny Tommy, 19 Wash. 270; Yelm Jim v. Territory, 1 W. T. 63; Hartigan v. Territory, 1 W. T. 447;

State v. Payne, 6 Wash. 563; State v. Humason, 4 Wash. 413; State v. Straub, 16 Wash. 111; State v. McGonigle, 14 Wash. 594; State v. Picani, 5 Wash. 343.

CHAPTER XIX.

JUDGMENT, AND THE ENFORCEMENT THEREOF.

§ 2187. (6975.) Judgment on Verdict.

When the defendant is found guilty, the court shall render judgment accordingly, and the defendant shall be liable for all costs, unless the court or jury trying the cause expressly find otherwise. [L. '54, p. 121, § 129; Cd. '81, § 1104; 2 H. C., § 1332.]

See *infra*, §§ 2190, 2198, pronouncing judgment.

See *infra*, § 2228 et seq., cost bills in criminal cases.

See *infra*, § 8541, conviction to be certified to state auditor.

Cited in 1 Wash. 414; 29 Wash. 60; 44 Wash. 618.

Judgment and sentence: See 1 Remington's Digest, pp. 834, 835, §§ 368-379; State v. Dunlap, 25 Wash. 292; State v. Nordstrom, 21 Wash. 403; Davis v. Catron, 22 Wash. 183; State v. McLain, 43 Wash. 124; State v. Symes, 17 Wash. 596.

Costs: 1 Remington's Digest, pp. 688, 689, §§ 98-102; State v. McFadden, 42 Wash. 1; State v. Armstrong, 29 Wash. 57; State v. Grimes, 7 Wash. 445; Clallam County v. Hall, 23 Wash. 85.

The only exception to the general rule that defendant on conviction must pay all costs is found in this section: Foster v. Territory, 1 Wash. 411, 414.

A judgment under § 2926, *infra*, imposing a fine of five hundred dollars and costs, without fixing the period of imprisonment for nonpayment of fine, is not void when construed in connection with § 2227, *supra*, and § 2206, *infra*: Id.

If defendant has been sentenced for a term beyond the power of the court to impose for the crime charged, he will not be discharged on a reversal of the judgment, but the case will be remanded with instructions to the court below to sentence the defendant as upon a conviction for simple assault: Watson v. State, 2 Wash. 504.

As to excessive sentences, see 1 Remington's Digest, p. 854, § 461; p. 848, § 440; State v. Bliss, 27 Wash. 463; State v. Newton, 29 Wash. 373; State v. Patchen, 37 Wash. 24; State v. Mobley, 44 Wash. 549; State v. Ryan, 34 Wash. 597.

Upon an improper sentence, the case will be remanded for a proper one: State v. King, 50 Wash. 312; State v. Gilluly, 50 Wash. 1.

The supreme court will not reduce an excessive sentence: State v. Van Waters, 36 Wash. 358.

§ 2188. (6976.) Judgment a Lien on Realty, When.

Judgments for fines in all criminal actions rendered are and may be made liens upon the real estate of the defendant in the same manner and with like effect as judgments in civil actions. [Cd. '81, § 1111; 2 H. C., § 1333.]

See *supra*, § 445 et seq., judgment liens in civil cases.

See *infra*, § 2204, stay of execution.

§ 2189. (6977.) Fines, Disposition—Penalty for Neglect to Pay Over.

All fines imposed on any person by the provisions of this code, where the same shall be collected, shall be paid to the county treasurer of the county where such conviction shall have been had, to go into the general county fund. The county treasurer shall give duplicate receipts therefor, one of which shall be filed with the county auditor; and all officers refusing or neglecting to pay over any fines within one month after they shall have been received shall, upon conviction thereof, be fined in fourfold the amount of such fines so received. [L. '54, § 128; Cd. '81, § 1113; 2 H. C., § 1335.]

See *supra*, § 966, disposition of fines and forfeitures generally.

See *infra*, § 2230, costs and other moneys collected in criminal cases belong to county.

Cited in 7 Wash. 447; 15 Wash. 416.

Under our system of county organization, the general rule is that counties are bur-

dened with the entire cost of the administration of the criminal laws within their boundaries; and, in return, they receive and

appropriate to their own use all fines and costs collected in criminal cases: *State v. Grimes*, 7 Wash. 445, 447.

It is not error to impose a fine without the imprisonment: *State v. Dunlap*, 25 Wash. 292.

§ 2190. (6978.) Judgment Pronounced, When.

After verdict of guilty or finding of the court against the defendant, if the judgment be not arrested or a new trial granted, the court must pronounce judgment. [L. '54, p. 123, § 136; Cd. '81, § 1114; 2 H. C., § 1336.]

See *infra*, § 2198, defendant to be informed of verdict.

Where the clerk of the court failed to enter an order in a criminal action, the court may make the record speak the truth by the

filing of an order *nunc pro tunc*: *State v. Williams*, 43 Wash. 505.

§ 2191. Suspension of Sentence on Person Under Twenty-one.

If any person under the age of twenty-one years shall be convicted in the superior court of the state of Washington, upon trial before the court or court[s] and jury on a plea of not guilty, or before the court upon a plea of guilty, of any misdemeanor or felony, the court, in its discretion, may withhold and suspend sentence and order the accused to be released during good behavior; and the court shall have power to order his or her rearrest and pronounce sentence whenever the conduct of the accused shall, in the opinion of the court, make such action proper. [L. '05, p. 49, § 1.]

As to repeal of this section, see § 2304, and note. See note to § 2253.

See *infra*, § 2280, suspension of sentence.

§ 2192. Recognizance may be Required—Dismissal After Five Years.

The court when sentence is withheld and suspended may order the person convicted to enter into recognizance to be approved by the court for his or her presence before the court at all times whenever the court shall require and the person so convicted shall report to the court from time to time as the court shall direct, and the court shall after five years, if the party, during said time, has been law-abiding, of good habits, sober and industrious, vacate and set aside the conviction and dismiss the case, which fact of good behavior, shall be shown to the court by petition and satisfactory proof. [L. '05, p. 49, § 2.]

As to repeal of this section, see § 2304, and note. See note to § 2253.

§ 2193. Indeterminate Sentence to Penitentiary—Court not to Fix Limit.

Every person convicted of a felony or other crime punishable by imprisonment in the penitentiary, except treason and murder, if judgment be not suspended or new trial granted, shall be sentenced to the penitentiary, except in the cases where the law provides for the sending of such convicted persons to the reform school, and in cases where the court is empowered to suspend sentence; but the court imposing such sentence shall not fix the limit or duration of the sentence, but the term of imprisonment of any person so convicted shall not exceed the maximum nor be less than the minimum term provided by law for the crime for which the person was convicted and sentenced: Provided, that in all cases when the maximum sentence, in the discretion of the court, may be for life or any number of years, the court imposing the sentence shall fix the maximum sentence: Provided, further, that in all cases when no maximum sentence is fixed by law, the court imposing sentence shall fix such minimum, which minimum shall not be less than

six months, nor more than five years, the release of such person to be determined as hereinafter provided. [L. '07, p. 341, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2281. See note to § 2253.

Where the crime of forgery was committed on April 11, 1907, the accused cannot be sentenced under the law [the above section] approved March 13, 1907, page 341, which went into effect June 11, 1907; since § 8554, infra (§ 8 of above act), provides that a

person found guilty of a crime committed prior to the taking effect of the law shall be sentenced under the law in force at the time of the offense: State v. Gilluly, 50 Wash. 1.

§ 2194. Certain Criminals may be Sentenced to Reformatory.

All provisions of existing laws requiring the courts of this state to sentence male criminals between the ages of sixteen and thirty, convicted of any criminal offense, to the Washington penitentiary shall, from and after the turning over of the buildings of the Washington state reformatory to the board of managers as provided for in section 8591, of this code, apply to said Washington state reformatory, so far as to enable courts to sentence the class of prisoners mentioned in section 8585 of this code to the Washington state reformatory. [L. '07, p. 389, § 12.]

See infra, § 8585, certain criminals to be sentenced to reformatory.

See infra, § 8595, definite sentences not void.

§ 2195. Indeterminate Sentence to Reformatory.

Every sentence to the Washington state reformatory of a person hereinafter convicted of a felony, shall be a general sentence to imprisonment in the Washington state reformatory, giving the location thereof, and the courts of this state imposing such sentence shall not fix or limit the duration thereof. The term of such imprisonment of any prisoner so convicted and sentenced shall be terminated by the board of managers of the Washington state reformatory as authorized by this act, but such imprisonment shall not exceed the maximum provided by law for the crime for which the person was convicted, nor be less than the minimum term provided by law for a felony; and a person sentenced to the Washington state reformatory shall, within thirty days after his sentence, unless the execution thereof be suspended, be conveyed to the Washington state reformatory by the state board of control in the manner prescribed in section 8955 of this code, and delivered into the custody of the superintendent of the Washington state reformatory, together with a certified copy of the sentence of the court, and there be safely kept until released by the board of managers of the Washington state reformatory, or until said prisoner be pardoned by the governor, and if the execution of the sentence be suspended, and the judgment be afterward affirmed, the defendant shall be conveyed to the Washington state reformatory within thirty days after the court directs the execution of the sentence. [L. '07, p. 390, § 13.]

See infra, § 2223, and notes, power of governor to pardon.

See infra, § 2282, indeterminate sentence to reformatory.

See infra, § 8585, certain criminals to be sentenced to reformatory.

See infra, § 8595, credits at reformatory and discharge by governor.

§ 2196. (6979.) Presence of Defendant, When Necessary.

For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present; if for a fine only he must be personally present, or some responsible person must

undertake for him to secure the payment of the judgment and costs; judgment may then be rendered in his absence. [L. '54, p. 123, § 137; Cd. '81, § 1115; 2 H. C., § 1337.]

See *supra*, § 2145, presence at trial.

§ 2197. (6980.) Warrant for Defendant, When.

If in any case the defendant is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served in any county in this state, as a warrant of arrest in other cases. [L. '54, p. 123, § 138; Cd. '81, § 1116; 2 H. C., § 1338.]

See *infra*, § 2199, bench-warrant for defendant's arrest.

§ 2198. (6981.) Defendant to be Informed of Verdict.

When the defendant appears for judgment, he must be informed by the court of the verdict of the jury, and asked whether he have any legal cause to show why judgment should not be pronounced against him. [L. '54, p. 123, § 139; Cd. '81, § 1117; 2 H. C., § 1339.]

See *supra*, § 2190, judgment on verdict.

§ 2199. (6982.) Bench-warrant, Forfeiture of Bail, etc.

If the defendant have been discharged on bail, or have deposited money instead thereof, and do not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the recognizance, or of the money deposited, may direct the clerk to issue a bench warrant for his arrest. [L. '54, p. 123, § 140; Cd. '81, § 1118; 2 H. C., § 1340.]

See *supra*, § 2197, warrant for arrest to bring defendant in.

§ 2200. (6983.) Commitment Until Fine and Costs Paid.

When the defendant is adjudged to pay a fine and costs, the court shall order him to be committed to the custody of the sheriff until the fine and costs are paid or secured as provided by law. [L. '54, p. 123, § 141; Cd. '81, § 1119; 2 H. C., § 1341.]

See *infra*, § 2206, enforcement of judgment for fine and costs.

See *infra*, § 2209, fine and costs, how worked out.

Cited in 1 Wash. 329.

Form of judgment under this section suggested in *Coffer v. Territory*, 1 Wash. 325, 329.

§ 2201. (6984.) Execution as in Civil Actions for Fine and Costs.

Upon a judgment for fine and costs, and for all adjudged costs, execution shall be issued against the property of the defendant, and returned in the same manner as in civil actions. [L. '54, p. 123, § 142; Cd. '81, § 1120; 2 H. C., § 1342.]

See *supra*, § 510 et seq., executions in civil actions.

Cited in 23 Wash. 87.

§ 2202. (6985.) Recognizance to Keep the Peace—Exception.

Every court before whom any person shall be convicted upon an indictment or information for an offense not punishable with death or imprisonment in the penitentiary may, in addition to the punishment prescribed by law, require such person to recognize with sufficient sureties in a reasonable sum to keep the peace, or to be of good behavior, or both, for any term not exceeding one year, and to stand committed until he shall so recognize. [Cf. L. '54, p. 123, § 143; Cd. '81, § 1121; L. '91, p. 62, § 83; 2 H. C., § 1343.]

§ 2203. (6986.) Proceedings upon Breach of Bond.

In case of the breach of the conditions of any such recognizance the same proceedings shall be had that are by law prescribed in relation to recognizances to keep the peace. [L. '54, p. 123, § 144; Cd. '81, § 1122; 2 H. C., § 1344.]

See *supra*, § 1936 et seq., provisions relating to recognizances to keep the peace.

§ 2204. (6987.) Stay upon Judgment Sixty Days.

Every defendant against whom a judgment has been rendered for fine and costs may stay the execution for the fine assessed and costs for sixty days from the rendition of the judgment, by procuring one or more sufficient sureties, to enter into a recognizance in open court, acknowledging themselves to be bail for such fine and costs. [L. '54, p. 124, § 145; Cd. '81, § 1123; 2 H. C., § 1345.]

The following section, being § 1112 of the Code of 1881, appears to be covered by the provisions of the above section, and the latter, being the later enactment, is considered as controlling:

"§ 1112. The defendant may have a stay of execution for the same length of time and in the same manner as provided by law in civil actions, and with like effect; and the same proceedings may be had therein."

Section 1334 of 2 Hill's Code, providing for stay of execution as in civil cases, is omitted as in conflict with the above provisions.

See *infra*, § 2232, stay of execution on forfeited recognizance.

§ 2205. (6988.) Qualification and Liability of Sureties.

Such sureties shall be approved by the clerk, and the entry of the recognizance shall be written immediately following the judgment, and signed by the bail, and shall have the same effect as a judgment; and if the fine or costs be not paid at the expiration of the sixty days, a joint execution shall issue against the defendant and the bail, and an execution against the body of the defendant, who shall be committed to jail, to be released as provided in this code in committal for default to pay or secure the fine and costs. [L. '54, p. 124, § 146; Cd. '81, § 1124; 2 H. C., § 1346.]

§ 2206. (6989.) Judgment of Fine and Costs, How Enforced.

If any person ordered into custody until the fine and costs adjudged against him be paid shall not, within five days pay or cause the payment of the same to be made, the clerk of the court shall issue a warrant to the sheriff commanding him to imprison such defendant in the county jail until such fine and costs are paid, or until he has been imprisoned in such jail one day for every three dollars of such fine and costs; but execution may at any time issue against the property of the defendant as in other cases. [Cf. L. '54, p. 124, § 147; Cd. '81, § 1125; L. '83, p. 38, § 1; L. '91, p. 62, § 84; 2 H. C., § 1347.]

See notes to § 2187, judgment on verdict.

See notes to § 2200, commitment until fine paid.

See *infra*, § 2209, fine and costs, how worked out.

Cited in 1 Wash. 414; 23 Wash. 87.

§ 2207. (6990.) Certified Transcript—Mittimus.

When any person shall be sentenced to be imprisoned in the penitentiary or county jail, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or his deputy, a transcript, from the minutes of the court, of such conviction and sentence, duly certified by such

clerk, which shall be sufficient authority for such sheriff to execute the sentence, who shall execute it accordingly. [L. '54, p. 124, § 148; Cd. '81, § 1126; 2 H. C., § 1348.]

§ 2208. (6991.) Form of Sentence to Penitentiary.

In every case where imprisonment in the penitentiary is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor; and he may also be sentenced to solitary imprisonment for such term as the court shall direct, not exceeding twenty days at any one time; and in the execution of such punishment the solitary [imprisonment] shall precede the punishment by hard labor, unless the court shall otherwise order. [L. '54, p. 124, § 149; Cd. '81, § 1127; 2 H. C., § 1349.]

See §§ 2193, 2281, indeterminate sentence.

See infra, § 8505, solitary confinement.

See infra, §§ 8570, 8575, 8584, 8519, and 8521, employment of convicts.

See infra, §§ 2279, 8493, 8494, employment of jail prisoners.

Where there are two judgments rendered void for uncertainty, and punishment there-
and filed on the same date with two differ- under is not justified: *Davis v. Catron*, 22
ent sentences in them, the real sentence is Wash. 183.

§ 2209. (6992.) Fine and Costs, How Worked Out.

When a defendant is committed to jail on failure to pay any fines and costs, he shall, under the order of the county commissioners, work out the amount of the fine and costs at the rate of two dollars per day; and in case he shall so work out the fine and costs, or in case he shall not be able to work, or the county commissioners fail to provide work, and he shall have been confined in the county jail one day for every two dollars of such fine and costs, no execution shall issue therefor. When any defendant is in the custody of the sheriff by virtue of a sentence of imprisonment in the county jail, and if there be no county jail in the county, he shall, under the order of the county commissioners, cause such person to work his unexpired term of imprisonment in such manner as said county commissioners may direct. [Cf. L. '54, p. 124, § 151; L. '77, p. 206, § 8; Cd. '81, § 1129; 2 H. C., § 1350.]

See supra, §§ 1977, 1978, employment of vagrants.

See supra, § 2206, enforcement of judgment.

See infra, §§ 8493, 8494, prisoners in jail when sentenced to labor.

§ 2210. (6993.*) Death Warrant, Contents, Return.

When judgment of death is rendered following conviction and no appeal is taken, or the judgment has been affirmed on appeal, a death warrant shall be issued by the clerk of the trial court, which said warrant shall be signed by a judge of said court and attested by the clerk thereof under the seal of the court. Said warrant shall be directed to the superintendent of the state penitentiary of the state of Washington, and shall state the conviction of the person named therein and the judgment of the court, and appoint a day in which the judgment shall be executed by the superintendent of the state penitentiary, which shall not be less than thirty nor more than ninety days from the date of final judgment. [L. '01, Ex. Ses., p. 17, § 1. Cf. L. '54, p. 125, § 152; L. '60, p. 159, § 291; Cd. '81, § 1130; 2 H. C., § 1351.]

This section does not apply to crimes committed prior to its taking effect, which are governed by the laws existing at the time of their commission: See infra, § 2221.

The amendment of 1901, p. 100, was repealed by Laws '01, Ex. Ses., p. 3, § 1, before the former took effect.

Cited in 25 Wash. 272, 612.

The day for carrying into effect a sentence of death should not be designated in the judgment, but in the warrant for the execution: *Timmerman v. Territory*, 3 W. T. 445; but fixing a specific day in the death sentence is an irregularity amounting to mere surplusage, and does not affect the validity of the judgment: *Id.*

The order of the lower court fixing the day of execution of one convicted of murder is not reviewable on appeal, and hence an appeal from such order affords no ground for an application for a stay of execution of the death sentence: *State v. Seaton*, 27 Wash. 120; *State v. Boyce*, 25 Wash. 422.

§ 2212. (6994.) Death Penalty, How Executed.

The punishment of death prescribed by law must be inflicted by hanging by the neck. [L. '54, p. 125, § 153; Cd. '81, § 1131; 2 H. C., § 1352.]

Cited in 9 Wash. 349; 25 Wash. 273.

§ 2213. Order to Sheriff to Deliver to State Penitentiary.

At the time of the issuance of said death warrant an order shall be issued by the clerk of the court, which shall be signed by the judge and attested by the clerk under the seal of the court. Said order shall direct the sheriff to hold the person condemned to death, who shall be named therein, in safe custody and forthwith deliver said person, together with the death warrant, into the hands of the superintendent of the state penitentiary. [L. '01, Ex. Ses., p. 18, § 2.]

§ 2214. Custody and Execution of Condemned at Penitentiary.

Upon delivery to him of said death warrant, and of the person therein named, the superintendent of the state penitentiary shall take the person condemned to be executed and keep said person in said custody within the said state penitentiary until the day appointed in the warrant for the execution, upon which appointed day he shall carry out the mandate contained in said warrant by executing said condemned person within the walls of the state penitentiary in the manner provided by law. And between the date of receiving such condemned person and the date fixed in such warrant for his execution, such superintendent shall not suffer or permit any person to visit, converse or communicate with such condemned person excepting the attendants in the state penitentiary, legal, spiritual and medical advisers, and the members of the immediate family of the condemned person, which visits and communications shall be under and subject to the rules and regulations of the state penitentiary. [L. '01, Ex. Ses., p. 18, § 3.]

§ 2215. Record, of Death Warrant and Return, by Superintendent.

The superintendent of the state penitentiary shall keep in his office as part of the public records a book in which shall be entered a copy of the death warrant and his return made thereon, together with a complete statement of his acts in pursuance of said warrant. [L. '01, Ex. Ses., p. 18, § 4.]

§ 2216. Return of Warrant to Clerk of Court.

Within twenty days after said execution the superintendent of the state penitentiary shall return said death warrant to the clerk of the court from which same was issued with his return thereon, showing all proceedings had by him thereunder. [L. '01, Ex. Ses., p. 19, § 5.]

§ 2217. Return of Execution of Order by Sheriff.

The sheriff to whom the above-named order is issued and delivered shall immediately execute such order and return the same into court within

twenty days after he has delivered the death warrant and the person named therein into the hands of the superintendent of the state penitentiary, with his return thereon showing all proceedings had by him thereunder. [L. '01, Ex. Ses., p. 19, § 6.]

§ 2218. Clerk to File Returns.

The clerk of the court from which the death warrant and the order to the sheriff were issued shall, upon receipt of the returns from the superintendent of the state penitentiary and from the sheriff hereinbefore directed, file same with the records in the case and subjoin to the record of conviction and sentence a brief abstract of such returns. [L. '01, Ex. Ses., p. 19, § 7. Cf. L. '54, p. 125, § 154; Cd. '81, § 1132; 2 H. C., § 1353; Bal. Code, § 6995.]

See *infra*, § 2221.

§ 2219. Sheriff to Keep Prisoner Pending Issuance of Warrant.

Pending the issuance of the death warrant, the sheriff shall hold the condemned person in safe custody. [L. '01, Ex. Ses., p. 19, § 8.]

See *supra*, § 2214, sheriff to deliver to penitentiary.

§ 2220. Repeal—Exception.

All acts or parts of acts in conflict with this act are hereby repealed, except as hereinafter provided. [L. '01, Ex. Ses., p. 19, § 9.]

§ 2221. Saving Clause.

The provisions of this act shall not apply to any act done or crime heretofore committed, and all acts and crimes heretofore done or committed shall be prosecuted and punished under the laws existing at the time of the commission of said acts or crimes in the same manner as if this act had not been enacted, and all such existing laws and especially sections 6993 and 6995 of Ballinger's Annotated Codes and Statutes of Washington are hereby continued in force as to all such acts and crimes committed prior to the taking effect of this act. [L. '01, Ex. Ses., p. 19, § 10.]

See *supra*, § 2006, general saving clause.

"Act" in this and preceding section refers to § 2210 and §§ 2213-2221.

Saving clause in the act of 1909: See *infra*, § 2294.

The Ballinger sections referred to are superseded (except as saved in this section) by §§ 2210, 2218, *supra*. They are as follows:

Bal. Code, § 6993: "When judgment of death is rendered, a warrant signed by the judge and attested by the clerk, under the seal of the court, shall be drawn and delivered to the sheriff; it shall state the conviction and judgment, and appoint a day in which the judgment shall be executed, which shall not be less than thirty nor more than ninety days from the time of judgment. And the sheriff or officer to whom said warrant was delivered shall return the same within twenty days after the time fixed for the execution."

Bal. Code, § 6995: "The sheriff shall return and file with the clerk the warrant, with a statement of his doings thereon, and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence."

§ 2222. (6996.) Proceedings on Failure to Execute Death Sentence.

Whenever the time appointed for the execution of a prisoner shall have passed, from any cause, the court by whom the time was fixed, or the judge or judges thereof, shall cause the prisoner to be brought immediately before the said court, judge or judges, and proceed to appoint a day for the carrying into effect the sentence of death. [L. '54, p. 125, § 155; Cd. '81, § 1133; 2 H. C., § 1354.]

See *supra*, § 2210, requisites of death warrant.

Judgment of death in force and unexecuted: See *supra*, note to § 2210.

Cited in 25 Wash. 273.

§ 2223. (6997.) Governor may Grant Pardons, etc.

Whenever a prisoner has been sentenced to death, the governor shall have power to commute such sentence to imprisonment for life at hard labor; and in all cases in which the governor is authorized to grant pardons or commute sentence of death, he may, upon the petition of the person convicted, commute a sentence or grant a pardon upon such conditions and with such restrictions and under such limitations as he may think proper; and he may issue his warrant to all proper officers to carry into effect such pardon or commutation, which warrant shall be obeyed and executed instead of the sentence, if any, which was originally given. The governor may also, on good cause shown, grant respites or reprieves, from time to time, as he may think proper. [L. '54, p. 128, § 174; Cd. '81, § 1136; 2 H. C., § 1356.]

See Const., Art. III, §§ 9, 11, pardoning power vested in governor—Power to remit fines and forfeitures, etc.—Report to legislature.

See infra, § 8545, power of governor to parole.

See infra, § 8551, parole of prisoners.

See infra, § 8553, recommitment on violation of parole.

See infra, § 8588, parole by governor of convicts in state reformatory.

See infra, § 8589, reimprisonment in reformatory of paroled prisoners.

See infra, § 8595, credits at state reformatory and discharge by governor.

Cited in 47 Wash. 280.

Under this section, the provision that he may "issue his warrant to carry into effect such pardon," is not limited to the issuance of the warrant granting the pardon, but reposes power in the governor to issue a warrant revoking a pardon which expressly provides that violation of its conditions shall cause its revocation, in the absence of any other statutory provision for determining when the conditions are violated: *Spencer v. Kees*, 47 Wash. 276.

A prisoner who is pardoned upon condition that he should be placed under the care and surveillance of Dr. B., and that he should remain with and be supported by his relatives as long as he lives, is shown to have violated the conditions of the pardon where he remained with his relatives only a few days, was permitted to support himself, was married, visited houses of prostitution and frequently became intoxicated: *Id.*

§ 2224. (6998.) Final Record shall Contain What.

The clerk of the court shall make a final record of all the proceedings in a criminal prosecution within six months after the same shall have been decided, which shall contain a copy of the minutes of the challenge to the panel of the grand jury, the indictment or information, journal entries, pleadings, minutes of challenges to panel of petit jurors, judgment, orders, or decision, and bill of exceptions. [Cf. L. '54, p. 125, § 156; Cd. '81, § 1134; L. '91, p. 63, § 85; 2 H. C., § 1355.]

See supra, § 381 et seq., exceptions in civil cases.

See supra, § 2186, exceptions in criminal same as in civil cases.

See infra, § 2227 et seq., fees and cost bills in criminal cases.

RECORD OF THE ACTION.—Presumptions in capital cases are not made in favor of the regularity of the proceedings in the trial court: *Shapoonmash v. United States*, 1 W. T. 188. The record must show that the prisoner was present when the jury rendered their verdict, and what disposition was made of the jury on adjournment from

one day until the next during the trial: *Id.* The action of the court below in granting or refusing instructions cannot be reviewed unless there is a statement or bill of exceptions showing the evidence to which the instructions pertain: *Thompson v. Territory*, 1 W. T. 548.

CHAPTER XX.

COSTS IN CRIMINAL CASES.

§ 2225. (1627.) Costs—How Taxed Where Complaint Unfounded or Malicious.

When any person shall be brought before a court, justice of the peace, or other committing magistrate of any county, city, or town in this state, having jurisdiction of the alleged offense, charged with the commission of a crime or misdemeanor, and such complaint upon examination shall appear to be unfounded, no costs shall be payable by such acquitted party, but the same shall be chargeable to the county, city, or town for or in which the said complaint is triable; but if the court, justice of the peace, or other magistrate trying said charge shall decide the complaint was frivolous or malicious, the judgment or verdict shall also designate who is the complainant, and may adjudge that said complainant pay the costs. In such cases a judgment shall thereupon be entered for the costs against said complainant, who shall stand committed until such costs be paid or discharged by due process of law. [L. '69, p. 418, § 1; Cd. '81, § 2103; 1 H. C., § 3050.]

See *supra*, §§ 1942, 1954, costs against complainant when.

Cited in 3 Wash. 673; 8 Wash. 450; 19 Wash. 348; 37 Wash. 587; 40 Wash. 10.

Query: Is provision relative to commitment until costs paid constitutional? See Const., Art. I, § 17.

The superior court has no authority, upon acquittal of a defendant in a criminal case, to enter a judgment for costs against the complaining witness, although the court may find that the complaint is frivolous and without probable cause: *Town of Ilwaco v. Miller*, 8 Wash. 449; *In re Permstick*, 3 Wash. 672. But see, *contra*, *Colby v. Backus*, 19 Wash. 347.

A jury in a criminal case has no authority, on the acquittal of the defendant, to find that the complaint was malicious and without probable cause, and a judgment on such verdict, that complaining witness pay the costs of the trial and stand committed to the county jail until payment, is void: *In re Permstick*, 3 Wash. 672.

The provisions of this section and §§ 1942, 1954, *supra*, authorizing the taxing of costs against complaining witness, apply only to cases of examinations before magistrates, and to complaints submitted to grand juries for investigation: *Town of Ilwaco v. Miller*, *supra*, 449, 450.

§ 2226. (1628.) Enforcing Costs Against Complainant.

When a grand jury, upon a complaint submitted to them for investigation, fail to find a bill of indictment for an offense against the laws of the state, they shall also inquire whether the complaint is frivolous or malicious, and decide whether the county or complainant shall pay the costs, and make return of their finding in open court. Any complainant adjudged by said grand jury as liable for the costs shall forthwith be brought into court, and sentenced to pay the same or stand committed until such judgment is satisfied or complied with. [L. '69, p. 418, § 2; Cd. '81, § 2104; 1 H. C., § 3051.]

See notes to last section.

See *supra*, § 2044.

§ 2227. (1629.) Jury Fee to be Taxed to Defendant, When.

Every person convicted of a crime, or held to bail to keep the peace, shall be liable to all the costs of the proceedings against him, including, when tried by a jury in the superior court, twelve dollars for a jury fee, and when tried by a jury before a committing magistrate, six dollars for jury fee, for which judgment shall be rendered and collection had as in cases of fines. The jury

fee, when collected for a case tried by the superior court, shall be paid to the clerk, to be by him applied as the jury fee in civil cases is applied. [L. '69, p. 418, § 3; Cd. '81, § 2105; 1 H. C., § 3052.]

See *infra*, § 2206.

The last part of this section appears to be obsolete.

Cited in 1 Wash. 414; 7 Wash. 448; 29 Wash. 60.

This section provides that on conviction the defendant shall be liable to pay the costs in all cases: *Foster v. Territory*, 1 Wash. 411, 414.

A prisoner, when convicted, is chargeable with a jury fee of twelve dollars, which goes into the cost bill against him: *State v. Grimes*, 7 Wash. 445, 448. See *State v. Armstrong*, 29 Wash. 57; *State v. McFadden*, 42 Wash. 1.

§ 2228. (1630.) Cost Bills, How Made and Certified.

In all convictions for felony, whether capital or punishable by imprisonment in the penitentiary, the clerk of the superior court shall forthwith, after sentence, tax the costs in the case. The cost bill shall be made out in triplicate, and be examined by the prosecuting attorney of the county in which the trial was had. After which the judge of the superior court shall allow and approve such bill or so much thereof as is allowable by law. The clerk of the superior court shall thereupon, under his hand, and under the seal of the court, certify said triplicate cost bills, and shall file one with the papers of the cause, and shall transmit one to the state auditor and one to the county auditor of the county in which said felony was committed. [Cd. '81, § 2106; L. '83, p. 35, § 1; 2 H. C., § 1382a.]

See *supra*, § 491, costs against state or county.

See notes to §§ 509, 2225, 2227, *supra*.

See *supra*, § 1942, costs against complaining witness.

See *supra*, § 1954, costs against complainant when.

See *infra*, § 3967, taxation and retaxation by prosecuting attorney.

Cited in 7 Wash. 446.

Costs in criminal prosecutions: See 1 Remington's Digest, pp. 687-689, §§ 92-102; *State v. Rutledge*, 40 Wash. 9; *State ex rel. Langhorne v. Superior Court*, 32 Wash. 80; *Spokane v. Smith*, 37 Wash. 583; *Colby v. Backus*, 19 Wash. 347; *State v. Graves*, 13 Wash. 485; *State ex rel. Crawford v. Evenson*, 18 Wash. 609; *State v. McFadden*, 42 Wash. 1; *State v. Armstrong*, 29 Wash. 57; *Lamey v. Coffman*, 11 Wash. 301; *Clallam County v. Hall*, 23 Wash. 85.

The state is not liable to the county in convictions for a felony for such costs as clerk's and sheriff's fees, fees and mileage of jurors, stenographers' charges, and expenses incurred for plat of scene of crime, nor fees of defendant's witnesses in the preliminary examination: *State v. Grimes*, 7 Wash. 445.

But the state is liable for defendant's witnesses appearing and testifying at the trial, when the cost bill has been properly certified and approved: *Id.*

A person convicted of murder is entitled, on appeal, to a transcript of the record at the expense of the public, on showing in-

ability to pay the clerk's fees therefor: *State v. Fenimore*, 2 Wash. 370.

The constitutional provision (Art. I, § 22) relieving an accused person from advancing fees before final judgment, has reference only to the "final judgment" in the trial court: *Stowe v. State*, 2 Wash. 124; citing *State v. Fenimore*, 2 Wash. 371.

County commissioners cannot be compelled, for the benefit of the accused, in a criminal prosecution, to pay for a copy of a stenographer's report of the trial: *Id.*

In contempt proceedings, brought on relation of private parties the discharge of the defendant will throw the costs on the county, as in criminal cases: *State v. Milligan*, 4 Wash. 29.

Where the only error committed by a magistrate in a criminal trial was in taxing costs under a law which had been repealed, the superior court should, in reviewing said action in certiorari, retax the costs and affirm the judgment: *State v. White*, 8 Wash. 230.

As to duty of county auditor to draw warrants in payment of costs, see *State ex rel. Crawford v. Evenson*, 18 Wash. 609.

§ 2229. (1631.) Payment of Amount Stated in Cost Bill.

Upon the receipt of the cost bill as provided for in the last preceding section, the county auditor shall draw warrants for the amounts due each

person, as certified in said cost bill, which warrants shall be paid as other county warrants are paid. On receipt of the certified copy of said cost bill, the state auditor shall examine and audit said bill and allow the same or so much thereof as may be allowable against the state, and shall credit the amount so allowed to the county from whence the bill came as so much state tax paid. The state auditor shall immediately notify the state treasurer and county auditor, each of whom shall credit and charge accordingly. [Cd. '81, § 2107; L. '83, p. 35, § 1; 1 H. C., § 3053.]

Cited in 7 Wash. 447; 18 Wash. 611.

§ 2230. (1632.) Costs and Other Moneys Collected Belong to County.

All costs collected against any person convicted of crime or misdemeanor, and all sums collected on recognizances of persons accused, or of witnesses in criminal cases for fines and forfeitures shall belong to the county from which the case came. [L. '63, p. 425, § 12; L. '69, p. 421, § 11; Cd. '81, § 2112; 1 H. C., § 3054.]

See § 2189, *supra*, and notes.
Cited in 7 Wash. 447.

CHAPTER XXI.

FORFEITURE OF RECOGNIZANCES IN CRIMINAL ACTIONS.

§ 2231. (7004.) Forfeiture of Recognizance, Judgment, Execution.

In criminal cases where a recognizance for the appearance of any person, either as a witness or to appear and answer, shall have been taken and a default entered, the recognizance shall be declared forfeited by the court. and at the time of adjudging such forfeiture said court shall enter judgment against the principal and sureties named in such recognizance for the sum therein mentioned, and execution may issue thereon the same as upon other judgments. [L. '67, p. 103, § 1137; 2 H. C., § 1357.]

See *supra*, § 1957, manner of taking and conditions of before magistrates.
See *supra*, § 2078, right of defendant to give bail.
See *supra*, § 2090, forfeiture of bail.

§ 2232. (7005.) Stay of Execution on Forfeited Recognizance.

The parties, or either of them, against whom such judgment may be entered in the superior or supreme courts, may stay said execution for sixty days by giving a bond, with two or more sureties, to be approved by the clerk, conditioned for the payment of such judgment at the expiration of sixty days, unless the same shall be vacated before the expiration of that time. [Cf. L. '67, p. 103, § 2; Cd. '81, § 1138; L. '91, p. 63, § 86; 2 H. C., § 1358.]

See *supra*, § 2204, stay on judgment for fines and costs.

§ 2233. (7006.) Judgment Vacated on Defendant's Production, When.

If a bond be given and execution stayed, as provided in the last preceding section, and the person for whose appearance such recognizance was given shall be produced in court before the expiration of said period of sixty days, the judge may vacate such judgment upon such terms as may be just and equitable; otherwise execution shall forthwith issue as well against the sureties in the new bond as against the judgment debtors. [Cf. L. '67, p. 193, § 3; Cd. '81, § 1139; L. '91, p. 63, § 87; 2 H. C., § 1359.]

§ 2234. (7007.) Recognizances Before Magistrates, Forfeiture, Action.

All recognizances taken and forfeited before any justice of the peace or magistrate shall be forthwith certified to the clerk of the superior court of the county; and it shall be the duty of the prosecuting attorney to proceed at once by action against all the persons bound in such recognizances, and in all forfeited recognizances, whatever, or such of them as he may elect to proceed against. [L. '54, p. 128, § 175; Cd. '81, § 1166; 2 H. C., § 1360.]

See *supra*, § 2031, action on forfeited recognizance before magistrates, suit on.

§ 2235. (7008.) Action on Recognizance not to be Barred, etc.

No action brought on any recognizance given in any criminal proceeding whatever shall be barred or defeated, nor shall judgment be arrested thereon, by reason of any neglect or omission to note or record the default of any principal or surety at the time when such default shall happen, or by reason of any defect in the form of the recognizance, if it sufficiently appear, from the tenor thereof, at what court or before what justice the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take such recognizance; and a recognizance may be recorded after execution awarded. [Cf. L. '54, p. 129, § 176; Cd. '81, § 1167; L. '91, p. 63, § 88; 2 H. C., § 1361.]

Bail: See 1 Remington's Digest, pp. 329-331, §§ 1-8; *State v. Lewis*, 35 Wash. 261; *McAlmond v. Bevington*, 23 Wash. 315; *State ex rel. Grass v. White*, 40 Wash. 560.

It is no defense to action on bail bond voluntarily given that the conditions of the bond are more onerous than the statute

permits: *Ainsworth v. Territory*, 3 W. T. 270. Neither can defendant take the ground that the bond was not declared forfeited because of the fact that the journal had not been signed by the judge. Such signature is unnecessary to make journal entries valid: *Id.*

§ 2236. (7009.) Costs, Liability for—How Taxed and Paid.

No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment is found against him, or, for want of prosecution, shall be liable for any costs or fees of any officer, or for any charge of subsistence while he was in custody, but in every such case the fees of the defendant's witnesses, and of the officers for services rendered at the request of the defendant, and charges for subsistence of the defendant while in custody, shall be taxed and paid as other costs and charges in such cases. [Cf. L. '54, p. 129, § 177; L. '77, p. 207, § 10; Cd. '81, § 1168; 2 H. C., § 1382.]

Cited in 7 Wash. 449; 18 Wash. 610; 37 Wash. 587; 40 Wash. 11.

CHAPTER XXII.

SEARCH-WARRANTS.

§ 2237. (7010.) When Issued.

When complaint shall have been made on oath to any magistrate authorized to issue warrant in criminal cases that personal property has been stolen or embezzled, or obtained by false tokens or pretenses, and that the complainant believes that it is concealed in any particular house or place, the magistrate, if he be satisfied that there is a reasonable cause for such belief shall issue a warrant for such property. [L. '54, p. 100, § 1; Cd. '81, § 967; 2 H. C., § 1383.]

See *supra*, §§ 50, 51, who are magistrates.

The fourth amendment to the constitution of the United States prohibits unreasonable searches and seizures, and provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The constitution of Washington provides that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law": Art. I, § 7.

Cited in 43 Wash. 477.

§ 2238. (7011.) Additional Grounds for Issuing Warrant.

Any such magistrate, when satisfied that there is reasonable cause, may also, upon like complaint made on oath, issue search-warrant in the following cases, to wit:—

1. To search for and seize any counterfeit or spurious coin, or forged instruments, or tools, machines, or materials prepared or provided for making either of them;

2. To search for and seize any gaming apparatus used or kept and to be used in any unlawful gaming-house, or in any building, apartment, or place resorted to for the purpose of unlawful gaming. [L. '54, p. 101, § 2; Cd. '81, § 968; 2 H. C., § 1384.]

See *infra*, § 2479, search for gambling apparatus.

See *infra*, § 2982, search-warrants to seize fighting birds, etc.

Cited in 9 Wash. 337, 339.

Under a statute permitting the destruction of gambling apparatus seized and held as evidence upon the trial, where the record is silent as to how the apparatus came into the possession of the sheriff, the court

cannot presume that such possession was wrongfully obtained, or that the recitals and order of the court directing the destruction were unauthorized: *Way v. Territory*, 1 Wash. 415.

§ 2239. (7012.) To Whom Directed—Contents of.

All such warrants shall be directed to the sheriff of the county or his deputy, or to any constable of the county, commanding such officer to search the house or place where the stolen property or other things for which he is required to search are believed to be concealed, which place and property or things to be searched for shall be designated and described in the warrant, and to bring such stolen property or other things, when found, and the person in whose possession the same shall be found, before the magistrate, who shall issue the warrant, or before some other magistrate or court having cognizance of the case. [L. '54, p. 101, § 3; Cd. '81, § 969; 2 H. C., § 1385.]

Cited in 43 Wash. 477.

§ 2240. (7013.) Execution of Warrant, Custody and Disposition of Property.

When any officer, in the execution of a search-warrant, shall find any stolen or embezzled property, or shall seize any other things for which a search is allowed by this chapter, all the property and things so seized shall be safely kept by the direction of the court or magistrate so long as shall be necessary for the purpose of being produced in evidence on any trial; and as soon as may be afterwards, all such stolen and embezzled property shall be restored to the owner thereof, and all other things seized by virtue of such warrant shall be destroyed under direction of the court or magistrate. [L. '54, p. 101, § 4; Cd. '81, § 970; 2 H. C., § 1386.]

See *infra*, § 2478, seizure and disposition of apparatus.

CHAPTER XXIII.

PROCEEDINGS RELATING TO FUGITIVES FROM JUSTICE.

§ 2241. (7015.) Governor's Agent to Demand Fugitive—Proceedings.

The governor of this state may appoint agents to demand of the executive authority of any state or territory any fugitive from justice, or any other person charged with felony or any other crime in this state; and whenever an application shall be made to the governor for that purpose, the prosecuting attorney, when required by the governor, shall forthwith investigate the ground of such application, and report to the governor all material circumstances which may come to his knowledge, with an abstract of the evidence and his opinion as to the expediency of the demand; but the governor may, in any case, appoint such agents without requiring the opinion of or any report from the prosecuting attorney, and the accounts of the agents appointed for such purposes shall in all cases be audited by the state auditor and paid from the state treasury. [Cf. L. '54, p. 102, § 5; Cd. '81, § 971; L. '91, p. 65, § 98; 2 H. C., § 1387.]

The right of extradition between the several states of the United States is derived from Art. IV, § 2, of the federal constitution.

§ 2242. (7016.) Demand on Governor—Proceedings.

When a demand shall be made upon the governor of this state by the executive of any state or territory, in any case authorized by the constitution and laws of the United States, for the delivery over of any person charged in such state or territory with treason, felony, or any other crime, the prosecuting attorney, or any other prosecuting officer, when required by the governor, shall forthwith investigate the ground of such demand, and report to the governor all material facts which may come to his knowledge as to the situation and circumstances of the person so demanded, especially as to whether he is held in custody or is under recognizance to answer for any offense against the laws of this state or of the United States, or by force of any civil process, and also whether such demand is made according to law, so that such person ought to be delivered up; and if the governor be satisfied that such demand is conformable to law, and ought to be complied with, he shall issue his warrant, under the seal of the state, authorizing the agents who make such demand either forthwith, or at such time as shall be designated by the warrant, to take and transport such person to the line of the state at the expense of such agents, and shall also by such warrant require the civil officers within this state to afford all needful assistance in the execution thereof. [L. '54, p. 102, § 6; Cd. '81, § 972; 2 H. C., § 1388.]

Extradition—Authority — Persons subject — Proceedings: See 1 Remington's Digest, pp. 1239-1241, §§ 1-8; In re Gillis, 38 Wash. 156; Poor v. Cudihee, 37 Wash. 609; In re Maney, 20 Wash. 509; In re Foye, 21 Wash. 250; In re Baker, 21 Wash. 259; In re Sylvester, 21 Wash. 263; State v. Roller, 30 Wash. 692; Armstrong v. Van de Vanter, 21 Wash. 682; State v. Boggs, 16 Wash. 143.

§ 2243. (7017.) Warrant for Fugitive, Issuance of.

Whenever any person shall be found within this state charged with an offense committed in any state or territory, and liable by the constitution and laws of the United States to be delivered on the demand of the executive of such state or territory, any court or magistrate authorized to issue warrants in

criminal cases may, upon complaint under oath setting forth the offense, and such other matters as are necessary to bring the offense within the provisions of law, issue a warrant to bring the person so charged before the same or some other court or magistrate so authorized within the state, to answer such complaint as in other cases. [L. '54, p. 102, § 7; Cd. '81, § 973; 2 H. C., § 1389.]

Cited in 40 Wash. 563.

This section requires a legal charge of crime made in the state having jurisdiction of the offense; and a person cannot be arrested and held in this state upon an un-

authenticated warrant from another state and a complaint, filed in a court of this state, reciting that the party is a fugitive from justice: *State ex rel. Grass v. White*, 40 Wash. 560.

§ 2244. (7018.) Examination by Court or Magistrate.

If, upon the examination of the persons charged, it shall appear to the court or magistrate, by proof in addition to the oath of the complainant, that there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the governor, he shall, if not charged with a capital crime, be required to recognize, with sufficient sureties, in a reasonable sum, to appear before such court or magistrate at a future day, allowing a reasonable time to obtain a warrant of the executive, and to abide the order of the court or magistrate; and if such person shall not so recognize, he shall be committed to prison, and there be detained until such day, in like manner as if the offense charged had been committed in this state; and if the person so recognizing shall fail to appear according to the conditions of his recognizance, he shall be defaulted, and the like proceedings shall be had as in the case of other recognizances entered into before such court or magistrate; but if such person be charged with a capital crime, he shall be committed to prison, and there be detained until the day so appointed for his appearance before the court or magistrate. [L. '54, p. 103, § 8; Cd. '81, § 974; 2 H. C., 1390.]

Cited in 40 Wash. 563.

Rights and liabilities of accused after extradition: See 1 Remington's Digest, p. 1241, § 9; *State v. Roller*, 30 Wash. 692; *State v. Lindegrind*, 33 Wash. 440.

In the case of extradition, a prisoner extradited upon a certain charge may be tried for an offense slightly different from the charge, if nothing appears to suggest fraud in procuring the extradition: *Harland v. Territory*, 3 W. T. 131.

§ 2245. (7019.) Discharge, When.

If the person recognized or committed shall appear before the court or magistrate upon the day ordered, he shall be discharged, unless he be demanded by some persons authorized by the warrant of the executive to receive him. or unless the court or magistrate shall see cause to commit him, or require of him to recognize anew for his appearance at some other day; and if, when ordered, he shall not so recognize, he shall be committed and be detained as before provided. Whenever the person so appearing shall be recognized, committed, or discharged, any person authorized by the warrant of the executive may at all times take him into custody, and the same shall be a discharge of the recognizance, if any. and shall not be deemed an escape. [L. '54, p. 103, § 9; Cd. '81, § 975; 2 H. C., § 1391.]

§ 2246. (7020.) Complainant Liable for Costs, When.

The complainant in such cases shall be answerable for the actual costs and charges, and for the support in prison of any person so committed, and shall

advance to the jailer one week's board at the time of commitment, and so from week to week, so long as such person shall remain in jail; and if he fails to do so, the jailer may forthwith discharge the person from his custody. [L. '54, p. 103, § 10; Cd. '81, § 976; 2 H. C., § 1392.]

CHAPTER XXIV.

REWARDS FOR THE APPREHENSION OF FUGITIVES.

§ 2247. (7022.) **Standing Rewards by Governor for Certain Offenses.**

The governor shall offer a standing reward of two hundred dollars for the arrest of each person who shall place any obstruction on any railroad track, or who shall misplace any switch, rail, or ties on any such road, whereby the life of any person passing over said road may be endangered; and for the arrest of each person engaged in the robbing or attempting to rob any person upon, or having in charge, in whole or in part, any stage-coach, wagon, railroad train, or other conveyance engaged in carrying passengers, or any private conveyance within this state, the reward to be paid to the person making such arrest, out of any money in the [state] treasury not otherwise appropriated, immediately upon the conviction of the person so arrested; but no reward shall be paid except after such conviction. [L. '77, p. 283, § 1; Cd. '81, § 1290; 1 H. C., § 2941.]

See *infra*, § 8988, subd. 8, rewards for fugitives.

§ 2248. (7023.) **Auditor to Draw Warrant.**

The auditor of state shall draw a warrant upon the treasurer for the amount of the reward, upon presentation to him of a certificate of the clerk of the court where the conviction was had, of such conviction, and the finding of the court that the satisfactory proof was made that the person claiming the reward is entitled thereto, under the provision of the preceding section. [L. '77, p. 284, § 2; Cd. '81, § 1291; 1 H. C., § 2942.]

§ 2249. (7024.) **Rewards by County Commissioners, When.**

The county commissioners in the several counties of this state, when in their opinion the public good requires it, are hereby authorized to offer and pay a suitable reward, not to exceed five hundred dollars in any one case, to any person or persons who, in consequence of such offer, apprehends, brings back, and secures any person or persons convicted of or charged with any criminal offense, if the offense be a felony. [L. '86, p. 124, § 1; 1 H. C., § 2943.]

§ 2250. (7025.) **Payment of Rewards Offered by Commissioners.**

Whenever any such reward has been offered by any board of county commissioners for the apprehension of any person or persons convicted of or charged with any criminal offense, if the offense be a felony, the person or persons who shall first apprehend, bring back, and secure such person or persons so charged shall be entitled to such reward, and the board of county commissioners who have offered such reward are authorized to draw a warrant or warrants on the county treasurer for the amount of such reward, who shall pay the amount of said warrant or warrants out of any money in the county treasury not otherwise appropriated. [L. '86, p. 124, § 2; 1 H. C., § 2944.]

§ 2251. (7026.) Conflicting Claims for, How Determined.

When more than one claimant applies for the payment of any reward, offered by any board of county commissioners, such commissioners shall determine, in their respective counties, to whom the same shall be paid, and if to more than one person, in what proportion to each, and their determination shall be final and conclusive. [L. '86, p. 124, § 3; 1 H. C., § 2945.]

§ 2252. State to Pay Expense of Foreign Government in Returning Fugitive.

The state auditor is hereby authorized to audit and allow all just and legal claims which any foreign government or its officers may have against this state, in accordance with the general fee-bills for like services, for the capture, detention, and keeping of any criminal who has escaped from this state and taken refuge in any foreign jurisdiction; and upon the allowance of any such claim, he shall draw his warrant upon the state treasury therefor; and the state treasurer is hereby required to pay the same out of any funds in the state treasury not otherwise appropriated. [L. '75, p. 115, § 1; 1 H. C., § 2946.]

It has been considered that this section applied only to claims existing at the time of its enactment.

TITLE XIV.

CRIMES AND PUNISHMENTS.

For title of this act, see *infra*, § 2304.

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CHAPTER I.

GENERAL PROVISIONS.

§ 2253. Classification of Crimes.

A crime is an act or omission forbidden by law and punishable upon conviction by death, imprisonment, fine or other penal discipline. Every crime which may be punished by death or by imprisonment in the state penitentiary is a felony. Every crime punishable by a fine of not more than two hundred and fifty dollars, or by imprisonment in a county jail for not more than ninety days, is a misdemeanor. Every other crime is a gross misdemeanor. [L. '09, p. 890, § 1.]

Compare Minn. Code, § 4747; N. Y. P. C., § 3.

Former laws, see *infra*, § 2722.

Some of the provisions of this and the next chapter are inconsistent with the Criminal Code of Procedure, Title XIII. Whether the general clause in the title of this act, "rights and custody of persons accused or convicted of crime," is sufficient to authorize amendments to the Code of Procedure, or implied repeals thereof, is doubted, especially as this act does not purport to be a Code of Procedure, or a complete act on the "rights and custody" of accused persons. The inconsistent provisions of Title XIII are accordingly all retained. See, also, note to § 2304.

For cases bearing on this title, see former laws on the same subject.

§ 2254. Persons Punishable.

The following persons are liable to punishment:

1. A person who commits in the state any crime, in whole or in part.
2. A person who commits out of the state any act which, if after committed within it, would be larceny, and is afterward found in the state with any of the stolen property.
3. A person who, being out of the state, counsels, causes, procures, aids, or abets another to commit a crime in this state.
4. A person who, being out of the state, abducts or kidnaps, by force or fraud, any person, contrary to the laws of the place where the act is committed, and brings, sends or conveys such person into this state.
5. A person who commits an act without the state which affects persons or property within the state, or the public health, morals or decency of the state, which, if committed within the state, would be a crime. [L. '09, p. 890, § 2.]

Compare Minn. Code, § 4750; N. Y. P. C., § 16.

Former laws, see *supra*, § 2010.

§ 2255. Duress of Married Woman No Defense.

It is no defense for a married woman charged with the commission of a crime, that the alleged act committed by her was committed in the presence of her husband. [L. '09, p. 891, § 3.]

Compare Minn. Code, § 4752; N. Y. P. C., § 24.

§ 2256. Duress as a Defense.

Whenever any crime, except murder, is committed or participated in by two or more persons, any one of whom participates only under compulsion by another engaged therein, who by threats creates a reasonable apprehension

in the mind of such participator that in case of refusal he is liable to instant death or grievous bodily harm, such threats and apprehension constitute duress, which will excuse such participator from criminal prosecution. [L. '09, p. 891, § 4.]

Compare Minn. Code, § 4753.

§ 2257. Responsibility of Children.

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong. Whenever in legal proceedings it becomes necessary to determine the age of a child, he may be produced for inspection, to enable the court or jury to determine the age thereby; and the court may also direct his examination by one or more physicians, whose opinion shall be competent evidence upon the question of his age. [L. '09, p. 891, § 5.]

Compare Minn. Code, § 4753; N. Y. P. C., §§ 18, 19.

§ 2258. Intoxication No Defense.

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such purpose, motive or intent. [L. '09, p. 891, § 6.]

Compare Minn. Code, § 4755; N. Y. P. C., § 22.

§ 2259. Insanity, Idiocy, Imbecility, Criminal Propensity, No Defense.

It shall be no defense to a person charged with the commission of a crime, that at the time of its commission, he was unable by reason of his insanity, idiocy or imbecility to comprehend the nature and quality of the act committed, or to understand that it was wrong; or that he was afflicted with a morbid propensity to commit prohibited acts; nor shall any testimony or other proof thereof be admitted in evidence. [L. '09, p. 892, § 7.]

Compare N. Y. P. C., §§ 20, 21, 23.

Insanity as a defense, in title on "Procedure," see §§ 2173-2176, which were not expressly repealed by the act of 1909.

See *infra*, § 2283, determination of insanity by court and medical experts.

See *infra*, §§ 5953-5970, determination of insanity and commitment of criminal insane.

The right to "trial by jury" is guaranteed by the 6th Amendment to the Federal Constitution; but the State Constitution, Art. I, § 21, provides that the right to trial by jury "shall remain inviolate."

§ 2260. Principal Defined.

Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent, shall not be a defense to any person aiding,

abetting, counseling, encouraging, hiring, commanding, inducing or procuring him. [L. '09, p. 892, § 8.]

Compare Minn. Code, § 4758; N. Y. P. C., §§ 28, 29.

See supra, § 2007, and notes, distinctions relating to accessory abolished.

§ 2261. Accessory Defined.

Every person not standing in the relation of husband or wife, brother or sister, parent or grandparent, child or grandchild, to the offender, who after the commission of a felony shall harbor, conceal or aid such offender with intent that he may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a felony or is liable to arrest, is an accessory to the felony. [L. '09, p. 892, § 9.]

Compare Minn. Code, § 4759; N. Y. P. C., § 30.

See supra, § 2008, accessory in the Code of Procedure.

§ 2262. Trial and Punishment of Accessories.

Every accessory to a felony may be indicted, tried and convicted either in the county where he became an accessory, or where the principal felony was committed; and whether the principal offender has or has not been convicted, or is or is not amenable to justice, or has been pardoned or otherwise discharged after conviction; and, except where a different punishment is specially provided by law, such accessory shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 892, § 10.]

Compare Minn. Code, § 4760; N. Y. P. C., § 32.

See supra, § 2009, trial of accessories.

See supra, § 2017, venue of action against accessories.

See infra, § 2787, accessories in arson.

§ 2263. Conviction of Lesser Crime.

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty. [L. '09, p. 893, § 11.]

Compare Minn. Code, § 4757; N. Y. P. C., § 35.

See supra, § 2167, jury may find any degree of offense, when.

§ 2264. Attempts, How Punished.

An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime; and every person who attempts to commit a crime, unless otherwise prescribed by statute, shall be punished as follows:

(1.) If the crime attempted is punishable by death or life imprisonment, the person convicted of the attempt shall be punished by imprisonment in the state penitentiary for not more than twenty years.

(2.) In every other case he shall be punished by imprisonment in such manner as may be prescribed for the commission of the completed offense, for not more than half the longest term, or by a fine of not more than half the largest sum, prescribed upon conviction for the commission of the offense attempted, or by both such fine and imprisonment; but nothing herein shall

protect a person who, in an unsuccessful attempt to commit one crime, does commit another and different one, from the punishment prescribed for the crime actually committed; and a person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court in its discretion shall discharge the jury and direct the defendant to be tried for the crime itself. [L. '09, p. 893, § 12.]

Compare Minn. Code, § 4771; N. Y. P. C., § 34.

For former laws, see *infra*, §§ 2985-2987.

See *infra*, § 2361, attempt to suborn perjury.

See *infra*, § 2577, attempt to commit arson.

See *infra*, § 2651, attempt to commit train robbery.

See *infra*, § 3274, attempts in misdemeanors against animals.

§ 2265. Punishment of Felony When not Fixed by Statute.

Every person convicted of a felony for which no punishment is specially prescribed by any statutory provision in force at the time of conviction and sentence, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 894, § 13.]

§ 2266. Punishment of Misdemeanor When not Fixed by Statute.

Every person convicted of a misdemeanor for which no punishment is prescribed by any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than ninety days, or by a fine of not more than two hundred and fifty dollars. [L. '09, p. 894, § 14.]

For former laws, see *infra*, § 2984.

§ 2267. Punishment of Gross Misdemeanor When not Fixed by Statute.

Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 894, § 15.]

For former laws, see *infra*, § 2984.

§ 2268. Nonfeasance in Office.

Whenever any duty is enjoined by law upon any public officer or other person holding any public trust or employment, their willful neglect to perform such duty, except where otherwise specially provided for, shall be a misdemeanor. [L. '09, p. 894, § 16.]

For former laws, see *infra*, § 2724.

§ 2269. Prohibited Acts.

Whenever the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the committing of such act shall be a misdemeanor. [L. '09, p. 894, § 17.]

See *infra*, § 2724, identical enactment.

§ 2270. Acts Punishable Elsewhere.

An act or omission punishable as a crime in this state is not less so because it is also punishable under the laws of another state, government or country, unless the contrary is expressly declared in the law relating thereto. [L. '09, p. 894, § 18.]

§ 2271. Foreign Conviction or Acquittal.

Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted upon the merits, upon a criminal prosecution under the laws of such state or country, founded upon the act or omission with respect to which he is upon trial, such former acquittal or conviction is a sufficient defense. [L. '09, p. 895, § 19.]

§ 2272. Conviction or Acquittal in Other County.

Whenever, upon the trial of any person for a crime, it shall appear that the defendant has already been acquitted or convicted upon the merits, of the same crime, in a court having jurisdiction of such offense in another county of this state, such former acquittal or conviction is a sufficient defense. [L. '09, p. 895, § 20.]

Compare § 2113, *supra*, when a bar.

§ 2273. Punishment for Contempt.

A criminal act which at the same time constitutes contempt of court, and has been punished as such, may also be punished as a crime, but in such case the punishment for contempt may be considered in mitigation. [L. '09, p. 895, § 21.]

See *infra*, § 2372, criminal contempt.

§ 2274. Sending Letter, When Complete.

Whenever any statute makes the sending of a letter criminal, the offense shall be deemed complete from the time it is deposited in any postoffice or other place, or delivered to any person, with intent that it shall be forwarded; and the sender may be proceeded against in the county wherein it was so deposited or delivered, or in which it was received by the person to whom it was addressed. [L. '09, p. 895, § 22.]

§ 2275. Omission, When not Punishable.

No person shall be punished for an omission to perform an act when such act has been performed by another acting in his behalf, and competent to perform it. [L. '09, p. 895, § 23.]

Compare Minn. Code, § 4770.

§ 2276. Commitment to Washington State Training School.

Whenever any boy between the ages of eight and sixteen years, or any girl between the ages of eight and eighteen years, shall be found guilty of any crime, except murder or manslaughter, the court may, in its discretion, order such person committed to the Washington state training school to remain, in case of a boy, until he shall arrive at the age of eighteen years and, in case of a girl, until she shall arrive at the age of nineteen years, unless sooner paroled or legally discharged. [L. '09, p. 896, § 24.]

See notes to §§ 2253 and 2301. This section is fully covered; see notes following.

See *supra*, § 1980, commitment of juvenile offenders to training school.

See *supra*, § 1986, commitment and effect of discharge.

See *supra*, § 1995, commitment of delinquent child to training school.

See *infra*, § 8615, incorrigible truants, when to be committed.

See note to § 2253, *supra*.

§ 2277. Commitment to Washington State Reformatory.

Whenever any male person, between the ages of sixteen and thirty years, never before convicted in this state or elsewhere of any crime which under the laws of this state would amount to a felony, shall be convicted of any felony except murder, arson in the first degree, or robbery, the court may, in its discretion order such person to be committed to and confined in the Washington state reformatory. [L. '09, p. 896, § 25.]

Compare supra, §§ 2194, 2195, and infra, § 8585, commitment to state reformatory.

§ 2278. Transfer of Prisoners.

Whenever in their judgment, the welfare of any prisoner or prisoners confined in any penal institution shall require that any prisoner be removed from one institution to another, the board having control of such institution shall have authority to order such removal. [L. '09, p. 896, § 26.]

See infra, § 2284, transfer of insane prisoners.

See infra, §§ 8536 and 8955, transportation of convicts and insane.

§ 2279. Employment of Prisoners.

The sheriff of each county shall employ all male persons sentenced to imprisonment in the county jail thereof in such manner and at such places within the county as may be directed by the board of county commissioners of such county. [L. '09, p. 896, § 27.]

See supra, §§ 1933, 2209, fines, how worked out.

See supra, §§ 1977, 1978, employment of vagrants.

See infra, §§ 8493, 8494, prisoners sentenced to labor when.

§ 2280. Suspending Sentences.

Whenever any person under the age of twenty-one years shall be convicted of any crime except murder, burglary in the first degree, arson in the first degree, robbery, carnal knowledge of a female child under the age of ten years, or rape, the court may in its discretion, at the time of imposing sentence upon such person, direct that such sentence be stayed and suspended until otherwise ordered by such court. [L. '09, p. 896, § 28.]

See supra, § 2191, suspending sentences. See note to § 2253.

§ 2281. Indeterminate Sentences.

Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the state penitentiary, or in the Washington state reformatory, as the case may be, for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years; and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment. [L. '09, p. 897, § 29.]

For former laws, see supra, § 2193, indeterminate sentence to penitentiary. See note to § 2253.

See supra, § 2195, indeterminate sentence to reformatory not repealed.

§ 2282. The Board having Control to Determine Period of Imprisonment.

The state board of control, acting in conjunction with the warden of the state penitentiary, or the board of managers of the Washington state reform-

atory, acting in conjunction with the superintendent of such reformatory, as the case may be, may at any time after the expiration of the minimum term of imprisonment for which such prisoner was committed thereto, direct that any prisoner confined in such institution shall be released on parole upon such terms and conditions as in their judgment they may prescribe in each case. [L. '09, p. 897, § 30.]

See supra, § 2223, and notes, paroles by governor.

See infra, § 8538, record of credits.

See infra, §§ 8545, 8551, 8588, paroles by governor.

See infra, § 8552, discharge.

See infra, §§ 8553, 8595, recommitment for violating paroles.

§ 2283. Confinement of Insane Prisoners.

Whenever, in the judgment of the court trying the same, any person convicted of a crime shall have been at the time of its commission unable by reason of his insanity, idiocy or imbecility, to comprehend the nature and quality of his act, or to understand that it was wrong, or shall be at the time of his conviction or sentence insane or an idiot or imbecile, such court may in its discretion direct that such person be confined for treatment in one of the state hospitals for the insane or in the insane ward of the state penitentiary, until such person shall have recovered his sanity. In determining whether any person convicted of a crime was at the time of the commission thereof unable by reason of his insanity, idiocy or imbecility to comprehend the nature and quality of his act, or to understand that it was wrong, or is at the time of his conviction or sentence insane or an idiot or imbecile, the court may take counsel with one or more experts in the diagnosis and treatment of insanity, idiocy and imbecility, and may make such personal or other examination of the defendant as in his judgment may be necessary to aid in the determination. [L. '09, p. 897, § 31.]

See note to § 2253. This section would fall, also, in case § 2259 is held unconstitutional, or ineffectual as a repeal of §§ 2173-2176. See note to § 2175.

See supra, § 2176, acquittal and confinement of insane unsafe to be at large.

See infra, §§ 5974-5978, confinement and discharge of the criminal insane.

§ 2284. Removal of Insane Convict.

Whenever in the judgment of the state board of control the welfare of any person confined in any penal institution, or in any institution for the care of the insane, shall require that he be removed for treatment or confinement to another institution for the care of the insane, or to the insane ward of the state penitentiary, they shall be authorized to order such removal, but whenever a change is made in the location of any such inmate, a record open to the public shall be made and the relatives of such inmate shall be notified of the change. [L. '09, p. 898, § 32.]

See supra, § 2278, removal of prisoners for any cause.

§ 2285. Imprisonment on Two or More Convictions.

Whenever a person shall be convicted of two or more offenses before sentence has been pronounced for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction shall commence at the termination of the first or other prior term or terms of imprisonment to which he is sentenced; and whenever a person while under sentence of felony shall commit another felony and be sentenced to another term of

imprisonment, such latter term shall not begin until the expiration of all prior terms. [L. '09, p. 898, § 33.]

Compare §§ 2177-2180, *supra*, on this subject. See note to § 2253.

§ 2286. Habitual Criminals.

Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been twice convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be adjudged to be an habitual criminal and shall be punished by imprisonment in the state penitentiary for not less than ten years.

Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been four times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state penitentiary for life. [L. '09, p. 899, § 34.]

Compare §§ 2177-2180, *supra*, on this subject.
See *infra*, § 8554, second term convicts.

§ 2287. Prevention of Procreation.

Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be an habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation. [L. '09, p. 899, § 35.]

United States Const., Art. VIII, prohibits cruel or unusual punishments.

§ 2288. Convicts Protected—Forfeitures Abolished.

Every person sentenced to imprisonment in any penal institution shall be under the protection of the law, and any unauthorized injury to his person shall be punished in the same manner as if he were not so convicted or sentenced. A conviction of crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein. All forfeitures in the nature of deodands, or in case of suicide or where a person flees from justice, are abolished. [L. '09, p. 899, § 36.]

Forfeitures abolished, see Const., Art. I, § 15.

§ 2289. Conviction of Public Officer Forfeits Office.

The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his office, and shall disqualify him from ever afterwards holding any public office in this state. [L. '09, p. 900, § 37.]

§ 2290. Convict as Witness.

Every person convicted of a crime shall be a competent witness in any civil or criminal proceeding, but his conviction may be proved for the pur-

pose of affecting the weight of his testimony, either by the record thereof, or a copy of such record duly authenticated by the legal custodian thereof, or by other competent evidence, or by his cross-examination, upon which he shall answer any proper question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer thereto. [L. '09, p. 900, § 38.]

See supra, § 2147, competency of witnesses.

§ 2291. Incriminating Testimony not to be Used.

In every case where it is provided in this act that a witness shall not be excused from giving testimony tending to criminate himself, no person shall be excused from testifying or producing any papers or documents on the ground that his testimony may tend to criminate or subject him to a penalty or forfeiture; but he shall not be prosecuted or subjected to a penalty or forfeiture for or on account of any action, matter or thing concerning which he shall so testify, except for perjury or offering false evidence committed in such testimony. [L. '09, p. 900, § 39.]

Compare §§ 2149, 2150. See note to § 2253.

See infra, § 2330, in bribery and corruption.

See infra, § 2451, in abortion and selling drugs.

See infra, § 2480, in gambling and swindling.

See infra, § 2568, in criminal anarchy.

§ 2292. Intent to Defraud.

Whenever an intent to defraud shall be made an element of an offense, it shall be sufficient if an intent appears to defraud any person, association or body politic or corporate whatsoever. [L. '09, p. 900, § 40.]

For former laws, see infra, § 2820.

§ 2293. Crimes on Railway Trains, Boats, etc.

The route traversed by any railway car, coach, train or other public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. [L. '09, p. 900, § 41.]

See Const., Art. I, § 22, right to trial by jury of county where offense is alleged to have been committed.

§ 2294. Application to Prior Offenses.

Nothing contained in any provisions of this act shall apply to an offense committed or act done at any time before the day when this act shall take effect. Such an offense shall be punished according to, and such act shall be governed by, the provisions of law existing when it is done or committed, in the same manner as if this act had not been passed. [L. '09, p. 901, § 42.]

See supra, § 2006, general saving clause.

See supra, § 2221, general saving clause in act of 1901, Ex. Ses., p. 19.

§ 2295. Application to Existing Civil Rights.

Nothing in this act shall be deemed to affect any civil right or remedy existing at the time when it shall take effect, by virtue of the common law or of the provision of any statute. [L. '09, p. 901, § 43.]

The title to this act seems to limit its scope to criminal matters. See note to § 2304.

§ 2296. Civil Remedies Preserved.

The omission to specify or affirm in this act any liability to any damages, penalty, forfeiture or other remedy, imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, shall not affect any right to recover or enforce the same. [L. '09, p. 901, § 44.]

See note to last section.

§ 2297. Proceedings to Impeach, etc., Preserved.

The omission to specify or affirm in this act any ground of forfeiture of a public office or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose or suspend any public officer or other person holding any trust, appointment or other special authority conferred by law, shall not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition or suspension. [L. '09, p. 901, § 45.]

§ 2298. Rule of Construction.

Every provision of this act shall be construed according to the fair import of its terms. [L. '09, p. 902, § 46.]

§ 2299. Common Law to Supplement Statute.

The provisions of the common law relating to the commission of crime and the punishment thereof, in so far as not inconsistent with the institutions and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the superior courts of this state. [L. '09, p. 902, § 47.]

For former laws, see *infra*, § 2723.

§ 2300. To be Construed as Continuation of Former Acts.

The provisions of this act, in so far as they are substantially the same as existing statutes, shall be construed as continuations thereof and not as new enactments. [L. '09, p. 902, § 48.]

See next section, apparently inconsistent with this section.

§ 2301. Act as Measure of Law.

No statute, law or rule is continued in force because it is consistent with the provisions of this act on the same subject; but in all cases provided for by this act, all statutes, laws and rules heretofore in force in this state, whether consistent or not with the provisions of this act, unless expressly continued in force by it, are repealed and abrogated. [L. '09, p. 902, § 49.]

See *supra*, § 2300, consistent statutes construed as continuations of earlier acts.

See *infra*, § 2304, all acts or parts of acts inconsistent herewith repealed.

Much that is "provided for by this act on the same subject" was already covered by special legislation of a purely regulative nature enforced by and imposing fines and penalties for misdemeanors or offenses created. In view of the restricted title of this act, and of the inconsistency between this and other sections, it seems that a reasonable construction of this section would limit its application strictly to the provisions embraced in the old Penal Code. Accordingly, all special legislation imposing regulative fines and penalties for misdemeanors or offenses created are retained as concurrent or additional remedies not included within the title of this act.

There are a number of sections of the old Penal Code not "provided for by this act on the same subject" and not inconsistent with any provisions of this act, the repeal of which, accordingly, depends entirely upon the schedule of repealed acts in § 2304, *infra*. In view of the fact that these sections are not mentioned in the title and that many

other sections of the old Penal Code are not mentioned, repealed, or affected, these sections may be still in force. From a cursory inspection, it would seem that the following sections repealed by the schedule in § 2304 might not be "provided for by this act on the same subject," or inconsistent with any provision of this act, viz.:

LIST OF ACTS NOT PROVIDED FOR ON SAME SUBJECT:

§ 2762, cruelty to children.
 § 2771, reckless shooting, etc.
 §§ 2772, 2773, flourishing and exhibiting dangerous weapons, etc.
 § 2804, presumption from possession of range stock.
 § 2813, allegations and proof on embezzlement of public funds.
 § 2817, secreting or destroying wills.
 § 2834, malicious injury to vessels.
 §§ 2846, 2847, misrepresentations of pedigree.
 § 2850, drawing check without funds.
 § 2864, failure to attend as witness.
 § 2877, willful inhumanity to prisoners.
 § 2880, auditor issuing illegal warrant.
 § 2881, officer purchasing or discounting warrants.
 § 2885, failure of officers to complain of violations.
 § 2894, living in a state of adultery.
 §§ 2904-2907, keeping house of ill-fame.
 § 2910, duty of officers as to prize-fights.
 § 2912, question of obscenity for jury.
 § 2918, duty of officers as to Sunday closing.
 § 2922, liability of owner of gambling-houses.
 § 2925, leasing premises for prostitution.
 §§ 2927-2930, duty of officers as to gambling.
 § 2930, gambling with Indians.
 § 2940, putting out poison without notice.
 §§ 2946, 2947, opium smoking and evidence thereof.
 §§ 2949, 2950, obstructing highways.
 § 2952, failure of road supervisor to perform duty.
 § 2962, selling liquor without a license.
 § 2964, allowing minor to play cards.
 § 2965, minor misrepresenting age.
 § 2966, sale of liquor to Indians.
 §§ 2982, 2983, proceedings to prevent cock-fights, trial, etc.
 See, also, §§ 2517, 2751, 2788, 2802, 2812, 2825-2830, 2838, 2890, 2942, 2955, 2975, 2981, 2988.

§ 2302. Repeal does not Revive Former Law.

The repeal or abrogation by this act of any existing law shall not revive any former law heretofore repealed, nor affect any right already existing or accrued or any action or proceeding already taken, except as in this act provided; nor does it repeal any private statute or statute affecting civil rights or liabilities not expressly repealed. [L. '09, p. 902, § 50.]

The title of this act seems to limit its scope to criminal matters. See note to § 2304. See supra, §§ 2295, 2296, no civil rights affected.

§ 2303. Definition of Terms.

In construing the provisions of this act, save when otherwise plainly declared or clearly apparent from the context, the following rules shall be observed:

(1.) Each of the words "neglect," "negligence," "negligent," and "negligently" shall import a want of such attention to the nature or probable consequences of an act or omission as an ordinarily prudent man usually exercises in his own business.

(2.) Each of the words "corrupt" and "corruptly" shall import a wrongful desire to acquire or cause some pecuniary or other advantage to himself or another, by the person to whom applicable.

(3.) "Malice" and "maliciously" shall import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

(4.) The word "knowingly" imports a knowledge that the facts exist which constitute the act or omission of a crime, and does not require knowledge of its unlawfulness; knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent man upon inquiry.

(5.) Whenever an intent to defraud constitutes a part of a crime, it is not necessary to aver or prove an intent to defraud any particular person.

(6.) The word "boat" shall include ships, steamers and other structures adapted to navigation or movement from place to place by water.

(7.) The word "signature" shall include any memorandum, mark, or sign made with intent to authenticate any instrument or writing, or the subscription of any person thereto.

(8.) The word "writing" shall include printing.

(9.) The word "property" shall include both real and personal property.

(10.) The term "real property" shall include every estate, interest and right in lands, tenements and hereditaments, corporeal or incorporeal.

(11.) The term "personal property" shall include dogs and all domestic animals and birds, water, gas and electricity, all kinds or descriptions of money, chattels and effects, all instruments or writings completed and ready to be delivered or issued by the maker, whether actually delivered or issued or not, by which any claim, privilege, right, obligation or authority, or any right or title to property real or personal, is, or purports to be, or upon the happening of some future event may be evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, and every right and interest therein.

(12.) The word "bond" shall include an undertaking.

(13.) Words in the present tense shall include the future tense; and in the masculine shall include the feminine and neuter genders; and in the singular shall include the plural; and in the plural shall include the singular.

(14.) The word "person" shall include a corporation or joint stock association; and whenever it is used to designate a party whose property may be the subject of the offense, it shall also include the state, or any other state, government or country which may lawfully own property within this state.

(15.) The term "judge" shall include every judicial officer authorized, alone or with others, to hold or preside over a court of record.

(16.) Any person shall be deemed an "owner" of any property who has a general or special property in the whole or any part thereof, or lawful possession thereof, either actual or constructive.

(17.) The words "dwelling-house" shall include every building or structure which shall have been usually occupied by a person lodging therein at night, and whenever it shall be so constructed as to consist of two or more parts or rooms occupied or intended to be occupied, whether permanently or temporarily, by different tenants separately by usually lodging therein at night, or for any other separate purpose, each part shall be deemed a separate dwelling-house of the tenant occupying the same.

(18.) The word "building" shall include every house, shed, boat, water craft, railway car, tent or booth, whether completed or not, suitable for affording shelter for any human being, or as a place where any property is or shall be kept for use, sale or deposit.

(19.) The word "night-time" shall include the period between sunset and sunrise; the word "daytime" the period between sunrise and sunset.

(20.) The word "break," when used in connection with the crime of burglary, shall include:

(a) Breaking or violently detaching any part, internal or external, of a building;

(b) Opening, for the purpose of entering therein, any outer door of a building or of any room, apartment or set of apartments therein separately used and occupied, or any window, shutter, scuttle or other thing used for covering or closing any opening thereto or therein, or which gives passage from one part thereof to another;

(c) Obtaining entrance into such building or apartment by any threat or artifice, used for that purpose, or by collusion with any person therein;

(d) Entering such building, room or apartment by or through any pipe, chimney or other opening, or by excavating or digging through or under a building or the walls or foundation thereof.

(21.) The word "enter," when constituting an element or part of a crime, shall include the entrance of the offender, or the insertion of any part of his body, or of any instrument or weapon held in his hand and used or intended to be used to threaten or intimidate a person, or to detach or remove property.

(22.) The term "railway" or "railroad" shall include all railways, railroads and street railways, whether operated by steam, electricity or any other motive power.

(23.) The words "indicted" and "indictment" shall include "informed against" and "information"; and the words "informed against" and "information" shall include the words "indicted" and "indictment."

(24.) The words "officer" and "public officer" shall include all assistants, deputies, clerks and employees of any public officer and all persons exercising or assuming to exercise any of the powers or functions of a public officer.

(25.) The word "juror" shall include a talesman, and extend to jurors in all courts, whether of record or not.

(26.) The word "prisoner" shall include any person held in custody under lawful arrest.

(27.) The word "prison" shall mean any place designated by law for the keeping of persons held in custody under process of law, or under lawful arrest. [L. '09, p. 902, § 51.]

§ 2304. Acts Repealed.

All acts or parts of acts enumerated in the following schedule, and all acts, and parts of acts in conflict with the provisions hereof, are hereby repealed.

SCHEDULE OF ACTS REPEALED.

Ballinger's Annotated Codes and Statutes of Washington, sections 3485, 3486, 3766, 4372, 4376, 6724, 6727 to 6736, inclusive; 6773 to 6776 inclusive; 6866, 6908, 6910 to 6916, inclusive; 6925 to 6927, inclusive; 6945; 7035 to 7071, inclusive; 7073 to 7089, inclusive; 7094 to 7101, inclusive; 7103 to 7116,

inclusive; 7118 to 7126, inclusive; 7128 to 7132, inclusive; 7136 to 7142, inclusive; 7144, 7145, 7146a, 7147, 7154, 7155, 7156, 7160, 7165 to 7168, inclusive; 7175, 7176, 7185 to 7231, inclusive; 7233 to 7256, inclusive; 7259, 7260, 7261, 7264, 7265, 7266, 7268, 7269, 7275 to 7286, inclusive; 7288, 7293 to 7296, inclusive; 7298 to 7301, inclusive; 7305, 7306, 7310 to 7317, inclusive; 7322, 7323, 7324, 7334 to 7343, inclusive; 7404, 7405, 7435 to 7440, inclusive;

Laws of Washington, 1901, chapters 17, 25, 34, 40, 59, 145, 154;

Laws of Washington, 1903, chapters 5, 13, 14, 45, 51, 52, 55, 56, 112, 123, 128, 131, section 1;

Laws of Washington, 1905, chapters 24, 33, 42, 49, 77, 98, 158, 179;

Laws of Washington, 1907, chapters 35, 39, 103, 128, 148, 155, 169, 170. [L. '09, p. 906, § 52.]

This title embraces chapter 249, Laws of 1909, commonly called the "Penal Code of 1909." Although it is not a complete penal code, it embraces more than a mere definition of "Crimes and Punishments." The title of the act is: "An act relating to crimes and punishments, and the rights and custody of persons accused or convicted of crime, and repealing certain acts."

In view of the general nature of the title of this act, a doubt exists as to the effect of this schedule of acts repealed. Accordingly, in so far as the repealed acts seem not in conflict with other provisions of this act, or not clearly embraced in the title of this act, they are all retained. The former conflicting laws defining crimes and punishments are retained in the appendix. This schedule of acts repealed will, therefore, be found herein, in the order named in this section, in the following sections of this compilation: 2983, 3200, 3201, 5561, 9317, 9321, 1967, 1970 to 1979 inclusive; 2722 to 2725, inclusive; 2078, 2117, 2119 to 2125, inclusive; 2131 to 2133, inclusive; 2157, 2726 to 2762, inclusive; 2763 to 2779, inclusive; 2784 to 2791, inclusive; 2792 to 2806, inclusive; 2807 to 2815, inclusive; 2816 to 2820, inclusive; 2821 to 2827, inclusive; 2828, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2843 to 2845, inclusive; 2846, 2847, 2851 to 2894, inclusive; 2896 to 2922, inclusive; 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2936 to 2947, inclusive; 2948, 2949 to 2952, inclusive; 2953 to 2956, inclusive; 2957, 2958, 2960 to 2967, inclusive; 2969, 2970, 2971, 2972 to 2981, inclusive; 2982 to 2989, inclusive; 2888, 2840, 2793, 2841, 2740, 2829, 2990, 2792, 2801, 2842; 2780 to 2783, inclusive; 2931, 2932, 2917, 2970, 2837, 2838, 2839, 2902, 2903, 2729, 2848, 2191, 2192, 2757, 3672, 2850, 2799, 2959, 2991, 2935, 3896, 3897, 5933, 6570, 6571, 2968, 2193; 8548 to 8554, inclusive; 2989, 2155.

This list includes all of the schedule except chapter 179, Laws of 1905, which was held void in *Leonard v. Bassindale*, 46 Wash. 301.

A number of the above sections sought to be repealed are part of the Criminal Code of Procedure, Title XIII; and many other sections of that title are embraced within, impliedly repealed by, or inconsistent with, various sections of this act. Title XIII is, however, retained in its entirety, because of the doubt as to whether the general clause in the title of this act, "rights and custody of persons accused or convicted of crime," is sufficient to authorize amendments or implied repeals of the Criminal Code of Procedure; especially as this act does not purport to cover procedure, or to be a complete act on the "rights and custody" of accused persons.

The above schedule of repealed acts does not include all of the old Penal Code nor all the later penal enactments: See note to § 2697, *infra*.

The above schedule of repealed acts embraces a number of sections of the old Penal Code which are not covered by, nor in conflict or inconsistent with, any of the provisions of this act: See note to § 2301, *supra*, for acts not "provided for by this act on the same subject."

CHAPTER II.

RIGHTS OF ACCUSED.

§ 2305. Right to Counsel.

Whenever a defendant shall be arraigned upon the charge that he has committed any felony, and shall request the court to appoint counsel to assist in his defense, and shall by his own oath or such other proof as may be required satisfy the court that he is unable, by reason of poverty, to procure counsel, the court shall appoint counsel, not exceeding two, for such defendant, to be paid, upon its order by the county in which such proceeding is had, compensation not exceeding ten dollars per day for each counsel, for the number of days such counsel is actually employed in court upon the trial. [L. '09, p. 906, § 53.]

See, *supra*, § 2095, right to counsel.

As to conflict between this chapter and the Criminal Code of Procedure, see note to § 2253, *supra*.

§ 2306. Witnesses.

Every person accused of crime shall have the right to meet the witnesses produced against him face to face: Provided, that whenever any witness whose deposition shall have been taken pursuant to law by a magistrate, in the presence of the defendant and his counsel, shall be absent, and cannot be found when required to testify upon any trial or hearing, so much of such deposition as the court shall deem admissible and competent shall be admitted and read as evidence in such case. [L. '09, p. 907, § 54.]

Compare §§ 2131 and 2132, *supra*.

The proviso to this section is believed to be unconstitutional. See notes to § 2131, *supra*.

§ 2307. Right to Subpoena.

Every person charged with the commission of a crime shall have the right upon the trial of such charge to be heard in person or by counsel, and to produce witnesses and proofs in his favor and to have compulsory process to compel the attendance of all witnesses who may be necessary for his proper defense. [L. '09, p. 907, § 55.]

Compare § 2132, *supra*.

See Const., Art. I, § 22, covering this subject.

§ 2308. Presumption of Innocence—Conviction of Lowest Degree, When.

Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt: and when an offense has been proved against him, and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest. [L. '09, p. 907, § 56.]

Compare Minn. Code, § 4784.

See *supra*, § 2263, jury to determine degree.

§ 2309. Conviction, When had.

No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court. [L. '09, p. 907, § 57.]

Compare Minn. Code, § 4785.

For former laws, see § 2133, *supra*.

§ 2310. Bail, When Allowable.

Every person charged with an offense, except that of murder in the first degree, where the proof is evident or the presumption great, may be bailed by sufficient sureties, and bail shall justify and have the same rights as in civil cases, except as otherwise provided by law. The amount of bail in each case shall be determined by the court in its discretion and may from time to time be increased or decreased as circumstances may justify. [L. '09, p. 908, § 58.]

Compare § 2078, *supra*, right to bail as fixed by Title XIII, on procedure.

§ 2311. Proceedings Within Thirty Days.

Whenever a person has been held to answer to any criminal charge, if an indictment be not found or information filed against him within thirty days, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown. [L. '09, p. 908, § 59.]

See *supra*, § 2119, identical enactment.

§ 2312. Trial Within Sixty Days.

If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown. [L. '09, p. 908, § 60.]

See *supra*, § 2120, identical enactment.

§ 2313. Discharge of Defendant and Bail upon Dismissal.

Whenever the court shall direct any criminal prosecution to be dismissed, the defendant shall, if in custody, be discharged therefrom, or if admitted to bail, his bail shall be exonerated, and if money has been deposited instead of bail it shall be refunded to the person depositing the same. [L. '09, p. 908, § 61.]

See *supra*, § 2122, identical enactment.

§ 2314. Nolle Prosequi.

The court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order any criminal prosecution to be dismissed; but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record. No prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in this section. [L. '09, p. 908, § 62.]

Compare § 2123, *supra*. See note to § 2253.

See *supra*, § 2124, nolle prosequi abolished.

§ 2315. Dismissal, When a Bar.

An order dismissing a prosecution under the provisions of sections 2311, 2312, or 2314 shall bar another prosecution for a misdemeanor or gross misdemeanor where the prosecution dismissed charged the same misdemeanor or gross misdemeanor, but in no other case shall such order of dismissal bar another prosecution. [L. '09, p. 909, § 63.]

Compare § 2125, *supra*.

§ 2316. Acquittal, When a Bar.

No order of dismissal or directed verdict of not guilty on the ground of a variance between the indictment or information and the proof, or on the ground of any defect in such indictment or information, shall bar another prosecution for the same offense. Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof. [L. '09, p. 909, § 64.]

Compare Minn. Code, § 4792.

Compare § 2117, supra, acquittal on ground of no variance. See note to § 2253.

Compare § 2166, supra, acquittal on charge consisting of different degrees.

CHAPTER III.

CRIMES AGAINST THE SOVEREIGNTY OF THE STATE.

§ 2317. Treason Defined—Penalty.

Treason against the people of the state consists in—

1. Levying war against the people of the state, or
2. Adhering to its enemies, or
3. Giving them aid and comfort.

Treason is punishable by death.

No person shall be convicted for treason unless upon the testimony of two witnesses to the same overt act or by confession in open court. [L. '09, p. 909, § 65.]

Compare N. Y. P. C., §§ 37, 38; Minn. Code, § 4793.

Treason is defined by Const., Art. I, § 27.

§ 2318. Levying War.

To constitute levying war against the state an actual act of war must be committed. To conspire to levy war is not enough. When persons arise in insurrection with intent to prevent, in general, by force and intimidation, the execution of a statute of this state, or to force its repeal, they shall be guilty of levying war. But an endeavor, although by numbers and force of arms, to resist the execution of a law in a single instance, and for a private purpose, is not levying war. [L. '09, p. 909, § 66.]

Compare Minn. Code, § 4750; N. Y. P. C., § 40.

§ 2319. Misprision of Treason.

Every person having knowledge of the commission of treason, who conceals the same, and does not, as soon as may be, disclose such treason to the governor or a judge of the supreme court or a superior court, shall be guilty of misprision of treason and punished by a fine of not more than one thousand dollars, or by imprisonment in the state penitentiary for not more than five years or in a county jail for not more than one year. [L. '09, p. 910, § 67.]

Compare Minn. Code, § 4794.

CHAPTER IV.

CRIMES BY OR AGAINST PUBLIC OFFICERS.

The subchapters of this act are preserved as enacted. For other crimes herein by or against public officers, not included in this subchapter, see *infra*:

- § 2569, Misappropriation and falsification of accounts by public officer.
- § 2570, Other violations by officers.
- § 2571, Misappropriation, by municipal treasurers.
- § 2584, False certificate to certain instruments.
- § 2605, Grand larceny by officers.
- § 2611, Oppression under color of office.
- § 2612, Extortion by public officer.
- § 2613, Blackmail.
- § 2616, Personating an officer.
- § 2627, Fraudulently presenting claim to public officer.
- § 2671, Solemnizing unlawful marriage.
- § 2672, Obstructing public officer.

Officers' failure to prosecute, and enforce laws, see *infra*, §§ 2918, 2927, 2928, 2930, 2952, 5286, 5400, and specific heads.

§ 2320. Bribery of Public Officer.

Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any executive or administrative officer of the state, with intent to influence him with respect to any act, decision, vote, opinion or other proceeding, as such officer; or who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a member of the legislature, or attempt, directly or indirectly, by menace, deceit, suppression of truth or other corrupt means, to influence such member to give or withhold his vote, or to absent himself from the house of which he is a member or from any committee thereof; or who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a judicial officer, juror, referee, arbitrator, appraiser, assessor or other person authorized by law to hear or determine any question, matter, cause, proceeding or controversy, with intent to influence his action, vote, opinion or decision thereupon; or shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a person executing any of the functions of a public officer other than as hereinbefore specified, with intent to influence him with respect to any act, decision, vote or other proceeding in the exercise of his powers or functions, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 910, § 68.]

Compare Minn. Code, § 4799; N. Y. P. C., §§ 44, 66, 71, 78.

For former laws, see *infra*, §§ 2867, 2868, 2869.

See *infra*, §§ 4963, 4969, bribery of voter.

§ 2321. Asking or Receiving Bribe.

Every executive or administrative officer or person elected or appointed to an executive or administrative office who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his vote, opinion or action upon any matter then pending, or which may by law be brought before him in his official capacity, shall be influenced thereby; and every member of either house of the legislature of the state who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his official vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of any question or matter upon which he may be

required to act in his official capacity; and every judicial officer, and every person who executes any of the functions of a public office not hereinbefore specified, and every person employed by or acting for the state or for any public officer in the business of the state, who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his vote, opinion, judgment, action, decision or other official proceeding shall be influenced thereby, or that he will do or omit any act or proceeding or in any way neglect or violate any official duty, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 911, § 69.]

Compare Minn. Code, § 4800; N. Y. P. C., §§ 45, 67, 72.

For former laws, see *infra*, §§ 2867, 2868, 2869.

§ 2322. Juror, etc., Accepting Bribe.

Every juror, referee, arbitrator, appraiser, assessor, or other person authorized by law to hear or determine any question, matter, cause, controversy or proceeding, who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his vote, opinion, action, judgment or decision shall be influenced thereby, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by fine of not more than five thousand dollars, or by both. [L. '09, p. 911, § 70.]

Compare Minn. Code, § 4801; N. Y. P. C., § 74.

For former laws, see *infra*, § 2867.

§ 2323. Bribing Witness.

Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any witness or person who may be called as a witness upon an agreement or understanding that the testimony of such witness shall be thereby influenced, or who shall willfully attempt by any other means to induce any witness or person who may be called as a witness to give false testimony, or to withhold true testimony, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 912, § 71.]

Compare Minn. Code, § 4802; N. Y. P. C., § 113.

For former laws, see *infra*, §§ 2860, 2888.

See *infra*, § 2363, tampering with witness.

§ 2324. Witness Accepting Bribe.

Every person who is or may be a witness upon a trial, hearing, investigation or other proceeding before any court, tribunal or officer authorized to hear evidence or take testimony, who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial, hearing or other proceeding, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 912, § 72.]

Compare Minn. Code, § 4803; N. Y. P. C., § 80.

§ 2325. Influencing Juror.

Every person who shall influence, or attempt to influence, improperly, a juror in a civil or criminal action or any proceeding, or any person chosen or

appointed as an arbitrator or referee, in respect to his verdict, judgment, report, award or decision in any cause or matter pending or about to be brought before him, in any case or in any manner not hereinbefore provided for, shall be guilty of a gross misdemeanor. [L. '09, p. 912, § 73.]

Compare Minn. Code, § 4804; N. Y. P. C., § 75.

For former laws, see *infra*, § 2868.

§ 2326. Juror, etc., Promising Verdict, etc.

Every juror and every person chosen or appointed arbitrator or referee, who shall make any promise or agreement to give a verdict, judgment, report, award or decision for or against any party, or who shall willfully receive any communication, book, paper, instrument or information relating to a cause or matter pending before him, except according to the regular course of proceeding upon the trial or hearing of such cause or matter, shall be guilty of a gross misdemeanor. [L. '09, p. 913, § 74.]

Compare Minn. Code, § 4805; N. Y. P. C., § 173.

§ 2327. Misconduct of Officer Drawing Jury.

Every person charged by law with the preparation of any jury list or list of names from which any jury is to be drawn, and every person authorized by law to assist at the drawing of a grand or petit jury to attend a court or term of court or to try any cause or issue, who shall—

(1.) Place in any such list any name at the request or solicitation, direct or indirect, of any person; or

(2.) Designedly put upon the list of jurors, as having been drawn, any name which was not lawfully drawn for that purpose; or

(3.) Designedly omit to place upon such list any name which was lawfully drawn; or

(4.) Designedly sign or certify a list of such jurors as having been drawn which were not lawfully drawn; or

(5.) Designedly and wrongfully withdraw from the box or other receptacle for the ballots containing the names of such jurors any paper or ballot lawfully placed or belonging there and containing the name of a juror, or omit to place therein any name lawfully drawn or designated, or place therein a paper or ballot containing the name of a person not lawfully drawn, and designated as a juror; or

(6.) In drawing or impaneling such jury, do any act which is unfair, partial or improper in any respect;

Shall be guilty of a gross misdemeanor. [L. '09, p. 913, § 75.]

Compare Minn. Code, § 4806; N. Y. P. C., § 76.

For former laws, see *infra*, §§ 2863, 2865.

§ 2328. Soliciting Jury Duty.

Every person who shall, directly or indirectly, solicit or request any person charged with the duty of preparing any jury list to put his name, or the name of any other person, on any such list, shall be guilty of a gross misdemeanor. [L. '09, p. 914, § 76.]

Compare Minn. Code, § 4807.

For former laws, see *infra*, § 2862.

§ 2329. Misconduct of Officer in Charge of Jury.

Every person to whose charge a jury shall be committed by a court or magistrate, who shall knowingly, without leave of such court or magistrate,

permit them or any one of them to receive any communication from any person, to make any communication to any person, to obtain or receive any book, paper or refreshment, or to leave the jury-room, shall be guilty of a gross misdemeanor. [L. '09, p. 914, § 77.]

Compare Minn. Code, § 4808; N. Y. P. C., § 77.

§ 2330. Offender a Competent Witness.

Every person offending against any of the provisions of law relating to bribery or corruption shall be a competent witness against another so offending and shall not be excused from giving testimony tending to criminate himself. [L. '09, p. 914, § 78.]

Compare Minn. Code, § 4809; N. Y. P. C., § 79.

Compare §§ 2149, 2150, *supra*.

§ 2331. Interfering With Public Officer.

Every person who, by means of any threat, force or violence, shall attempt to deter and prevent any executive or administrative officer from performing any duty imposed upon him by law, or who shall knowingly resist by force or violence any executive or administrative officer in the performance of his duty, shall be guilty of a gross misdemeanor. [L. '09, p. 914, § 79.]

Compare Minn. Code, § 4810; N. Y. P. C., §§ 46, 47.

For former laws, see *infra*, § 2874.

See, also, *infra*, § 2366, and notes.

§ 2332. Offering Reward for Appointment.

Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward, in consideration that he or another person shall be appointed to a public office, or to a clerkship, deputation or other subordinate position in such office, or that he or any other person shall be permitted to exercise, perform or discharge any prerogative or duty or receive any emolument of such office, shall be guilty of a gross misdemeanor. [L. '09, p. 914, § 80.]

Compare Minn. Code, § 4811; N. Y. P. C., § 52.

§ 2333. Grafting.

Every person who shall ask or receive any compensation, gratuity or reward, or any promise thereof, upon the representation that he can, directly or indirectly, or in consideration that he shall, or shall attempt to, directly or indirectly, influence any public officer, whether executive, administrative, judicial or legislative, to refuse, neglect, or defer the performance of any official duty; or who shall ask or receive any compensation, gratuity or reward, or any promise thereof, the right to retain or receive which shall be conditioned that such person shall, directly or indirectly, successfully influence by any means whatever any executive, administrative or legislative officer, in respect to any act, decision, vote, opinion or other proceeding, as such officer; or who shall ask or receive any compensation, gratuity or reward, or any promise thereof, upon the representation that he can, directly or indirectly, or in consideration that he shall, or shall attempt to, directly or indirectly, influence any public officer, whether executive, administrative, judicial or legislative, in respect to any act, decision, vote, opinion or other proceeding, as such officer, unless it be clearly understood and agreed in good

faith between the parties thereto, on both sides, that no means or influence shall be employed except explanation and argument upon the merits, shall be guilty of a gross misdemeanor, and, in any prosecution, under the third clause of this section, evidence of the means actually employed to influence such officer shall be admitted as proof of the means originally contemplated by the defendant. [L. '09, p. 915, § 81.]

§ 2334. Misconduct of Public Officer.

Every public officer who shall—

(1.) Ask or receive, directly or indirectly, any compensation, gratuity or reward, or promise thereof, for omitting or deferring the performance of any official duty; or for any official service which has not been actually rendered, except in case of charges for prospective costs or fees demandable in advance in a case allowed by law; or

(2.) Be beneficially interested, directly or indirectly, in any contract, sale, lease or purchase which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward from any other person beneficially interested therein; or

(3.) Employ or use any person, money or property under his official control or direction, or in his official custody, for the private benefit or gain of himself or another;

Shall be guilty of a gross misdemeanor, and any contract, sale, lease or purchase mentioned in subdivision 2 hereof shall be void. [L. '09, p. 915, § 82.]

Compare Minn. Code, § 4812; N. Y. P. C., §§ 48, 49, 50, 53.

For former laws, see *infra*, § 2812.

§ 2335. Grant of Official Powers.

Every public officer who, for any reward, consideration or gratuity paid or agreed to be paid, shall, directly or indirectly, grant to another the right or authority to discharge any function of his office, or permit another to perform any of his duties, shall be guilty of a gross misdemeanor. [L. '09, p. 916, § 83.]

Compare Minn. Code, § 4813; N. Y. P. C., § 54.

§ 2336. Intrusion into and Refusal to Surrender Public Office.

Every person who shall falsely personate or represent any public officer, or who shall willfully intrude himself into a public office to which he has not been duly elected or appointed, or who shall willfully exercise any of the functions or perform any of the duties of such officer, without having duly qualified therefor, as required by law, or who, having been an executive or administrative officer, shall willfully exercise any of the functions of his office after his right to do so has ceased, or wrongfully refuse to surrender the official seal or any books or papers appertaining to such office, upon the demand of his lawful successor, shall be guilty of a gross misdemeanor. [L. '09, p. 916, § 84.]

Compare Minn. Code, § 4814; N. Y. P. C., §§ 56, 57.

For former laws, see *infra*, §§ 2882, 2883.

§ 2337. Disturbing Legislature or Intimidating Member.

Every person who shall willfully disturb the legislature of this state, or either house thereof, while in session, or who shall commit any disorderly

conduct in the presence or view of either house thereof, tending to interrupt its proceedings or impair the respect due to its authority, or who willfully, by intimidation or otherwise, shall prevent any member of the legislature from attending any session of the house of which he shall be a member or any committee thereof, or from giving his vote upon any question which may come before such house or committee, or from performing any other official act, shall be guilty of a gross misdemeanor. [L. '09, p. 916, § 85.]

Compare Minn. Code, § 4815; N. Y. P. C., §§ 60, 62.

§ 2338. Witness Refusing to Attend Legislature or Committee or to Testify.

Every person duly summoned to attend as a witness before either house of the legislature of this state, or any committee thereof authorized to summon witnesses, who shall refuse or neglect, without lawful excuse, to attend pursuant to such summons, or who shall willfully refuse to be sworn or to affirm or to answer any material or proper question, or to produce, upon reasonable notice, any material or proper books, papers or documents in his possession or under his control, shall be guilty of a gross misdemeanor. [L. '09, p. 917, § 86.]

Compare Minn. Code, § 4818; N. Y. P. C., §§ 68, 69.

See supra, § 2148, and notes.

See infra, §§ 6932-6934, penalties on same subject.

§ 2339. Rescuing Prisoner.

Every person who shall, by force or fraud, rescue from lawful custody, or from an officer or person having him in lawful custody, a prisoner held upon a charge, arrest, commitment, conviction or sentence for felony, shall be guilty of a felony; and every person who shall rescue a prisoner held upon a charge, arrest, commitment, conviction or sentence for a gross misdemeanor or misdemeanor shall be guilty of a misdemeanor. [L. '09, p. 917, § 87.]

Compare Minn. Code, § 4819; N. Y. P. C., § 82.

§ 2340. Taking Property from an Officer.

Every person who shall take from the custody of any officer or other person any personal property in his charge under any process of law, or who shall willfully injure or destroy such property, shall be guilty of a misdemeanor. [L. '09, p. 917, § 88.]

Compare Minn. Code, § 4820; N. Y. P. C., § 83.

§ 2341. Escaped Prisoner Recaptured.

Every person in custody, under sentence of imprisonment for any crime, who shall escape from custody, may be recaptured and imprisoned for a term equal to the unexpired portion of the original term. [L. '09, p. 917, § 89.]

Compare Minn. Code, § 4821; N. Y. P. C., § 84.

§ 2342. Prisoner Escaping.

Every prisoner confined in a prison, or being in the lawful custody of an officer or other person, who shall escape or attempt to escape from such prison or custody, by force or fraud, if he is held on a charge, conviction or sentence of a felony, shall be guilty of a felony; if held on a charge, conviction

or sentence of a gross misdemeanor or misdemeanor, he shall be guilty of a misdemeanor. [L. '09, p. 918, § 90.]

Compare Minn. Code, § 4822; N. Y. P. C., § 85.
For former laws, see *infra*, § 2873.

§ 2343. Aiding Prisoner to Escape.

Every person who, with intent to effect or facilitate the escape of a prisoner, whether such escape shall be effected or attempted or not, shall convey or send to a prisoner any information or aid, or convey or send into a prison any disguise, instrument, weapon or other thing, or aid or assist a prisoner in escaping or attempting to escape from the lawful custody of a sheriff or other officer or person, shall be guilty of a felony if such prisoner is held upon a charge, arrest, commitment, conviction or a sentence for a felony, and shall be guilty of a misdemeanor if such prisoner is held upon a charge, arrest, commitment, conviction or sentence for a gross misdemeanor or misdemeanor. [L. '09, p. 918, § 91.]

Compare Minn. Code, § 4824; N. Y. P. C., §§ 87, 88.
For former laws, see *infra*, § 2870.
See *infra*, § 8530, assisting prisoner to escape from penitentiary.
See *infra*, § 8531, supplying with weapons or drugs.

§ 2344. Custodian Suffering Escape.

Every person who shall allow a prisoner lawfully in his custody to escape, or shall connive at or assist such escape, or shall omit any act or duty by reason of which omission such escape is occasioned, contributed to or assisted, shall, if he connive at or assist such escape, be guilty of a felony; and in any other case, of a gross misdemeanor. [L. '09, p. 918, § 92.]

Compare Minn. Code, § 4825; N. Y. P. C., § 89.
For former laws, see *infra*, §§ 2871, 2872.

§ 2345. Ministerial Officer Permitting Escape.

Every officer who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or promise thereof, to procure, assist, connive at or permit any prisoner in his custody to escape, whether such escape shall be attempted or not, or shall commit any unlawful act tending to hinder justice, shall be guilty of a gross misdemeanor. [L. '09, p. 918, § 93.]

Compare Minn. Code, § 4826.
For former laws, see *infra*, § 2872.

§ 2346. Concealing Escaped Prisoner.

Every person who shall conceal, or harbor for the purpose of concealment, a prisoner who has escaped or is escaping from custody, shall be guilty of a felony if the prisoner is held upon a charge or conviction or sentence of felony, and of a misdemeanor if the prisoner is held upon a charge or conviction of a gross misdemeanor or misdemeanor. [L. '09, p. 919, § 94.]

Compare Minn. Code, § 4827; N. Y. P. C., § 91.

§ 2347. Injury to Public Record.

Every person who shall willfully and unlawfully remove, alter, mutilate, destroy, conceal or obliterate a record, map, book, paper, document or other thing filed or deposited in a public office, or with any public officer, by authority of law, shall be punished by imprisonment in the state penitentiary

for not more than five years, or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 919, § 95.]

Compare Minn. Code, § 4828; N. Y. P. C., § 94.

§ 2348. Injury to and Misappropriation of Record.

Every officer who shall mutilate, destroy, conceal, erase, obliterate or falsify any record or paper appertaining to his office, or who shall fraudulently appropriate to his own use or to the use of another person, or secrete with intent to appropriate to such use, any money, evidence of debt or other property intrusted to him by virtue of his office, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 919, § 96.]

Compare Minn. Code, § 4829.

§ 2349. Offering False Instrument for Filing or Record.

Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 919, § 97.]

Compare Minn. Code, § 4830; N. Y. P. C., § 95.

§ 2350. False Report.

Every public officer who shall knowingly make any false or misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor. [L. '09, p. 920, § 98.]

See infra, § 2380, false certificates by officers.

See infra, § 6648, false appraisement of public lands.

§ 2351. Perjury—First Degree.

Every person who, in any action, proceeding, hearing, inquiry or investigation, in which an oath may lawfully be administered, shall swear that he will testify, declare, depose or certify truly, or that any testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed is true, and who in such action, proceeding, hearing, inquiry or investigation shall state or subscribe as true any material matter which he knows to be false, shall be guilty of perjury in the first degree and shall be punished by imprisonment in the state penitentiary for not more than fifteen years. [L. '09, p. 920, § 99.]

Compare Minn. Code, § 4831; N. Y. P. C., § 96.

For former laws, see infra, §§ 2851, 2858.

See infra, § 3300, perjury, bank examinations.

See infra, § 4702, false oath.

See infra, § 4835, sworn statements by primary candidates.

See infra, § 4838, perjury by primary candidates.

See infra, § 5070, statement as to state depositaries.

See infra, § 5298, perjury under bulk sales law.

See infra, §§ 7164, 7165, perjury in securing marriage certificate.

See infra, § 8898, perjury in land registrations.

See infra, § 9130, listing property for taxation.

§ 2352. Knowledge of Materiality not Necessary.

It shall be no defense to a prosecution for perjury in the first degree that the defendant did not know the materiality of his false statement or that it did not in fact affect the proceeding in or for which it was made. It shall be sufficient that it was material and might have affected such proceeding. [L. '09, p. 920, § 100.]

Compare Minn. Code, § 4833; N. Y. P. C., § 99.
For former laws, see *infra*, § 2855.

§ 2353. Perjury—Second Degree.

Every person who, whether orally or in writing, and whether as a volunteer or in a proceeding or investigation authorized by law, shall knowingly swear falsely concerning any matter whatsoever, shall be guilty of perjury in the second degree and shall be punished by imprisonment in the state penitentiary for not more than five years, or by imprisonment in the county jail for not more than one year. [L. '09, p. 920, § 101.]

For former laws, see *infra*, §§ 2851, 2858.

§ 2354. "Oath" and "Swear" Defined.

The term "oath" shall include an affirmation and every other mode authorized by law of attesting the truth of that which is stated. A person who shall state any matter under oath shall be deemed to "swear" thereto. [L. '09, p. 920, § 102.]

For former laws, see *infra*, § 2852.

§ 2355. Irregularity in Administering Oath or Incompetency of Witness No Defense.

It shall be no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner or that the defendant was not competent to give the testimony, deposition, certificate or affidavit of which falsehood is alleged. It shall be sufficient that he actually gave such testimony or made such deposition, certificate or affidavit. [L. '09, p. 921, § 103.]

Compare Minn. Code, § 4832; N. Y. P. C., §§ 97, 98.
For former laws, see *infra*, §§ 2853, 2854.

§ 2356. Deposition—When Complete.

The making of a deposition, certificate or affidavit shall be deemed to be complete when it is subscribed and sworn to or affirmed by the defendant with intent that it be uttered or published as true. [L. '09, p. 921, § 104.]

Compare Minn. Code, § 4384; N. Y. P. C., § 100.
For former laws, see *infra*, § 2856.

§ 2357. Statement of What One does not Know to be True.

Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false. [L. '09, p. 921, § 105.]

Compare Minn. Code, § 4835; N. Y. P. C., § 101.
For former laws, see *infra*, § 2857.

§ 2358. Offering False Evidence.

Every person who, upon any trial, hearing, inquiry, investigation or other proceeding authorized by law, shall offer or procure to be offered in evidence, as genuine, any book, paper, document, record or other instrument in

writing, knowing the same to have been forged or fraudulently altered, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 921, § 106.]

Compare Minn. Code, § 4838.

§ 2359. Committal of Witness—Detention of Documents.

Whenever it shall appear probable to a judge, justice of the peace, magistrate, or other officer lawfully authorized to conduct any hearing, proceeding or investigation, that a person who has testified before him has committed perjury in any testimony so given, or offered any false evidence, he may, by order or process for that purpose, immediately commit such person to jail or take a recognizance for his appearance to answer such charge. In such case he may detain any book, paper, document, record or other instrument produced before him or direct it to be delivered to the prosecuting attorney. [L. '09, p. 921, § 107.]

Compare Minn. Code, § 4836; N. Y. P. C., §§ 102, 104.

§ 2360. Subornation of Perjury.

Every person who shall willfully procure another to commit perjury, in either degree, or to offer any false evidence, shall be guilty of subornation of perjury and shall be punished in the same manner as if he had himself committed the perjury so procured or offered the false evidence so offered. [L. '09, p. 922, § 108.]

Compare Minn. Code, § 4837; N. Y. P. C., § 105.
For former laws, see *infra*, § 2860.

§ 2361. Attempt to Suborn Perjury.

Every person who, without giving, offering or promising a bribe, shall incite or attempt to procure another to commit perjury, in either degree, or to offer any false evidence, or to withhold true testimony, though no perjury be committed or false evidence or true testimony withheld, shall be guilty of a gross misdemeanor. [L. '09, p. 922, § 109.]

Compare Minn. Code, § 4841.
For former laws, see *infra*, § 2861.
See *infra*, § 2264, attempts, how punished.

§ 2362. Destroying Evidence.

Every person who, with intent to conceal the commission of any felony, or to protect or conceal the identity of any person committing the same, or with intent to delay or hinder the administration of the law or to prevent the production thereof at any time, in any court or before any officer, tribunal, judge or magistrate, shall willfully destroy, alter, erase, obliterate or conceal any book, paper, record, writing, instrument or thing, shall be guilty of a gross misdemeanor. [L. '09, p. 922, § 110.]

Compare Minn. Code, § 4839; N. Y. P. C., § 110.

§ 2363. Tampering with Witness.

Every person who shall willfully prevent or attempt to prevent, by persuasion, threats or otherwise, any person from appearing before any court, or officer authorized to subpoena witnesses, as a witness in any action, pro-

ceeding or investigation, with intent thereby to obstruct the course of justice, shall be guilty of a gross misdemeanor. [L. '09, p. 922, § 111.]

Compare N. Y. P. C., § 111.

For former laws, see *infra*, § 2888.

See *supra*, § 2323, bribing witness.

§ 2364. Neglect or Refusal to Receive a Person into Custody.

Every officer who, in violation of any legal duty, shall willfully neglect or refuse to receive a person into his official custody or into a prison under his charge, shall, in a case where no other punishment is specially provided by law, be guilty of a gross misdemeanor. [L. '09, p. 922, § 112.]

Compare Minn. Code, § 4842; N. Y. P. C., § 116.

For former laws, see *infra*, § 2872.

§ 2365. Refusal to Make Arrest or to Aid Officer.

Every person who, after having been lawfully commanded by any magistrate to arrest another person, shall willfully neglect or refuse so to do; and every person who, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from lawful custody, or in executing any lawful process, shall willfully neglect or refuse to aid such officer, shall be guilty of a misdemeanor. [L. '09, p. 923, § 113.]

Compare Minn. Code, § 4847; N. Y. P. C., §§ 121, 122.

For former laws, see *infra*, §§ 2875, 2876.

See next section and notes.

§ 2366. Resisting Public Officer.

Every person who, in any case or under any circumstances not otherwise specially provided for, shall willfully resist, delay or obstruct a public officer in discharging or attempting to discharge any legal duty of his office, shall be guilty of a misdemeanor. [L. '09, p. 923, § 114.]

Compare Minn. Code, § 4848; N. Y. P. C., § 124.

For former laws, see *infra*, § 2874.

See *supra*, § 2331, interfering with or resisting officer.

See *supra*, § 2365, resisting and refusing to aid in arrest.

See *infra*, § 2520, obstructing firemen.

See *infra*, § 2555, combination to resist process.

See *infra*, § 2672, obstructing officer.

See *infra*, § 3205, resisting state veterinarian.

See *infra*, § 5156, resisting fish commissioner.

See *infra*, § 5281, refusing to aid fire-warden.

See *infra*, § 5476, obstructing milk inspection.

See *infra*, § 5517, refusing to assist in enforcing health regulations.

See *infra*, § 6019, obstructing feed stuff inspection.

See *infra*, § 6046, resisting hotel inspection.

See *infra*, § 6556, refusal to permit factory inspection.

§ 2367. Compounding Crimes.

Every person who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that he will compound or conceal a crime or violation of a statute, or abstain from testifying thereto, delay a prosecution therefor or withhold any evidence thereof, except in a case where a compromise is allowed by law, shall be guilty—

(1.) Of a felony and punished by imprisonment in the state penitentiary for not more than five years, where the agreement or understanding relates to a felony;

(2.) Of a misdemeanor, where the agreement or understanding relates to a gross misdemeanor or misdemeanor, or to a violation of statute for which a pecuniary penalty or forfeiture is prescribed.

In any proceeding against a person for compounding a crime, it shall not be necessary to prove that any person has been convicted of the crime or violation of statute in relation to which an agreement or understanding herein prohibited was made. [L. '09, p. 923, § 115.]

Compare Minn. Code, § 4849; N. Y. P. C., §§ 125, 126.
For former laws, see *infra*, § 2866.

§ 2368. Intimidating Public Officer.

Every person who shall, directly or indirectly, address any threat or intimidation to a public officer or to a juror, referee, arbitrator, appraiser or assessor, or to any other person authorized by law to hear or determine any controversy or matter, with intent to induce him, contrary to his duty to do or make or omit or delay any act, decision or determination, shall be guilty of a misdemeanor. [L. '09, p. 924, § 116.]

Compare Minn. Code, § 4850; N. Y. P. C., § 127.

§ 2369. Malicious Prosecution.

Every person who shall, maliciously and without probable cause therefor, cause or attempt to cause another to be arrested or proceeded against for any crime of which he is innocent—

(1.) If such crime be a felony, shall be punished by imprisonment in the state penitentiary for not more than five years; and,

(2.) If such crime be a gross misdemeanor or misdemeanor, shall be guilty of a misdemeanor. [L. '09, p. 924, § 117.]

For former laws, see *infra*, § 2779.

§ 2370. Barratry.

Every person who shall bring on his own behalf, or instigate, incite or encourage another to bring, any false suit at law or in equity in any court of this state, with intent thereby to distress or harass a defendant therein; and every person, being an attorney or counselor at law, who shall personally, or through the agency of another, solicit employment as such attorney, in any suit pending or prospective, or, with intent to obtain such employment, shall, directly or indirectly, loan any money or give or promise to give any money, property or other consideration to the person from whom such employment is sought, shall be guilty of barratry and be punished as for a misdemeanor; and in case the person offending is an attorney, he may, in addition thereto, be disbarred from practicing law in this state. [L. '09, p. 924, § 118.]

Compare N. Y. P. C., §§ 132, 133, 134, 135, 136.
For former laws, see *infra*, § 2970.
See *supra*, § 139, disbarment of attorneys.

§ 2371. Buying Demand or Promising Reward by Justice or Constable.

Every justice of the peace or constable who shall, directly or indirectly, buy or be interested in buying anything in action for the purpose of commencing a suit thereon before a justice of the peace, or who shall give or promise any valuable consideration to any person as an inducement to bring,

or as a consideration for having brought, a suit before a justice of the peace, shall be guilty of a misdemeanor. [L. '09, p. 924, § 119.]

Compare Minn. Code, § 4853; N. Y. P. C., §§ 137, 138.

§ 2372. Criminal Contempt.

Every person who shall commit a contempt of court of any one of the following kinds shall be guilty of a misdemeanor:

(1.) Disorderly, contemptuous or insolent behavior committed during the sitting of the court, in its immediate view and presence, and directly tending to interrupt its proceeding or to impair the respect due to its authority; or,

(2.) Behavior of like character in the presence of a referee, while actually engaged in a trial or hearing pursuant to an order of court, or in the presence of a jury while actually sitting in the trial of a cause or upon an inquest or other proceeding authorized by law; or,

(3.) Breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of a court, jury or referee; or,

(4.) Willful disobedience to the lawful process or mandate of a court; or,

(5.) Resistance, willfully offered, to its lawful process or mandate; or,

(6.) Contumacious and unlawful refusal to be sworn as a witness, or after being sworn, to answer any legal and proper interrogatory; or,

(7.) Publication of a false or grossly inaccurate report of its proceedings; or,

(8.) Assuming to be an attorney or officer of a court or acting as such without authority. [L. '09, p. 925, § 120.]

Compare Minn. Code, § 4854; N. Y. P. C., § 143.

For former laws, see *supra*, § 1032.

See *infra*, §§ 6932-6934, contempt before legislative committee.

See *supra*, §§ 1049-1062, contempts and their punishment.

§ 2373. Grand Juror Acting After Challenge Allowed.

Every grand juror who, with knowledge that a challenge interposed against him by a defendant has been allowed, shall be present at, or take part, or attempt to take part, in the consideration of the charge against the defendant who interposed such challenge, or the deliberations of the grand jury thereon, shall be guilty of a misdemeanor. [L. '09, p. 925, § 121.]

Compare Minn. Code, § 4855; N. Y. P. C., § 144.

See *supra*, § 2026, challenge to grand juror.

§ 2374. Production of Pretended Heir.

Every person who shall fraudulently or falsely pretend that any infant child was born of a parent whose child is or would be entitled to inherit real property or to receive any personal property, or who shall falsely represent himself or another to be a person entitled to an interest or share in the estate of a deceased person as executor, administrator, husband, wife, heir, legatee, devisee, next of kin or relative of such deceased person, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 926, § 122.]

Compare Minn. Code, § 4857; N. Y. P. C., § 151.

§ 2375. Substitution of a Child.

Every person to whom a child has been confided for nursing, education or any other purpose, who, with intent to deceive a person[parent], guardian or

relative of such child, shall substitute or produce to such parent, guardian or relative, another child or person in the place of the child so confided, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 926, § 123.]

Compare Minn. Code, § 4858; N. Y. P. C., § 152.

§ 2376. Instituting Suit in Name of Another.

Every person who shall institute or prosecute any action or other proceeding in the name of another, without his consent and contrary to law, shall be guilty of a gross misdemeanor. [L. '09, p. 926, § 124.]

Compare Minn. Code, § 4860.

§ 2377. Unauthorized Communication with Prisoner.

Every person who, not being authorized by law or by any officer authorized thereto, shall have any verbal communication with any prisoner in any jail, reformatory, penitentiary, or other penal institution, or shall bring into or convey out of the same any writing, clothing, food, tobacco or any article whatsoever, shall be guilty of a misdemeanor. [L. '09, p. 926, § 125.]

Compare Minn. Code, § 4861.

§ 2378. Disclosing Transaction of Grand Jury.

Every judge, grand juror, prosecuting attorney, clerk, stenographer or other officer who, except in the due discharge of his official duty, shall disclose the fact that a presentment has been made or indictment found or ordered against any person, before such person shall be in custody; and every grand juror, clerk or stenographer who, except when lawfully required by a court or officer, shall disclose any evidence adduced before the grand jury, or any proceeding, discussion or vote of the grand jury or any member thereof, shall be guilty of a misdemeanor. [L. '09, p. 927, § 126.]

Compare Minn. Code, § 4862; N. Y. P. C., § 156.

For former laws, see *supra*, § 2039.

See *supra*, § 2046, violation a contempt.

§ 2379. Disclosure of Deposition Returned by Grand Jury.

Every clerk of any court or other officer who shall willfully permit any deposition, or the transcript of any testimony, returned by a grand jury and filed with such clerk or officer, to be inspected by any person except the court, the deputies or assistants of such clerk, and the prosecuting attorney and his deputies, until after the arrest of the defendant, shall be guilty of a misdemeanor. [L. '09, p. 927, § 127.]

Compare N. Y. P. C., § 146.

See last section and notes.

§ 2380. Public Officer Making False Certificate.

Every public officer who, being authorized by law to make or give a certificate or other writing, shall knowingly make and deliver as true such a certificate or writing containing any statement which he knows to be false, in a case where the punishment thereof is not expressly prescribed by law, shall be guilty of a gross misdemeanor. [L. '09, p. 927, § 128.]

Compare Minn. Code, § 4864; N. Y. P. C., § 163.

See *supra*, § 2350, false reports by officers.

See *infra*, § 2584, false certificates to certain instruments.

See *infra*, § 5038, violating duty as to vouchers and warrants.

§ 2381. Falsely Auditing and Paying Claims.

Every public officer or person holding or discharging the duties of any public office or place of trust under the state or in any county, town or city, a part of whose duty it is to audit, allow or pay, or take part in auditing, allowing or paying, claims or demands upon the state or such county, town or city, who shall knowingly audit, allow or pay, or, directly or indirectly, consent to or in any way connive at the auditing, allowance or payment of any claim or demand against the state or such county, town or city, which is false or fraudulent or contains any charge, item or claim which is false or fraudulent, shall be guilty of a gross misdemeanor. [L. '09, p. 927, § 129.]

Compare Minn. Code, § 4865; N. Y. P. C., § 165.

§ 2382. Conspiracy.

Whenever two or more persons shall conspire—

- (1.) To commit a crime; or
- (2.) Falsely and maliciously to procure another to be arrested or proceeded against for a crime; or
- (3.) Falsely to institute or maintain any action or proceeding; or
- (4.) To cheat or defraud another out of any property by unlawful or fraudulent means; or
- (5.) To prevent another from exercising any lawful trade or calling, or from doing any other lawful act, by force, threats or intimidation, or by interfering or threatening to interfere with any tools, implements or property belonging to or used by another, or with the use or employment thereof; or
- (6.) To commit any act injurious to the public health, public morals, trade or commerce, or for the perversion or corruption of public justice or the due administration of the law; or
- (7.) To accomplish any criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means;

Every such person shall be guilty of a gross misdemeanor. [L. '09, p. 928, § 130.]

Compare Minn. Code, § 4867; N. Y. P. C., § 168.

For former laws, see *infra*, § 2779.

§ 2383. Overt Act not Necessary.

In any proceeding for [a] violation of section 2382, it shall [not] be necessary to prove that any overt act was done in pursuance of such unlawful conspiracy or combination. [L. '09, p. 928, § 131.]

§ 2384. Corporation to Forfeit Franchise.

Every corporation, whether foreign or domestic, which shall violate any provision of section 2382, shall forfeit every right and franchise to do business in this state. The attorney general shall begin and conduct all actions and proceedings necessary to enforce the provisions of this section. [L. '09, p. 928, § 132.]

Compare Minn. Code, § 5169.

CHAPTER V.

CRIMES AGAINST THE PERSON.

§ 2385. Suicide Defined.

Suicide is the intentional taking of one's own life. [L. '09, p. 929, § 133.]

Compare Minn. Code, § 4869; N. Y. P. C., § 172.

§ 2386. Attempting Suicide.

Every person who, with intent to take his own life, shall commit upon himself any act dangerous to human life, or which, if committed upon or toward another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, shall be punished by imprisonment in the state penitentiary for not more than two years, or by a fine of not more than one thousand dollars. [L. '09, p. 929, § 134.]

Compare Minn. Code, § 4870; N. Y. P. C., § 174.

For former laws, see *infra*, § 2734.

§ 2387. Aiding Suicide.

Every person who, in any manner, shall willfully advise, encourage, abet or assist another in taking his own life shall be guilty of manslaughter. [L. '09, p. 929, § 135.]

Compare Minn. Code, § 4871; N. Y. P. C., § 175.

For former laws, see *infra*, § 2734.

§ 2388. Abetting Attempt at Suicide.

Every person who, in any manner, shall willfully advise, encourage, abet or assist another person in attempting to take the latter's life shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 929, § 136.]

Compare Minn. Code, § 4872; N. Y. P. C., § 176.

§ 2389. Incapacity of Person Aided No Defense.

The fact that the person attempting to take his own life was incapable of committing crime shall not be a defense to a prosecution under either of sections 2387 or 2388. [L. '09, p. 929, § 137.]

Compare Minn. Code, § 4873; N. Y. P. C., § 177.

§ 2390. Homicide—Defined and Classified.

Homicide is the killing of a human being by the act, procurement or omission of another and is either (1) murder, (2) manslaughter, (3) excusable homicide or (4) justifiable homicide. [L. '09, p. 929, § 138.]

Compare Minn. Code, § 4874; N. Y. P. C., §§ 178, 180.

§ 2391. Proof of Death and of Killing by Defendant.

No person shall be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts beyond a reasonable doubt. [L. '09, p. 930, § 139.]

Compare Minn. Code, § 4875; N. Y. P. C., § 181.

§ 2392. Murder in the First Degree.

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either—

(1.) With a premeditated design to effect the death of the person killed, or of another; or

(2.) By an act imminently dangerous to others and evincing a depraved mind, regardless of human life, without a premeditated design to effect the death of any individual; or

(3.) Without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a robbery, rape, burglary, larceny or arson in the first degree; or

(4.) By maliciously interfering or tampering with or obstructing any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure or appliance pertaining to or connected with any railway, or any engine, motor or car of such railway.

Murder in the first degree shall be punishable by death or by imprisonment in the state penitentiary for life, in the discretion of the court. [L. '09, p. 930, § 140.]

Compare N. Y. P. C., §§ 183, 186.

For former laws, see *infra*, §§ 2726, 2728; murder in arson, see § 2786, *infra*.

§ 2393. Murder in the Second Degree.

The killing of a human being, unless it is excusable or justifiable, is murder in the second degree when—

(1.) Committed with a design to effect the death of the person killed or of another, but without premeditation; or

(2.) When perpetrated by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a felony other than those enumerated in section 2392.

Murder in the second degree shall be punished by imprisonment in the state penitentiary for not less than ten years. [L. '09, p. 931, § 141.]

Compare N. Y. P. C., §§ 184, 187.

For former laws, see *infra*, § 2729.

§ 2394. Killing in Duel.

Every person who shall fight or participate in, as second or assistant, any duel within this state, in which any person is killed, or who, by previous appointment made within this state, shall fight or participate in, as second or assistant, any duel out of the state, in which any person is killed, shall be guilty of murder in the second degree; and, in the latter case, may be proceeded against in any county in this state. [L. '09, p. 931, § 142.]

Compare Minn. Code, § 4878; N. Y. P. C., § 185.

For former laws, see *infra*, § 2730.

§ 2395. Manslaughter.

In any case other than those specified in sections 2392, 2393 and 2394, homicide, not being excusable or justifiable, is manslaughter.

Manslaughter is punishable by imprisonment in the state penitentiary for not more than twenty years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment. [L. '09, p. 931, § 143.]

Compare N. Y. P. C., §§ 188, 189, 192.

For former laws, see *infra*, §§ 2733, 2737.

§.2396. Killing Unborn Quick Child.

The willful killing of an unborn quick child, by any injury committed upon the mother of such child, is manslaughter. [L. '09, p. 931, § 144.]

Compare Minn. Code, § 4882; N. Y. P. C., §§ 190, 191.

§ 2397. Killing Unborn Quick Child by Administering Drugs.

Every person who shall provide, supply or administer to a woman, whether pregnant or not, or shall prescribe for or advise or procure a woman to take any medicine, drug or substance, or shall use or employ, or cause to be used or employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman or of any quick child of which she is pregnant is thereby produced, shall be guilty of manslaughter. [L. '09, p. 931, § 145.]

Compare Minn. Code, § 4882; N. Y. P. C., §§ 190, 191.
For former laws, see *infra*, § 2758.

§ 2398. Woman Taking Drugs.

Every woman quick with child who shall take or use, or submit to the use of, any drug, medicine or substance, or any instrument or other means, with intent to procure her own miscarriage, unless the same is necessary to preserve her own life or that of the child whereof she is pregnant, and thereby causes the death of such child, shall be guilty of manslaughter. [L. '09, p. 932, § 146.]

Compare Minn. Code, § 4885.
See *infra*, § 2449, attempted abortion.

§ 2399. Owner of Vicious Animal.

If the owner or custodian of any vicious or dangerous animal, knowing its propensities, shall willfully or negligently allow it to go at large, and such animal while at large shall kill a human being not himself in fault, such owner or custodian shall be guilty of manslaughter. [L. '09, p. 932, § 147.]

Compare Minn. Code, § 4887.
For former laws, see *infra*, § 3200.

§ 2400. Killing by Overloading Passenger Vessel.

Every person navigating a vessel for gain who shall willfully or negligently receive so many passengers or such a quantity of other lading on board, that by means thereof such vessel shall sink, be upset or injured, and thereby a human being shall be drowned or otherwise killed, shall be guilty of manslaughter. [L. '09, p. 932, § 148.]

Compare Minn. Code, § 4888.
For former laws, see *infra*, § 2735.

§ 2401. Reckless Operation of Steamboat or Engine.

Every person having charge of a steamboat used for the conveyance of passengers, or of a boiler or engine thereof, who, from ignorance, recklessness or gross negligence, or for the purpose of excelling another boat in speed, shall create or allow to be created such an undue quantity of steam as to burst the boiler or other apparatus in which it is generated or contained, or to break any apparatus or machinery connected therewith, where-

by the death of a human being is occasioned; and every engineer or other person having charge of a steam boiler, steam engine or other apparatus for generating or applying steam, who, willfully or from ignorance or gross negligence, shall create or allow to be created such an undue quantity of steam as to burst the boiler, engine or apparatus, or to cause any other accident, whereby the death of a human being is occasioned, shall be guilty of manslaughter. [L. '09, p. 932, § 149.]

Compare Minn. Code, § 4889.

For former laws, see *infra*, § 2736.

§ 2402. Liability of Intoxicated Physician.

Every physician or surgeon, or person practicing as such, who, being in a state of intoxication, or under the influence of any narcotic drug, shall prescribe or administer any poison, drug or medicine, or do any other act as a physician, to another person, which, though done without design, shall cause the death of the latter, shall be guilty of manslaughter. [L. '09, p. 933, § 150.]

Compare Minn. Code, § 4890; N. Y. P. C., § 200.

See *infra*, § 2942, injury from prescription by intoxicated physician.

§ 2403. Keeping Explosive Unlawfully.

Every person who shall make or keep gunpowder, or any other explosive substance, in a city or village, in any quantity or manner prohibited by law or by ordinance of such municipality, if an explosion thereof shall occur whereby the death of a human being is occasioned, shall be guilty of manslaughter. [L. '09, p. 933, § 151.]

Compare Minn. Code, § 4891; N. Y. P. C., § 201.

For former laws, see *infra*, § 8308.

See *infra*, § 2504, keeping explosives unlawfully.

§ 2404. Homicide, When Excusable.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, with ordinary caution and without any unlawful intent. [L. '09, p. 933, § 152.]

Compare Minn. Code, § 4893; N. Y. P. C., § 203.

See note to § 2726, *infra*.

§ 2405. Justifiable Homicide by Public Officer.

Homicide is justifiable when committed by a public officer, or person acting under his command and in his aid, in the following cases:

(1.) In obedience to the judgment of a competent court.

(2.) When necessary to overcome actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty.

(3.) When necessary in retaking an escaped or rescued prisoner who has been committed, arrested for, or convicted of a felony; or in arresting a person who has committed a felony and is fleeing from justice; or in attempting, by lawful ways or means, to apprehend a person for a felony actually committed; or in lawfully suppressing a riot or preserving the peace. [L. '09, p. 933, § 153.]

Compare Minn. Code, § 4894; N. Y. P. C., § 204.

§ 2406. Homicide by Other Person, When Justifiable.

Homicide is also justifiable when committed either—

(1.) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or

(2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is. [L. '09, p. 934, § 154.]

Compare Minn. Code, § 4895; N. Y. P. C., § 205.

§ 2407. "Maiming" Defined—How Punished.

Every person who, with intent to commit a felony, or to injure, disfigure or disable another, shall willfully inflict upon him an injury which—

(1.) Seriously disfigures his person by any mutilation thereof; or

(2.) Destroys or displaces any member or organ of his body; or

(3.) Seriously diminishes his physical vigor by the injury of any member or organ;

Shall be guilty of maiming and be punished by imprisonment in the state penitentiary for not more than ten years, and the willful infliction of the injury shall be prima facie evidence of the intent. [L. '09, p. 934, § 155.]

Compare Minn. Code, § 4896; N. Y. P. C., § 206.

For former laws, see *infra*, §§ 2738, 2739.

§ 2408. Instrument or Manner of Maiming.

To constitute maiming it is immaterial by what means or instrument or in what manner the injury was inflicted. [L. '09, p. 934, § 156.]

Compare Minn. Code, § 4898; N. Y. P. C., § 209.

§ 2409. Recovery from Injury, When a Defense.

Whenever upon a trial for maiming another person it shall appear that the injury inflicted will not result in any permanent disfiguration of appearance, diminution of vigor, or other permanent injury, no conviction for maiming shall be had, but the defendant may be convicted of assault in any degree. [L. '09, p. 934, § 157.]

Compare Minn. Code, § 4899; N. Y. P. C., § 210.

§ 2410. Kidnaping Defined—How Punished.

Every person who shall willfully—

(1.) Seize, confine or inveigle another with intent to cause him without authority of law to be secretly confined or imprisoned, or in any way held to service, or with intent to extort or obtain money or reward for his return, release, or disposition, or to lead, take, entice away, or detain, a child under the age of sixteen years with intent to conceal him from his parent, guardian or other person having lawful care or control of him, or to steal any article upon his person; or

(2.) Abduct, entice, or by force or fraud unlawfully take or carry away another to or from a place without the state, and shall afterward send, bring or keep such person, or cause him to be kept or secreted within this state;

Shall be guilty of kidnaping, and punished by imprisonment in the state penitentiary for not less than ten years. [L. '09, p. 935, § 158.]

Compare Minn. Code, § 4900; N. Y. P. C., § 211.

For former laws, see *infra*, §§ 2740, 2741.

See *infra*, § 2439, abduction.

§ 2411. Selling Services of Person Kidnaped.

Every person, who within this state or elsewhere, shall sell or in any manner transfer for any term, the services or labor of any person who has been forcibly taken, inveigled, or kidnaped in or from this state, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 935, § 159.]

Compare Minn. Code, § 4901; N. Y. P. C., § 214.

§ 2412. Venue—Effect of Consent.

Any proceeding for kidnaping may be instituted either in the county where the offense was committed or in any county through or in which the person kidnaped or confined was taken or kept while under confinement or restraint. Upon a trial for violation of section 2410 or 2411, the consent thereto of the person kidnaped or confined shall not be a defense unless it appears satisfactorily to the jury that such person was above the age of sixteen years and that his consent was not extorted by threats, duress or fraud. [L. '09, p. 935, § 160.]

Compare Minn. Code, § 4903; N. Y. P. C., §§ 217, 220.

For former laws, see *infra*, § 2742.

§ 2413. Assault in First Degree Defined—How Punished.

Every person who, with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another—

(1.) Shall assault another with a firearm or any deadly weapon or by any force or means likely to produce death; or

(2.) Shall administer to or cause to be taken by another, poison or any other destructive or noxious thing so as to endanger the life of another person, shall be guilty of assault in the first degree and shall be punished by imprisonment in the state penitentiary for not less than five years. [L. '09, p. 936, § 161.]

Compare Minn. Code, § 4903; N. Y. P. C., §§ 217, 220.

For former laws, see *infra*, §§ 2748, 2750.

§ 2414. Assault in the Second Degree—How Punished.

Every person who, under circumstances not amounting to assault in the first degree—

(1.) With intent to injure, shall unlawfully administer to or cause to be taken by another, poison or any other destructive or noxious thing, or any drug or medicine the use of which is dangerous to life or health; or

(2.) With intent thereby to enable or assist himself or any other person to commit any crime, shall administer to, or cause to be taken by, another, chloroform, ether, laudanum or any other intoxicating narcotic or anaesthetic; or

(3.) Shall willfully inflict grievous bodily harm upon another with or without a weapon; or

(4.) Shall willfully assault another with a weapon or other instrument or thing likely to produce bodily harm; or

(5.) Being armed with a deadly weapon shall willfully assault another with a whip; or

(6.) Shall assault another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court officer, or the lawful apprehension or detention of himself or another person; or

(7.) While hunting any game or other animals or birds, shall shoot another;

Shall be guilty of assault in the second degree and be punished by imprisonment in the state penitentiary for not more than ten years or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 936, § 162.]

Compare Minn. Code, § 4904; N. Y. P. C., §§ 218, 221.

For former laws, see *infra*, §§ 2749, 2750.

§ 2415. Assault in the Third Degree—How Punished.

Every person who shall commit an assault or an assault or battery not amounting to assault in either the first or second degrees, shall be guilty of assault in the third degree, and shall be punished as for a gross misdemeanor. [L. '09, p. 937, § 163.]

Compare Minn. Code, § 4905; N. Y. P. C., §§ 219, 222.

For former laws, see *infra*, § 2746.

See *infra*, § 2442, indecent assault.

See *infra*, § 4694, abuse of pupil.

§ 2416. Force, When Lawful.

The use, attempt, or offer to use force upon or toward the person of another shall not be unlawful in the following cases:

(1.) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting him and acting under his direction;

(2.) Whenever necessarily used by a person arresting one who has committed a felony and delivering him to a public officer competent to receive him into custody;

(3.) Whenever used by a party about to be injured, or by another lawfully aiding him, in preventing or attempting to prevent an offense against his person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his possession, in case the force is not more than shall be necessary;

(4.) Whenever used in a reasonable and moderate manner by a parent or his authorized agent, a guardian, master, or teacher in the exercise of lawful authority to restrain or correct his child, ward, apprentice or scholar;

(5.) Whenever used by a carrier of passengers or his authorized agent or servant, or other person assisting them at their request in expelling from a carriage, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force used is not more than shall be necessary to expel the offender with reasonable regard to his personal safety;

(6.) Whenever used by any person to prevent an idiot, lunatic or insane person from committing an act dangerous to himself or another, or in enforcing necessary restraint for the protection of his person, or his restoration

to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person. [L. '09, p. 937, § 164.]

Compare Minn. Code, § 4906; N. Y. P. C., § 223.

See *infra*, § 4694, abuse of pupil.

§ 2417. Provoking Assault.

Every person who shall by word, sign or gesture, willfully provoke, or attempt to provoke, another person to commit an assault or breach of the peace, shall be guilty of misdemeanor. [L. '09, p. 938, § 165.]

For former laws, see *infra*, § 2747.

§ 2418. Robbery Defined.

Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. If used merely as a means of escape, it does not constitute robbery. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear. Every person who shall commit robbery shall be punished by imprisonment in the state penitentiary for not less than five years. [L. '09, p. 938, § 166.]

Compare Minn. Code, § 4907; N. Y. P. C., §§ 224, 225, 226, 227, 228, 229, 230, 231, 232, 233.

For former laws, see *infra*, § 2792.

§ 2419. Duel, How Punished.

Every person who shall fight a duel or engage in any combat with another with a deadly weapon, by previous agreement, or upon a previous quarrel, although no death or wound shall ensue, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 938, § 167.]

Compare Minn. Code, § 4911; N. Y. P. C., § 234.

For former laws, see *infra*, § 2743.

§ 2420. Challenger, Abettor, etc.

Every person who shall challenge another to fight a duel, or who shall send a written or verbal message purporting or intended to be a challenge to fight a duel, or an invitation to a combat with deadly weapons, or shall accept such a challenge or message, or shall knowingly carry or deliver such challenge or message, or be present at the time appointed for such duel or combat, or when the same is fought, either as second, aide, or surgeon, or who shall advise, or abet, or give any countenance or assistance to such duel or combat upon previous agreement, shall be punished by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 939, § 168.]

Compare Minn. Code, § 4912; N. Y. P. C., § 235.

For former laws, see *infra*, §§ 2732, 2744.

§ 2421. Attempt to Induce Challenge, Posting.

Every person who shall send or use to another any word or sign whatever with intent to provoke or induce such person to give or receive a challenge to fight a duel, or who shall post or advertise another for not fighting a duel or for not sending or accepting a challenge to fight a duel, or who, in writing or in print, shall use reproachful or contemptuous language to or concerning anyone for not sending or accepting a challenge to fight a duel, or for not fighting a duel, shall be guilty of a gross misdemeanor. [L. '09, p. 939, § 169.]

Compare Minn. Code, § 4913; N. Y. P. C., §§ 237, 238.

§ 2422. Duel Outside State, Venue.

Every person who shall leave the state with intent to elude any provision of sections 2419 or 2420, or to commit any act outside of the state punished by the provisions thereof, if committed in the state, shall be guilty of the same offense and subject to the same punishment as if the act had been committed or was to have been consummated in the state and may be proceeded against and tried in any county therein, but a former conviction or acquittal in another state or county for the same offense shall be a bar to further proceedings against him for such offense. [L. '09, p. 939, § 170.]

Compare Minn. Code, § 4914; N. Y. P. C., §§ 239, 240.

For former laws, see *infra*, § 2731.

See Const., Art. I, § 22, right to trial by jury of county where offense committed.

§ 2423. Witnesses.

Every person offending against any provision contained in sections 2419 to 2422, inclusive, shall be a competent witness against any other offender in the same transaction, and shall not be excused from giving testimony tending to incriminate himself. [L. '09, p. 940, § 171.]

Compare Minn. Code, § 4915; N. Y. P. C., § 241.

§ 2424. Libel Defined.

Every malicious publication by writing, printing, picture, effigy, sign or otherwise than by mere speech, which shall tend:

(1.) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or

(2.) To expose the memory of one deceased to hatred, contempt, ridicule or obloquy; or

(3.) To injure any person, corporation or association of persons in his or their business or occupation, shall be a libel. Every person who publishes a libel shall be guilty of a gross misdemeanor. [L. '09, p. 940, § 172.]

Compare Minn. Code, § 4916; N. Y. P. C., §§ 242, 243. For former laws, see *infra*, § 2777.

§ 2425. How Justified or Excused—Malice, When Presumed.

Every publication having the tendency or effect mentioned in section 2424 shall be deemed malicious unless justified or excused. Such publication is justified whenever the matter charged as libelous charges the commission of a crime, is a true and fair statement, and was published with good motives and for justifiable ends. It is excused when honestly made in belief of its truth and fairness and upon reasonable grounds for such belief, and consists

of fair comments upon the conduct of any person in respect of public affairs, made after a fair and impartial investigation. [L. '09, p. 940, § 173.]

Compare Minn. Code, § 4917; N. Y. P. C., § 244.

§ 2426. Publication Defined.

Any method by which matter charged as libelous may be communicated to another shall be deemed a publication thereof. [L. '09, p. 940, § 174.]

Compare Minn. Code, § 4918; N. Y. P. C., § 245.

For former laws, see *infra*, § 2778.

§ 2427. Liability of Editors and Others.

Every editor or proprietor of a book, newspaper or serial, and every manager of a copartnership or corporation by which any book, newspaper or serial is issued, is chargeable with the publication of any matter contained in any such book, newspaper or serial, but in every prosecution for libel the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes by another who had no authority from him to make such publication, and was retracted by him as soon as known with an equal degree of publicity. [L. '09, p. 941, § 175.]

Compare Minn. Code, § 4919; N. Y. P. C., § 246.

§ 2428. Report of Proceedings Privileged.

No prosecution for libel shall be maintained against a reporter, editor, proprietor, or publisher of a newspaper for the publication therein of a fair and true report of any judicial, legislative or other public and official proceeding, or of any statement, speech, argument or debate in the course of the same, without proving actual malice in making the report. The editor or proprietor of a book, newspaper or serial shall be proceeded against in the county where such book, newspaper or serial is published. [L. '09, p. 941, § 176.]

Compare Minn. Code, § 4920; N. Y. P. C., §§ 247, 248.

§ 2429. Venue.

Every other person publishing a libel in this state may be proceeded against in any county where such libelous matter was published or circulated, but a person shall not be proceeded against for the publication of the same libel against the same person in more than one county. [L. '09, p. 941, § 177.]

Compare Minn. Code, § 4921; N. Y. P. C., §§ 249, 250, 251.

§ 2430. Privileged Communications.

Every communication made to a person entitled to or concerned in such communication, by one also concerned in or entitled to make it, or who stood in such relation to the former as to offer a reasonable ground for supposing his motive to be innocent, shall be presumed not to be malicious, and shall be termed a privileged communication. [L. '09, p. 941, § 178.]

Compare Minn. Code, § 4922; N. Y. P. C., § 253.

§ 2431. Furnishing Libelous Information.

Every person who shall willfully state, deliver or transmit by any means whatever, to any manager, editor, publisher, reporter or other employee of a publisher of any newspaper, magazine, publication, periodical or serial, any

statement concerning any person or corporation, which, if published therein, would be a libel, shall be guilty of a misdemeanor. [L. '09, p. 941, § 179.]

Compare N. Y. P. C., § 254a.

§ 2432. Threatening to Publish Libel.

Every person who shall threaten another with the publication of a libel concerning the latter, or his spouse, parent, child, or other member of his family, and every person who offers to prevent the publication of a libel upon another person upon condition of the payment of, or with intent to extort money or other valuable consideration from any person, shall be guilty of a gross misdemeanor. [L. '09, p. 942, § 180.]

Compare Minn. Code, § 4923; N. Y. P. C., § 254.

§ 2433. Slander of Woman.

Every person who, in the presence or hearing of any person other than the female slandered, whether she be present or not, shall maliciously speak of or concerning any female of the age of twelve years or upward, not a common prostitute, any false or defamatory words or language which shall injure or impair the reputation of any such female for virtue or chastity or which shall expose her to hatred, contempt or ridicule, shall be guilty of a misdemeanor. Every slander herein mentioned shall be deemed to be malicious unless justified, and shall be justified when the language charged as slanderous, false or defamatory is true and fair, and was spoken with good motives and for justifiable ends. [L. '09, p. 942, § 181.]

Compare Minn. Code, § 4924.

§ 2434. Testimony Necessary to Convict.

No conviction shall be had under the provisions of the preceding section of this act, upon the testimony of the woman slandered unsupported by other evidence. [L. '09, p. 942, § 182.]

Compare Minn. Code, § 4925.

CHAPTER VI.

CRIMES AGAINST MORALITY, DECENCY, ETC.

§ 2435. Rape.

Rape is an act of sexual intercourse with a female not the wife of the perpetrator committed against her will and without her consent. Every person who shall perpetrate such an act of sexual intercourse with a female of the age of ten years or upward not his wife:

(1.) When, through idiocy, imbecility or any unsoundness of mind, either temporary or permanent, she is incapable of giving consent; or

(2.) When her resistance is forcibly overcome; or

(3.) When her resistance is prevented by fear of immediate and great bodily harm which she has reasonable cause to believe will be inflicted upon her; or

(4.) When her resistance is prevented by stupor or weakness of mind produced by an intoxicating narcotic or anesthetic agent administered by or with the privity of the defendant; or

(5.) When she is at the time unconscious of the nature of the act, and this is known to the defendant;

Shall be punished by imprisonment in the state penitentiary for not less than five years. [L. '09, p. 942, § 183.]

Compare Minn. Code, § 4926; N. Y. P. C., § 278.

For former laws, see *infra*, §§ 2753, 2754.

§ 2436. Carnal Knowledge of Children.

Every person who shall carnally know and abuse any female child under the age of eighteen years, not his wife, shall be punished as follows:

(1.) When such child is under the age of ten years, by imprisonment in the state penitentiary for life;

(2.) When such child is ten and under fifteen years of age, by imprisonment in the state penitentiary for not less than five years;

(3.) When such child is fifteen and under eighteen years of age, and of previously chaste character, by imprisonment in the state penitentiary for not more than ten years, or by imprisonment in the county jail for not more than one year. [L. '09, p. 943, § 184.]

Compare Minn. Code, § 4927; N. Y. P. C., § 278.

For former laws, see *infra*, § 2753.

§ 2437. Sexual Intercourse and Carnal Knowledge Defined.

Any sexual penetration, however slight, is sufficient to complete sexual intercourse or carnal knowledge. [L. '09, p. 943, § 186 (185).]

Compare Minn. Code, § 4928.

§ 2438. Compelling a Woman to Marry.

Every person who, by force, menace, or duress, shall compel a woman against her will to marry him or to marry any other person, or to be defiled, shall be punished by imprisonment in the state penitentiary for not more than twenty years, or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 943, § 186.]

Compare Minn. Code, § 4929; N. Y. P. C., § 281.

For former laws, see *infra*, § 2755.

§ 2439. Abduction.

Every person who—

(1.) Shall take a female under the age of eighteen years for the purpose of prostitution or sexual intercourse, or without the consent of her father, mother, guardian or other person having legal charge of her person, for the purpose of marriage; or

(2.) Shall inveigle or entice an unmarried female of previously chaste character into a house of ill-fame or assignation, or elsewhere, for the purpose of prostitution; or

(3.) Shall take or detain a woman unlawfully against her will, with intent to compel her by force, menace or duress, to marry him or another person, or to be defiled; or

(4.) Being the parent, guardian or other person having legal charge of the person of a female under the age of eighteen years, shall consent to her taking or detention by any person for the purpose of prostitution or sexual intercourse or for any obscene, indecent or immoral purpose;

Shall be guilty of abduction and punished by imprisonment in the state penitentiary for not more than ten years or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 944, § 187.]

Compare Minn. Code, § 4930; N. Y. P. C., § 282.
For former laws, see *infra*, §§ 2756, 2935.
See *supra*, § 2410, kidnaping.

§ 2440. Placing Female in House of Prostitution.

Every person who—

(1.) Shall place a female in the charge or custody of another person for immoral purposes, or in a house of prostitution, with intent that she shall live a life of prostitution, or who shall compel any female to reside with him or with any other person for immoral purposes, or for the purposes of prostitution, or shall compel any such female to reside in a house of prostitution or to live a life of prostitution; or

(2.) Shall ask or receive any compensation, gratuity or reward, or promise thereof, for or on account of placing in a house of prostitution or elsewhere any female for the purpose of causing her to cohabit with any male person or persons not her husband; or

(3.) Shall give, offer, or promise any compensation, gratuity or reward, to procure any female for the purpose of placing her for immoral purposes in any house of prostitution, or elsewhere, against her will; or

(4.) Being the husband of any woman, or the parent, guardian or other person having legal charge of the person of a female under the age of eighteen years, shall connive at, consent to, or permit her being or remaining in any house of prostitution or leading a life of prostitution; or

(5.) Shall live with or accept any earnings of a common prostitute, or entice or solicit any person to go to a house of prostitution for any immoral purpose, or to have sexual intercourse with a common prostitute.

Shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than two thousand dollars. [L. '09, p. 944, § 188.]

Compare N. Y. P. C., §§ 282a, 282b.
For former laws, see *infra*, §§ 2902, 2903.

§ 2441. Seduction.

Every person who shall seduce and have sexual intercourse with any female of previously chaste character, shall be punished by imprisonment in the state penitentiary for not more than five years or by imprisonment in the county jail for not more than one year or by a fine of not more than one thousand dollars, or by both fine and imprisonment. Provided, that if at any time before judgment upon an information or indictment, a defendant shall marry such female, the court shall order all further proceedings stayed; and if at any time within three years from the date of such marriage the defendant shall wrongfully fail to support or provide for or shall wrongfully desert or abandon such wife, said proceeding shall be revived and continued in the same manner as though no marriage had taken place, and in the trial of such cause the wife shall be competent to testify and may testify against her husband. [L. '09, p. 945, § 189.]

Compare Minn. Code, § 4931; N. Y. P. C., § 284.
For former laws, see *infra*, § 2757.

§ 2442. Indecent Assault.

Every person who shall take any indecent liberties with, or on the person of any female of chaste character, without her consent, or with or on the

person of any female under the age of eighteen years, of chaste character, with or without her consent, shall be guilty of a gross misdemeanor. [L. '09, p. 946, § 190.]

Compare Minn. Code, § 4932.

§ 2443. Corroborating Evidence Necessary.

No conviction shall be had for violation of any of the foregoing provisions of this chapter upon the testimony of the female upon or against whom the crime was committed, unless supported by other evidence. [L. '09, p. 946, § 191.]

Compare N. Y. P. C., §§ 283, 286.

Compare § 2155, *supra*. See note to § 2253.

§ 2444. Abandonment of Wife or Child.

Every person who shall willfully and without lawful excuse desert, or willfully neglect or refuse to provide for the support and maintenance of, his wife, or child under the age of sixteen years, either said wife or child being in necessitous circumstances, shall be punished by imprisonment in the state penitentiary for not more than three years, or in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment: Provided, that, before trial, with the consent of the defendant, or after conviction, the court may, in its discretion, require the defendant to enter into a recognizance in such amount as the court may fix, with or without sureties, conditioned that such defendant will faithfully pay weekly, such sum and for such a time as the court may direct, to or for the benefit of such wife or child, and so long as the defendant shall faithfully comply with the conditions of such recognizance, all proceedings in such action, or upon such judgment, shall be stayed; but if the defendant shall fail to comply with the conditions of such recognizance, or shall fail to comply with any order for his appearance in said court, such proceeding shall be revived and continued as if no stay had taken place. [L. '09, p. 946, § 192.]

Compare Minn. Code, §§ 4933, 4934.

See *infra*, § 5933, penalty for wife desertion.

§ 2445. Keepers of Concert Saloons, etc.

Every person who—

(1.) Shall admit to or allow to remain in any [drinking saloon] dance-house, public pool or billiard hall, concert saloon, or in any place except a restaurant or dining-room, where intoxicating liquors are sold or given away, or in any place of entertainment injurious to health or morals, owned, kept or managed by him, in whole or in part, any person under the age of twenty-one years, [or any female person, whether as employee, visitor or patron; or in any of the places hereinbefore enumerated shall sell or give, or permit to be sold or given, any intoxicating liquor to any such minor or female person; or,]

(2.) Shall suffer or permit any such person to play any game of skill or chance, in any such place, or in any place adjacent thereto, or to be or remain therein, or admit or allow to remain in any reputed house of prostitution or assignation, or in any place where opium, or any preparation thereof, is smoked, or where any narcotic drug is used, any person under the age of twenty-one years; or,

(3.) Shall sell, or give, or permit to be sold, or given to any person under the age of twenty-one years any intoxicating liquor, cigar, cigarette, cigarette paper or wrapper, or tobacco in any form; or,

(4.) Shall sell, or give, or permit to be sold or given to any person under the age of eighteen years, any revolver, pistol, or toy pistol;

Shall be guilty of a gross misdemeanor.

It shall be no defense to a prosecution for a violation of this section that the person acted, or was believed by the defendant to act, as agent or representative of another. [L. '09, p. 947, § 193; L. '09, Ex. Ses., p. 66, § 1.]

Compare Minn. Code, §§ 4936, 4937, 4938; N. Y. P. C., § 290.

For former laws, see *infra*, §§ 2919-2923, 2963, 2967, 2971.

This section was amended by Laws of 1909, Ex. Ses., p. 66, the title of which was as follows: "An Act to amend sections 193 and 437 of an act entitled 'An act relating to crimes and punishments and the rights and custody of persons accused or convicted of crime, and repealing certain acts,' being sections 193 and 437 of chapter 249 of the Session Laws of the regular session of the legislature of 1909, and declaring an emergency." A doubt exists as to the validity of this title. The words in brackets are added by the amendment. The title is probably sufficient under the rule in *In re Donnellan*, 49 Wash. 460.

For violations of liquor laws, etc., see note to § 2696, *infra*.

§ 2446. Employment of Minors Prohibited.

Every person who shall employ, or cause to be employed, exhibit or have in his custody for exhibition or employment any minor actually or apparently under the age of eighteen years; and every parent, relative, guardian, employer or other person having the care, custody, or control of any such minor, who shall in any way procure or consent to the employment of such minor—

(1.) In begging, receiving alms, or in any mendicant occupation; or,

(2.) In any indecent or immoral exhibition or practice; or,

(3.) In any practice or exhibition dangerous or injurious to life, limb, health or morals; or,

(4.) As a messenger for delivering letters, telegrams, packages or bundles, to any known house of prostitution or assignation;

Shall be guilty of a misdemeanor. [L. '09, p. 948, § 194.]

Compare Minn. Code, § 4939.

See notes to next section.

§ 2447. Employment of Children.

Every person who shall employ, and every parent, guardian or other person having the care, custody or control of such child, who shall permit to be employed, by another, any male child under the age of fourteen years or any female child under the age of sixteen years at any labor whatever, in or in connection with any store, shop, factory, mine or any inside employment not connected with farm or house work, without the written permit thereto of a judge of a superior court of the county wherein such child may live, shall be guilty of a misdemeanor. [L. '09, p. 948, § 195.]

For former laws, see *infra*, § 6570.

See *infra*, § 5490, hours for employment in bakeries.

See *infra*, § 4715, forbidden employment of children.

See *infra*, §§ 6567-6571, employment of female and child labor.

§ 2448. Abortion Defined.

Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall—

(1.) Prescribe, supply, or administer to a woman, whether pregnant or not, or advise or cause her to take any medicine, drug or substance; or,

(2.) Use, or cause to be used, any instrument or other means;

Shall be guilty of abortion, and punished by imprisonment in the state penitentiary for not more than five years, or in the county jail for not more than one year. [L. '09, p. 948, § 196.]

Compare Minn. Code, § 4942.

For former laws, see *infra*, §§ 2758, 2759.

See *supra*, § 2398, taking drugs to produce miscarriage.

§ 2449. Pregnant Woman Attempting Abortion.

Every pregnant woman who shall take any medicine, drug or substance, or use or submit to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than one thousand dollars. [L. '09, p. 948, § 197.]

Compare Minn. Code, § 4943.

See last section, and § 2398, *supra*.

§ 2450. Selling Drugs, etc.

Every person who shall manufacture, sell or give away any instrument, drug, medicine, or other substance, knowing or intending that the same may be unlawfully used in procuring the miscarriage of a woman, shall be guilty of a gross misdemeanor. [L. '09, p. 949, § 198.]

Compare Minn. Code, § 4944.

§ 2451. Evidence.

In any prosecution for abortion, attempting abortion, or selling drugs unlawfully, no person shall be excused from testifying as a witness on the ground that said testimony would tend to incriminate himself. [L. '09, p. 949, § 199.]

Compare Minn. Code, § 4945.

§ 2452. Concealing Birth.

Every person who shall endeavor to conceal the birth of a child by any disposition of its dead body, whether the child died before or after its birth, shall be guilty of a gross misdemeanor. [L. '09, p. 949, § 200.]

Compare Minn. Code, § 4946.

§ 2453. Bigamy Defined—How Punished—Exceptions.

Every person who, having a husband or wife living, shall marry another person, or continue to cohabit with such second husband or wife in this state, shall be guilty of bigamy and be punished by imprisonment in the state penitentiary for not more than five years: Provided, that this section shall not extend to a person—

(1.) Whose former husband or wife has been absent for five years exclusively then last past, without being known to him or her within that time to be living, and believed to be dead; or,

(2.) Whose former marriage has been pronounced void, annulled or dissolved by a court of competent jurisdiction. [L. '09, p. 949, § 201.]

Compare Minn. Code, § 4947.

For former laws, see *infra*, §§ 2896-2898.

§ 2454. Punishment of Consort.

Every person who shall knowingly enter into a bigamous marriage with another, or, after such marriage, continue to cohabit with such other, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars. [L. '09, p. 950, § 202.]

Compare Minn. Code, § 4948.

For former laws, see *infra*, § 2899.

§ 2455. Incest.

Whenever any male and female persons, nearer of kin to each other than second cousins, computing by the rules of the civil law, whether of the half or the whole blood, shall have sexual intercourse together, both shall be guilty of incest and punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 950, § 203.]

Compare Minn. Code, § 4949.

For former laws, see *infra*, §§ 2891, 2892.

See *infra*, § 7151, marriage within prohibited degrees of consanguinity.

§ 2456. Crime Against Nature.

Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female person by the anus, or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 950, § 204.]

Compare Minn. Code, § 4950.

For former laws, see *infra*, § 2889.

§ 2457. Adultery.

Whenever any married woman shall have sexual intercourse with a man other than her husband, whether married or not, both shall be guilty of adultery and punished by imprisonment in the state penitentiary for not more than two years or by a fine of not more than one thousand dollars: Provided, that no prosecution for violation of this section shall be commenced except on complaint of the husband or wife, nor after one year from the commission of the offense. [L. '09, p. 950, § 205.]

Compare Minn. Code, § 4951.

For former laws, see *infra*, §§ 2893, 2894.

§ 2458. Lewdness.

Every person who shall lewdly and viciously cohabit with another not the husband or wife of such person, and every person who shall be guilty of open or gross lewdness, or make any open and indecent or obscene exposure of his person, or of the person of another, shall be guilty of a gross misdemeanor. [L. '09, p. 950, § 206.]

For former laws, see *infra*, §§ 2894, 2901, living in a state of adultery.

§ 2459. Obscene Literature.

Every person who—

(1.) Shall sell, lend, or give away, or have in his possession with intent to sell, lend, give away or show any obscene or indecent book, magazine,

pamphlet, newspaper, story paper, writing, picture, drawing, photograph, or any article or instrument of indecent or immoral character; or who shall design, copy, draw, photograph, print, utter, publish or otherwise prepare such a book, picture, drawing, paper or other article; or write or print any circular, advertisement or notice of any kind, or give oral information stating when, where, how or of whom such an indecent or obscene article or thing can be purchased or obtained; or,

(2.) Shall sell, lend, give away or have in his possession with intent to sell, lend, give away or show any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, or largely made up of criminal news, police reports, accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust or crime; or,

(3.) Shall exhibit within the view of any minor any of the books, papers or other things, hereinbefore enumerated; or,

(4.) Shall hire, use or employ, or having custody or control of his person shall permit any minor to sell, give away, or in any manner distribute any article hereinbefore mentioned; or,

(5.) Shall cause to be performed or exhibited, or engage in the performance or exhibition of any obscene, indecent or immoral show, act or performance;

Shall be guilty of a gross misdemeanor. [L. '09, p. 951, § 207.]

Compare Minn. Code, § 4954.

For former laws, see *infra*, § 2911.

§ 2460. Indecent Articles, etc.

Every person who shall expose for sale, loan or distribution, any instrument or article, or any drug or medicine, for the prevention of conception, or for causing unlawful abortion; or shall write, print, distribute or exhibit any card, circular, pamphlet, advertisement or notice of any kind, stating when, where, how, or of whom such article or medicine can be obtained, shall be guilty of a misdemeanor. [L. '09, p. 951, § 208.]

Compare Minn. Code, § 4955.

For former laws, see *infra*, § 2911.

§ 2461. Prohibited Publications.

Every person who shall publish, and every proprietor, manager or editor who shall permit to be published, in any book, newspaper, magazine or other printed publication circulated wholly or in part in this state—

(1.) Any detailed account of the commission or attempted commission of the crime of rape, carnal knowledge, seduction, adultery, sodomy or any other sexual crime, or of the trial of any person charged therewith; or,

(2.) Any detailed account of the execution of any person convicted of crime; or,

(3.) Any detailed statement of any evidence of indecent, obscene or immoral acts offered in any trial or proceeding; or,

(4.) Any interview with, advertisement for, communication from or account of the actions of any public prostitute, except upon a matter concerning public welfare;

Shall be guilty of a misdemeanor. [L. '09, p. 952, § 209.]

For former laws, see § 2911, *infra*.

§ 2462. Advertising Cures.

Every person who shall publish, and every proprietor, manager or editor who shall permit to be published in any publication whatever, and every person who shall cause to be displayed or distributed in any public manner any card or notice advertising any treatment or cure for any venereal disease or any disease or weakness of the sexual organs caused by sexual vice or abuse, shall be guilty of a misdemeanor. [L. '09, p. 952, § 210.]

See, also, § 2710, *infra*.

§ 2463. Advertising for Divorce Business.

Every person who shall cause to be published in any newspaper, magazine or other publication, or who shall cause or allow to be posted or distributed in any place frequented by the public any card or notice offering to procure or obtain, or to aid in procuring or obtaining any divorce or the dissolution or nullification of any marriage, or offering to appear or act as attorney or counsel in any suit for divorce, alimony, or the dissolution or nullification of any marriage, either in this state or elsewhere, shall be guilty of a misdemeanor. [L. '09, p. 952, § 211.]

Compare Minn. Code, § 5166.

For former laws, see *infra*, § 2900.

§ 2464. Lotteries Defined—A Nuisance—Drawing, How Punished.

A lottery is a scheme for the distribution of money or property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether it shall be called a lottery, raffle, gift enterprise, or by any other name, and is hereby declared unlawful and a public nuisance.

Every person who shall contrive, propose or draw a lottery, or shall assist in contriving, proposing or drawing a lottery, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 953, § 212.]

Compare Minn. Code, § 4959.

For former laws, see *infra*, § 2923.

§ 2465. Selling Tickets, Advertising.

Every person who shall sell, give, or in any way whatever furnish or transfer to or for another, a ticket, chance, share or interest, or any paper, certificate or instrument purporting to be or to represent a ticket, chance, share or interest in, or dependent upon the event of, a lottery, to be drawn within or without the state; or who by writing, printing, circular or letter, or in any other way shall advertise or publish the account of a lottery in or out of the state, stating how, when or where the same is to be or has been drawn, or what are the prizes therein, or any of them, or the price of a ticket, or any share or interest therein, or where or how it may be obtained, shall be guilty of a gross misdemeanor. [L. '09, p. 953, § 213.]

Compare Minn. Code, § 4960.

For former laws, see *infra*, § 2923.

§ 2466. Disposal of Property by Lottery—Keeping Office—Letting Building.

Every person who shall offer for sale or distribution in any way any real or personal property, or any interest therein, to be determined by lot or

chance, dependent upon the drawing of a lottery in or out of the state; or who shall sell, furnish or procure in any manner a chance or share, or any interest in property offered for sale or distribution in violation of this section, or a ticket or other evidence of any such chance, share or interest; or who shall open, set up, or keep for himself or another, an office or place for registering the number of tickets in a lottery in or out of the state, or for making, receiving, or registering any bets or stakes for the drawing or result of such lottery; or who shall advertise or in any way publish any account of an opening, setting up, or keeping of such an office or place; or who shall knowingly let, or permit to be used, any building or portion thereof for any of the purposes specified in this subdivision;

Shall be guilty of a gross misdemeanor. [L. '09, p. 953, § 214.]

Compare Minn. Code, § 4961.

§ 2467. Insuring Lottery Tickets—Advertising Offers to Insure.

Every person who shall insure, or receive any consideration for insuring, for or against the drawing of a ticket, share or interest in a lottery, or a number of such ticket, share or interest; or who shall receive any valuable consideration, upon an agreement to pay money or deliver property in the event that a ticket, share or interest, or a number of such a ticket, share or interest in a lottery shall prove fortunate or unfortunate, or shall be drawn or not drawn in a proper way or in a proper order; or who shall promise or agree or offer to pay money or deliver property, or to do or forbear to do any act for the benefit of any person, with or without consideration, upon any accident or contingency dependent upon the drawing thereof, or of any number or ticket therein, or who, by writing, printing, circular or letter, or in any way, shall advertise or publish an offer, notice or proposition in violation of the provisions of this section;

Shall be guilty of a gross misdemeanor. [L. '09, p. 954, § 215.]

Compare Minn. Code, § 4962.

§ 2468. Lotteries Out of State—Advertisement by Nonresidents.

The provisions of this subdivision are applicable to lotteries drawn, or to be drawn out of the state, whether authorized or not by the laws of the state or country where they are to be drawn, in the same manner as to those in the state, and every provision of law relating to advertising lotteries or offers to insure lottery tickets, shall be applicable, whenever the advertisement was published, or the letter or circular sent or delivered, through or in the state, though the person causing or procuring the same to be published, sent or delivered was out of the state at the time of so doing. [L. '09, p. 954, § 216.]

Compare Minn. Code, § 4963.

§ 2469. Conducting Gambling.

Every person who shall open, conduct, carry on or operate, whether as owner, manager, agent, dealer, clerk, or employee, and whether for hire or not, any gambling game or game of chance, played with cards, dice, or any other device, or any scheme or device whereby any money or property or any representative of either, may be bet, wagered or hazarded upon any chance, or any uncertain or contingent event, shall be a common gambler, and

shall be punished by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 955, § 217.]

For former laws, see *infra*, §§ 2924-2926, 2931.

§ 2470. Gambling.

Every person who shall bet, wager or hazard any money or property, or any representative of either, upon any game, scheme or device, opened, conducted, carried on or operated in violation of the last section shall be guilty of a misdemeanor. [L. '09, p. 955, § 218.]

For former laws, see *infra*, § 2924 et seq.

§ 2471. Swindling.

Every person who, by color, or aid of any trick or sleight of hand performance, or by any fraud or fraudulent scheme, cards, dice, or device, shall win for himself or for another any money or property, or representative of either, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 955, § 219.]

Compare Minn. Code, § 4969.

§ 2472. Possession of Gambling Devices.

Every person who shall have in his possession or shall permit to be placed or kept in any building or boat, or part thereof, owned, leased or occupied by him, any table, slot machine, or any other article, device or apparatus of a kind commonly used for gambling, or operated for the losing or winning of any money or property, or any representative of either, upon any chance or uncertain or contingent event, shall be guilty of a gross misdemeanor. [L. '09, p. 955, § 220.]

Compare Minn. Code, § 4965.

For former law, see *infra*, § 2932.

Possession of slot machines as *prima facie* evidence, and disposition of fines, see *infra*, §§ 2933, 2934.

§ 2473. Poolselling and Book-making.

Every person, whether acting in his own behalf, or as an agent, servant or employee of another person within or outside of this state, who shall sell any pool, make any book, or receive, record, register, transmit or forward any bet or wager, or any money or property or thing of value designed or intended to be bet, wagered or hazarded, upon the result of any contest or trial of skill, speed or endurance between men or beasts, whether such contest or trial take place within or outside of this state, or upon the result of any lot, chance, casualty, or uncertain or contingent event whatever, shall be punished by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 956, § 221.]

See *infra*, § 2721, race-track gambling.

§ 2474. Allowing Building to be Used.

Every person being in possession or control of any tent, building, float or vessel, or part thereof, who shall knowingly permit the same, or any part thereof, to be used for gambling, swindling, poolselling, or book-making, or for betting, wagering or hazarding money or property, or any representative of either, upon any game, scheme or device, or upon the result of any lot,

chance, or uncertain or contingent event whatever, shall be guilty of a gross misdemeanor. [L. '09, p. 956, § 222.]

For former laws, see *infra*, § 2926.

§ 2475. Bucket-shop Defined.

A bucket-shop is hereby defined to be a shed, tent, tenement, booth, building, float or vessel, or any part thereof, wherein may be made contracts respecting the purchase or sale upon margin or credit of any commodities, securities, or property, or option for the purchase thereof, wherein both parties intend that such contract shall or may be terminated, closed and settled; either;

(1.) Upon the basis of the market prices quoted or made on any board of trade or exchange upon which such commodities, securities or property may be dealt in; or,

(2.) When the market prices for such commodities, securities or property shall reach a certain figure in any such board of trade or exchange; or,

(3.) On the basis of the difference in the market prices at which said commodities, securities or property are, or purport to be, bought and sold. [L. '09, p. 956, § 223.]

Compare N. Y. P. C., § 355a.

§ 2476. Maintaining Bucket-shop—Penalty.

Every person, whether in his own behalf, or as agent, servant or employee of another person, within or outside of this state, who shall open, conduct or carry on any bucket-shop, or make or offer to make any contract described in the last section, or with intent to make such a contract, or assist therein, shall receive, exhibit, or display, any statement of market prices of any commodities, securities, or property, shall be punished by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 957, § 224.]

Compare N. Y. P. C., § 355b.

§ 2477. Written Statement to be Furnished—Presumption.

Every person, whether in his own behalf, or as the servant, agent or employee of another person, within or outside of this state, who shall buy or sell for another, or execute any order for the purchase or sale of any commodities, securities or property, upon margin or credit, whether for immediate or future delivery, shall, upon written demand therefor, furnish such principal or customer with a written statement containing the names of the persons from whom such property was bought, or to whom it has been sold, as the case may be, the time when, the place where, the amount of, and the price at which the same was either bought or sold; and if such person shall refuse or neglect to furnish such statement within forty-eight hours after such written demand, such refusal shall be *prima facie* evidence as against him that such purchase or sale was made in violation of section 2476. [L. '09, p. 957, § 225.]

§ 2478. Seizure and Disposition of Gambling Devices.

It shall be the duty of all peace officers to search for and seize all tables, slot machines, or other article, machine, device or apparatus of the kind commonly used for gambling, or operated for the winning or losing of money

or property, or any representative of either, upon any chance or uncertain or contingent event, and all property useful in the operation or maintenance of a bucket-shop, and take the same before a magistrate. If in the judgment of such magistrate any of such articles may be useful as evidence in the trial of any case, he may order the same held for such trial or delivered to the prosecuting attorney; otherwise, he shall order the same to be forthwith destroyed. After the final hearing and disposition of any case in which any of said articles may be held or used as evidence, whether such case result in a conviction or acquittal, the magistrate or judge having jurisdiction of such case shall forthwith order all such articles destroyed. [L. '09, p. 957, § 226.]

Compare N. Y. P. C., §§ 355c, 345, 346, 347.
See supra, §§ 2237-2240, search-warrants.

§ 2479. Bunco-steering.

Every person who shall entice or induce another, upon any pretense, to go to any place where any gambling game, scheme or device, or any trick, sleight-of-hand performance, fraud or fraudulent scheme, cards, dice or device, is being conducted or operated; or while in such place shall entice or induce another to bet, wager or hazard any money or property, or representative of either, upon any such game, scheme, device, trick, sleight-of-hand performance, fraud or fraudulent scheme, cards, dice, or device, or to execute any obligation for the payment of money, or delivery of property, or to lose, advance, or loan any money or property, or representative of either, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 957, § 227.]

§ 2480. Evidence—Testimony of Player.

No person shall be excused from giving testimony concerning any offense committed by another against any of the provisions of sections 2469 or 2473, inclusive by reason of his having bet or played at the prohibited game or device. [L. '09, p. 957, § 228.]

§ 2481. Pawnbrokers and Second-hand Dealers—Duty to Record Transactions.

It shall be the duty of every pawnbroker and second-hand dealer doing business in any city of the first class in this state to maintain in his place of business a book or other permanent record in which shall be legibly written in the English language, at the time of each loan, purchase or sale, a record thereof containing—

- (1.) The date of the transaction;
- (2.) The name of the person or employee conducting the same;
- (3.) The name, age, street and house number, and a general description of the dress, complexion, color of hair, and facial appearance of the person with whom the transaction is had;
- (4.) The name and street and house number of the owner of the property bought or received in pledge;
- (5.) The street and house number of the place from which the property bought or received in pledge was last removed;
- (6.) A description of the property bought or received in pledge, which in the case of watches shall contain the name of the maker and the number

of both the works and the case, and in the case of jewelry shall contain a description of all letters and marks inscribed thereon: Provided, that when the article bought or received is furniture, or the contents of any house or room actually inspected on the premises, a general record of the transaction shall be sufficient;

(7.) The price paid or the amount loaned;

(8.) The names and street and house numbers of all persons witnessing the transaction; and

(9.) The number of any pawn ticket issued therefor. [L. '09, p. 959, § 229.]

Query, whether this and the following sections are within the title of the act. See note to § 2304, *supra*.

§ 2482. Inspection of Records and Goods.

Such record, and all goods received, shall at all times during the ordinary hours of business be open to the inspection of the prosecuting attorney or of any peace officer. [L. '09, p. 959, § 230.]

See note to last section.

§ 2483. Report to Chief of Police.

Every pawnbroker and second-hand dealer doing business in any city of the first and second class shall, before noon of each day, furnish to the chief of police of such city, on such forms as such chief of police may provide therefor, a full, true and correct transcript of the record of all transactions had on the preceding day, and having good cause to believe that any property in his possession has been previously lost or stolen, he shall forthwith report such fact to the chief of police, together with the name of the owner, if known, and the date when, and the name of the person from whom the same was received by him. [L. '09, p. 960, § 231.]

See note to § 2481.

§ 2484. Retention of Property.

No property bought or received in pledge by any pawnbroker or second-hand dealer shall be removed from his place of business, except when redeemed by the owner thereof, within four days after the receipt thereof shall have been reported to the chief of police as herein provided. [L. '09, p. 960, § 232.]

See note to § 2481.

§ 2485. Penalty.

Every pawnbroker or second-hand dealer, and every clerk, agent or employee of such pawnbroker or second-hand dealer, who shall—

(1.) Fail to make an entry of any material matter in his book or record kept as provided for in section 2483; or,

(2.) Make any false entry therein; or,

(3.) Falsify, obliterate, destroy or remove from his place of business such book or record; or,

(4.) Refuse to allow the prosecuting attorney or any peace officer to inspect the same, or any goods in his possession, during the ordinary hours of business; or,

(5.) Report any material matter falsely to the chief of police; or,

(6.) Having forms provided therefor, shall fail before noon of each day to furnish the chief of police with a full, true and correct transcript of the record of all transactions had on the previous day, it being the intent of this section that Saturday's business may be reported on Monday; or,

(7.) Fail to report forthwith to the chief of police the possession of any property which he may have good cause to believe has been lost or stolen, together with the name of the owner, if known, and the date when, and the name of the person from whom the same was received by him; or,

(8.) Remove, or allow to be removed from his place of business, except upon redemption by the owner thereof, any property received, within four days after the receipt thereof shall have been reported to the chief of police; or,

(9.) Receive any property from any person under the age of twenty-one years, any common drunkard, any habitual user of narcotic drugs, any habitual criminal, any person in an intoxicated condition, any known thief or receiver of stolen property, or any known associate of such thief or receiver of stolen property, whether such person be acting in his own behalf or as the agent of another;

Shall be guilty of a misdemeanor. [L. '09, p. 960, § 233.]

See note to § 2481.

§ 2486. Rates of Interest and Sale of Pledged Property.

All pawnbrokers are authorized to charge and receive interest at the rate of three per cent a month for money loaned on the security of personal property actually received in pledge, and every person who shall ask or receive a higher rate of interest or discount on any such loan, or on any actual or pretended sale, or redemption of personal property, or who shall sell any property held for redemption within ninety days after the period for redemption shall have expired, shall be guilty of a misdemeanor. [L. '09, p. 961, § 234.]

See note to § 2481.

See infra, § 6251, legal rate of interest.

§ 2487. "Pawnbroker" Defined.

Every person engaged, in whole or in part, in the business of loaning money on the security of pledges, deposits or conditional sales of personal property, shall be deemed to be a pawnbroker. [L. '09, p. 961, § 235.]

§ 2488. "Second-hand Dealer" Defined.

Every person engaged in whole or in part in the business of buying or selling second-hand personal property, metal junk, or melted metals, shall be deemed to be a second-hand dealer. [L. '09, p. 961, § 236.]

§ 2489. Rights of Sepulture—Dissection, When Permitted.

The right to dissect the dead body of a human being shall be limited to cases specially provided by statute or by the direction or will of the deceased; cases where a coroner is authorized to hold an inquest upon the body, and then only as he may authorize dissection; and cases where the husband, wife or next of kin charged by law with the duty of burial shall authorize dissection for the purpose of ascertaining the cause of death, and then only to the extent so authorized. Every person who shall make, cause or procure

to be made any dissection of the body of a human being, except as hereinbefore provided, shall be guilty of a gross misdemeanor. [L. '09, p. 962, § 237.]

Compare Minn. Code, § 4975.

For former laws, see *infra*, § 2913.

See *infra*, § 7052, undertaker acting without a license.

Dissection when permitted, see *infra*, §§ 8408-8411.

§ 2490. Burial or Cremating.

Except in cases of dissection provided for in the last section, and where a dead body shall rightfully be carried through or removed from the state for the purpose of burial elsewhere, every dead body of a human being lying within this state, and the remains of any dissected body, after dissection, shall be decently buried, or cremated within a reasonable time after death. [L. '09, p. 962, § 238.]

Compare Minn. Code, § 4976.

See *infra*, § 5443, interment, transportation, etc., without burial permit.

§ 2491. Opening Grave—Stealing Body—Receiving Same.

Every person who shall remove the dead body of a human being, or any part thereof, from a grave, vault, or other place where the same has been buried or deposited awaiting burial or cremation, without authority of law, with intent to sell the same, or for the purpose of securing a reward for its return, or for dissection, or from malice or wantonness, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars, or by both.

Every person who shall purchase or receive, except for burial or cremation, any such dead body, or any part thereof, knowing that the same has been removed contrary to the foregoing provisions, shall be punished by imprisonment in the state penitentiary for not more than three years, or by a fine of not more than one thousand dollars, or by both.

Every person who shall open a grave or any other place of interment, temporary or otherwise, or a building where such dead body is deposited while awaiting burial or cremation, with intent to remove said body or any part thereof, for the purpose of selling or demanding money for the same, for dissection, from malice or wantonness, or with intent to sell or remove the coffin or of any part thereof, or anything attached thereto, or any vestment, or other article interred, or intended to be interred with the body, shall be punished by imprisonment in the state penitentiary for not more than three years or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 962, § 239.]

Compare Minn. Code, § 4977.

For former laws, see *infra*, § 2913.

§ 2492. Interfering with Dead Body or Funeral.

Every person who shall arrest or attach the dead body of a human being upon a debt or demand, or shall detain or claim to detain it for any debt or demand, or upon any pretended lien or charge; or who, without authority of law, shall obstruct or detain a person engaged in carrying or accompanying the dead body of a human being to a place of burial or cremation shall be guilty of a misdemeanor. [L. '09, p. 963, § 240.]

Compare Minn. Code, § 4978.

§ 2493. Opening Road Through Cemetery.

Every person who shall make or open any road, or construct any railway, turnpike, canal, or other public easement over, through, in, or upon, such part of any inclosure as may be used for the burial of the dead, without authority of law or the consent of the owner thereof, shall be guilty of a misdemeanor. [L. '09, p. 963, § 241.]

Compare Minn. Code, § 4979.

§ 2494. Sabbath-breaking—Defined.

Every person who, on the first day of the week, shall promote any noisy or boisterous sport or amusement, disturbing the peace of the day; or who shall conduct or carry on, or perform or employ any labor about any trade or manufacture, except livery-stables, garages and works of necessity or charity conducted in an orderly manner so as not to interfere with the repose and religious liberty of the community; or who shall open any drinking saloon, or sell, offer or expose for sale, any personal property, shall be guilty of a misdemeanor: Provided, that meals, without intoxicating liquors, may be served on the premises or elsewhere by caterers, and prepared tobacco, milk, fruit, confectionery, newspapers, magazines, medical and surgical appliances may be sold in a quiet and orderly manner. In works of necessity or charity is included whatever is needful during the day for the good order or health or comfort of a community; but keeping open a barber-shop, shaving or cutting hair shall not be deemed a work of necessity or charity, and nothing in this section shall be construed to permit the sale of uncooked meats, groceries, clothing, boots or shoes. [L. '09, p. 963, § 242.]

Compare Minn. Code, §§ 4980, 4981; N. Y. P. C., §§ 259, 260, 262, 266, 267, 269.
For former laws, see *infra*, §§ 2915, 2916, 2917.

§ 2495. Obstructing View of Saloon.

Every person being the owner or manager of or an employee in any drinking saloon who shall obstruct the view of the inside thereof from the outside by means of any screen, shade or other devices on any day shall be guilty of a misdemeanor. [L. '09, p. 964, § 243.]

See *infra*, §§ 2694-2696, liquor sales.

§ 2496. Observance of Other Day.

It shall be a sufficient defense to a prosecution for performing work or labor on the first day of the week that the defendant uniformly keeps another day of the week as holy time and that the act complained of was done in such manner as [will] not disturb others in the observance of the Sabbath. [L. '09, p. 964, § 244.]

Compare Minn. Code, § 4952; N. Y. P. C., § 264.

§ 2497. Service of Process on the Sabbath Prohibited.

Every person who shall serve any legal process on the Sabbath day, except in case of a breach, or apprehended breach, of the peace, or when sued out for the apprehension of a person charged with a crime, or where such service is expressly authorized by statute, shall be guilty of a misdemeanor. [L. '09, p. 964, § 245.]

Compare Minn. Code, § 4983; N. Y. P. C., § 268.

§ 2498. Preventing Religious Act.

Every person who by threats or violence shall willfully prevent another person from performing any lawful act enjoined upon or recommended to him by the religion which he professes, shall be guilty of a misdemeanor. [L. '09, p. 965, § 246.]

Compare Minn. Code, § 4984; N. Y. P. C., § 273.
See next section.

§ 2499. Disturbing Religious Meeting.

Every person who shall willfully disturb, interrupt, or disquiet any assemblage of people met for religious worship—

(1.) By noisy, rude or indecent behavior, profane discourse, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting; or,

(2.) By exhibiting shows or plays, or promoting any racing of animals, or gaming of any description, or engaging in any boisterous or noisy amusement; or,

(3.) By disturbing in any manner, without authority of law within one mile thereof, free passage along a highway to the place of such meeting, or by maliciously cutting or otherwise injuring or disturbing a harness, conveyance, tent or other property belonging to any person in attendance upon such meeting;

Shall be guilty of a misdemeanor. [L. '09, p. 965, § 247.]

Compare Minn. Code, § 4985; N. Y. P. C., §§ 274, 275.

For former laws, see *infra*, §§ 2766, 2767.

See *infra*, § 2547, disturbing any meeting.

See *infra*, § 4697, disturbing public school.

CHAPTER VII.

CRIMES AGAINST PUBLIC HEALTH AND SAFETY.

§ 2500. Public Nuisance.

A public nuisance is a crime against the order and economy of the state. Every place

(1.) Wherein any gambling, swindling game or device, book-making, pool-selling, or bucket-shop or any agency therefor shall be conducted, or any article, apparatus or device useful therefor shall be kept; or,

(2.) Wherein any fighting between men or animals or birds shall be conducted; or,

(3.) Wherein any intoxicating liquors are kept for unlawful use, sale or distribution; or,

(4.) Where vagrants resort; and

Every act unlawfully done and every omission to perform a duty, which act or omission

(1.) Shall annoy, injure or endanger the safety, health, comfort, or repose of any considerable number of persons; or,

(2.) Shall offend public decency; or,

(3.) Shall unlawfully interfere with, befoul, obstruct, or tend to obstruct, or render dangerous for passage, a lake, navigable river, bay, stream, canal or basin, or a public park, square, street, alley or highway; or,

(4.) Shall in any way render a considerable number of persons insecure in life or the use of property;

Shall be a public nuisance. [L. '09, p. 965, § 248.]

Compare Minn. Code, § 4987; N. Y. P. C., § 385.

For former laws, see *infra*, § 2960.

See *infra*, § 6073, refusing to remove combustible material.

See *infra*, § 6278, druggist, room for sale of liquor.

See *infra*, § 6304, place of selling liquor a nuisance.

See *infra*, § 7992, pollution of water supply.

See *infra*, §§ 8307-8323, public nuisances, defined.

§ 2501. Unequal Damage.

An act which affects a considerable number of persons in any of the ways specified in section 2500, is not less a public nuisance because the extent of the damages is unequal. [L. '09, p. 966, § 249.]

Compare N. Y. P. C., § 386.

§ 2502. Maintaining or Permitting Nuisance.

Every person who shall commit or maintain a public nuisance, for which no special punishment is prescribed; or who shall willfully omit or refuse to perform any legal duty relating to the removal of such nuisance; and every person who shall let, or permit to be used, any building or boat, or portion thereof, knowing that it is intended to be, or is being used, for committing or maintaining any such nuisance, shall be guilty of a misdemeanor. [L. '09, p. 966, § 250.]

Compare Minn. Code, § 4988; N. Y. P. C., §§ 387, 388.

§ 2503. Abatement of Nuisance.

Any court or magistrate before whom there may be pending any proceeding for a violation of section 2502, shall, in addition to any fine or other punishment which it may impose for such violation, order such nuisance abated, and all property unlawfully used in the maintenance thereof destroyed by the sheriff at the cost of the defendant. [L. '09, p. 966, § 251.]

See, also, *infra*, § 8321.

§ 2504. Keeping Explosives Unlawfully.

Every person who shall make or keep any explosive or combustible substance in any city or village, or carry it through the streets thereof in a quantity, or manner prohibited by law, or by ordinance of such municipality; and every person who, by careless, negligent or unauthorized use or management of any such explosive or combustible substance, shall injure or cause injury to the person or property of another, shall be guilty of a misdemeanor. [L. '09, p. 966, § 252.]

Compare Minn. Code, § 4989.

See *supra*, § 2403, killing by explosives unlawfully kept.

See *infra*, § 2652, endangering life by explosives.

See *infra*, § 2653, damaging building.

§ 2505. Possession of Uninspected Oils and Effacing Brands from Oil Barrels.

Every person who shall sell, or offer for sale, or have in his possession with intent to sell, or who shall knowingly use for illuminating purposes, any oil, or other petroleum product, which shall not have been tested and approved by the state oil inspector, or who shall sell or dispose of any empty

oil barrel, cask or package without thoroughly removing and effacing all inspection brands thereon, shall be guilty of a misdemeanor. [L. '09, p. 967, § 253.]

See *infra*, §§ 6055-6058, selling oils without inspection.

§ 2506. Transporting Explosives.

Any person who shall put up for sale, or who shall deliver to any warehouseman, dock, depot, or common carrier, any package, cask or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder or other explosive or combustible substance, without having printed thereon in a conspicuous place in large letters the word "Explosive," shall be guilty of a misdemeanor. [L. '09, p. 967, § 254.]

Former laws, see § 2959, *infra*.

§ 2507. Person Omitting to Label Drugs, or Labeling Them Wrongly.

Every person who, in putting up any drug, medicine, or food, or preparation used in medical practice, or making up any prescription, or filling any order for drugs, medicines, food or preparation shall put any untrue label, stamp or other designation of contents upon any box, bottle or other package containing a drug, medicine, food or preparation used in medical practice, or substitute or dispense a different article for or in lieu of any article prescribed, ordered, or demanded, or put up a greater or less quantity of any ingredient specified in any such prescription, order or demand than that prescribed, ordered, or demanded, or otherwise deviate from the terms of the prescription, order, or demand by substituting one drug for another, shall be guilty of a misdemeanor: Provided, however, that, except in the case of physician's prescriptions, nothing herein contained shall be deemed or construed to prevent or impair or in any manner affect the right of an apothecary, druggist, pharmacist or other person to recommend the purchase of an article other than that ordered, required or demanded, but of a similar nature, or to sell such other article in place or in lieu of an article ordered, required or demanded, with the knowledge and consent of the purchaser. [L. '09, p. 967, § 255.]

Compare N. Y. P. C., § 401.

See *infra*, § 3137, sale of adulterated spraying compounds.

See *infra*, § 3049, sale of fertilizers without label.

See *infra*, § 3068, sale of impure seeds.

§ 2508. Selling Poison Without Labeling and Recording the Sale.

It shall be unlawful for any person to sell at retail or furnish any of the poisons named in the schedules hereinafter set forth, without affixing or causing to be affixed to the bottle, box, vessel or package, a label containing the name of the article and the word "poison" distinctly shown, with the name and place of business of the seller, all printed in red ink, together with the name of such poison printed or written thereon in plain, legible characters, which schedules are as follows, to wit:

SCHEDULE "A."

Arsenic, cyanide of potassium, hydrocyanic acid, cocaine, morphine, strychnia and all other poisonous vegetable alkaloids and their salts, oil of bitter almonds, containing hydrocyanic acid, opium and its preparations,

except paregoric and such others as contain less than two grains of opium to the ounce.

SCHEDULE "B."

Aconite, belladonna, cantharides, colchicum, conium, cotton root, digitalis, ergot, hellebore, henbane, phytolacca, strophanthus, oil of tansy, veratrum viride and their pharmaceutical preparations, arsenical solutions, carbolic acid, chloral hydrate, chloroform, corrosive sublimate, creosote, croton oil, mineral acids, oxalic acid, paris green, salts of lead, salts of zinc, white hellebore or any drug, chemical or preparation which, according to standard works on medicine or materia medica, is liable to be destructive to adult human life in quantities of sixty grains or less. Every person who shall dispose of or sell at retail or furnish any poisons included under schedule A shall, before delivering the same, make or cause to be made an entry in a book kept for that purpose, stating the date of sale, the name and address of the purchaser, the name and the quantity of the poison, the purpose for which it is represented by the purchaser to be required and the name of the dispenser, such book to be always open for inspection by the proper authorities, and to be preserved for at least five years after the last entry. He shall not deliver any of said poisons to any minor, intoxicated person, or person known to be of unsound mind, or to any person without satisfying himself that the purchaser is aware of its poisonous character and that the said poison is to be used for a legitimate purpose. The foregoing portions of this section shall not apply to the dispensing of medicines, or poisons on physicians' prescriptions. Wholesale dealers in drugs, medicines, pharmaceutical preparations or chemicals shall affix or cause to be affixed to every bottle, box, parcel or outer inclosure of an original package containing any of the articles enumerated under said schedule A, a suitable brand in red ink with the word "poison" upon it. Every person who shall violate any of the provisions of this section shall be guilty of a misdemeanor. [L. '09, p. 968, § 256.]

Compare N. Y. P. C., § 402.

For former laws, see *infra*, §§ 2937, 2939.

See *infra*, § 8458, sale of adulterated drugs.

See *infra*, § 8459, sale of poisons without recording.

See *infra*, § 5453, sale of adulterated articles prohibited.

§ 2509. Regulating the Sale of Narcotic Drugs.

It shall be unlawful for any person to sell, furnish or dispose of any opium, morphine, alkaloid cocaine, or alpha or beta eucaine, or any derivative, mixture or preparation of any of them, except upon the signed prescription of a physician duly licensed under the laws of this state, which prescription shall be retained by the person dispensing the same, shall be filled but once, and of which no copy shall be taken by any person. The person dispensing the same shall at the time thereof indorse on the back of such prescription the name and street and house number of the person to whom dispensed; and the proprietor or manager of the store where dispensed shall keep all such prescriptions in a permanent file, separate from all other prescriptions, in his place of business for the period of two years after the same shall have been dispensed, and shall at any time allow the same to be inspected, and copies thereof to be made by any peace officer, the prosecuting attorney of the county where sold, or any authorized inspector of drugs:

Provided, that nothing herein contained shall prohibit any manufacturer or licensed druggist from selling or delivering any of the drugs named to a person known to be a licensed physician or licensed druggist, nor prohibit a physician from dispensing the same in good faith to his patients, nor prohibit the sale of patent or proprietary medicines containing opium or morphine, in combination or compound with other active elements wherein the dose of opium is less than one-quarter grain, or the dose of morphine is less than one-twentieth grain. Every person who shall violate any of the provisions of this section shall be guilty of a gross misdemeanor. [L. '09, p. 969, § 257.]

Compare N. Y. P. C., § 405a.

See on this subject §§ 2942, 2944, 6275, *infra*.

§ 2510. Fraudulent Prescription by Physician.

Every physician who shall sell or give to or prescribe for any person any opium, morphine, alkaloid cocaine, or alpha or beta eucaine, or any derivative, mixture or preparation of any of them, or any intoxicating liquor, except to a patient believed in good faith to require the same for medicinal use, and in quantities proportioned to the needs of such patient, shall be guilty of a gross misdemeanor. [L. '09, p. 970, § 258.]

See *infra*, § 8406, deception in treating sick.

See *infra*, § 8401, false personation by, a felony.

See *infra*, § 8400, practicing without a license.

§ 2511. Presenting Fraudulent Prescription:

Every person who shall falsely make, forge or alter, or, knowing the same to have been falsely made, forged or altered, shall present to any druggist a physician's prescription with intent by means thereof to procure from such druggist any opium, morphine, alkaloid cocaine, or alpha or beta eucaine, or any derivative, mixture or preparation of any of them, or any intoxicating liquor, shall be guilty of a misdemeanor. [L. '09, p. 970, § 259.]

§ 2512. Regulating the Sale of Milk and Cream in Cities.

Every person who, in any city of the first class, shall sell or deliver, or offer for sale, or have in his possession with intent to sell or deliver any milk or cream without having a permit therefor duly issued by the commissioner of health, health officer, or inspector of milk in such city, or without having such permit displayed in a conspicuous manner in his place of business, or without having the number of such permit and the name of the owner thereof painted in a conspicuous manner on both outer sides of every wagon or other vehicle used for the sale or delivery of milk or cream, shall be guilty of a misdemeanor. [L. '09, p. 971, § 260.]

See on this subject, *infra*, § 5469.

§ 2513. Regulating the Sale of Milk and Cream Generally.

Every person who shall sell, or deliver, or offer for sale, or have in his possession with intent to sell or deliver—

(1.) Any unwholesome milk or cream; or,

(2.) Any milk containing less than 8.75 per cent of milk solids, exclusive of fat, or less than 3.25 per cent of fat, except in the manner and under the conditions prescribed for the sale of skimmed milk; or,

(3.) Any skimmed milk, except under the title "skimmed milk" and in cans or bottles plainly stamped in some prominent and conspicuous manner with the words, "skimmed milk"; and every person who shall sell or serve or keep for sale or service in any hotel, restaurant or boarding-house any skimmed milk without having displayed in a conspicuous manner in every room where so sold or served, placards bearing in large letters the words, "Skimmed Milk Sold Here"; or,

(4.) Any skimmed milk containing less than 9.3 per cent of milk solids, exclusive of fat; or,

(5.) Any cream containing less than eighteen per cent of fat, shall be guilty of a misdemeanor. [L. '09, p. 971, § 261.]

For former law see *infra*, § 2948.

See *infra*, §§ 5446, 5448, sale of impure milk and cream.

See *infra*, § 5448i, violating law for sale of dairy products.

See *infra*, § 5447a, skimmed milk to be labeled.

See *infra*, § 5470, failure to register place of business.

§ 2514. "Unwholesome" Defined.

Milk or cream shall be deemed unwholesome in the following cases:

(1.) When any foreign substance has been added thereto or placed therein for the purpose of thickening, coloring or preserving the same; or,

(2.) When it contains any pathogenic bacteria or germs, pus cells, or blood cells; or,

(3.) When it contains more than two hundred thousand bacteria or germs of all kinds to the cubic centimetre; or,

(4.) When any water has been added thereto; or,

(5.) When any part of it has been drawn from a cow fed on refuse or unwholesome food; or,

(6.) When any part of it has been drawn from a dirty cow or cow kept in an unclean shed, barn or yard, or has been milked by unclean milkers; or,

(7.) When any part of it has been contaminated; or,

(8.) When any part it has been drawn from an unhealthy cow; or,

(9.) When any part of it has been exposed to any contagious or infectious disease; or,

(10.) When any part of it has been drawn from a cow within ten days before or five days after parturition, or in any case before such cow shall be free from fever.

No milk or cream once unwholesome can thereafter be rendered wholesome or salable. [L. '09, p. 971, § 262.]

See *infra*, §§ 5472-5474, standard milk.

See *infra*, § 5451, sale of adulterated milk a felony.

See *infra*, § 5471, sale of impure milk.

See *infra*, § 5475, counterfeiting seal of standard milk.

§ 2515. "Skimmed Milk" Defined.

Any milk from which the cream has been removed or which contains less than 3.25 per cent. of butter fat shall be deemed to be "skimmed milk." [L. '09, p. 972, § 263.]

See *infra*, § 5447a, skimmed milk to be labeled.

§ 2516. Willfully Poisoning Food.

Every person who shall willfully mingle poison in any food, drink or medicine intended or prepared for the use of a human being, and every per-

son who shall willfully poison any spring, well or reservoir of water, shall be punished by imprisonment in the state penitentiary for not less than five years, or by a fine of not less than one thousand dollars. [L. '09, p. 972, § 264.]

Compare Minn. Code, § 5175.

For former laws, see *infra*, § 2752.

Administering poison with intent to kill, see *infra*, § 2751.

See *supra*, §§ 2513, 2514, and notes, adulteration of milk.

See *infra*, §§ 5449, 5450, poisonous substances in food.

Administering poisons to animals, see *infra*, § 3289.

See § 2940, *infra*, putting out poison without notice.

§ 2517. Dangerous Weapons—Evidence.

Every person who shall manufacture, sell or dispose of or have in his possession any instrument or weapon of the kind usually known as slung shot, sand club, or metal knuckles; shall furtively carry, or conceal any dagger, dirk, knife, pistol, or other dangerous weapon; or who shall use any contrivance or device for suppressing the noise of any firearm, shall be guilty of a gross misdemeanor. [L. '09, p. 972, § 265.]

Compare Minn. Code, § 4996; N. Y. P. C., §§ 409, 410.

For former laws, see *infra*, § 2774.

§ 2518. Setting Spring Gun.

Every person who shall set a so-called trap, spring pistol, rifle, or other deadly weapon, shall be punished as follows:

(1.) If no injury result therefrom to any human being, by imprisonment in the county jail for not more than one year or by a fine of not more than one thousand dollars, or by both.

(2.) If injuries not fatal result therefrom to any human being, by imprisonment in the state penitentiary for not more than twenty years.

(3.) If the death of a human being results therefrom, by imprisonment in the state penitentiary for not more than twenty years. [L. '09, p. 973, § 266.]

Compare Minn. Code, § 5176.

§ 2519. Obstruction of Extinguishment of Fire.

Every person who, with intent to prevent or obstruct the extinguishment of any fire, shall cut or remove any bell rope, wire or other apparatus for communicating an alarm of fire, or cut, injure or destroy any engine, hose, or other fire apparatus, and otherwise prevent or obstruct the extinguishment of any fire, shall be punished by imprisonment in the state penitentiary for not more than five years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars. [L. '09, p. 973, § 267.]

Compare Minn. Code, § 5144.

§ 2520. Obstructing Firemen.

Every person who at the burning of any building shall be guilty of any disobedience to the lawful orders of a public officer or fireman or of resistance to or interference with the lawful efforts of any fireman, or company of firemen to extinguish the same, or of disorderly conduct likely to interfere with the extinguishment thereof, or who shall forbid, prevent or dissuade

others from assisting to extinguish such fire, shall be guilty of a misdemeanor. [L. '09, p. 973, § 268.]

Compare Minn. Code, § 4998; N. Y. P. C., § 414.

§ 2521. Smoking, Where Prohibited.

Every person who shall light a pipe, cigar or cigarette in, or who shall enter with a lighted pipe, cigar or cigarette, any mill or other building on which is posted in a conspicuous place over and near each principal entrance a notice in plain, legible characters, stating that no smoking is allowed in such building, shall be guilty of a misdemeanor. [L. '09, p. 974, § 269.]

Compare Minn. Code, § 5145.

§ 2522. Setting Prohibited Fire.

Every person who, within a county where there is a deputy fire warden, shall burn any wood or brush between the 1st day of June and the 1st day of October in each year, without first obtaining a permit thereto from such deputy fire warden, or who, in setting, guarding or extinguishing any fire in such wood or brush, shall willfully or negligently fail to observe any precaution prescribed by such deputy fire warden, shall be guilty of a misdemeanor: Provided, that nothing herein contained shall prevent any person from burning any logs, stumps, drift or brush heaps in small quantities isolated from other inflammable material under personal supervision and such other safeguard as shall prevent such fires from spreading. [L. '09, p. 974, § 270.]

See infra, §§ 5283, 5284, forest fires in closed season.
See infra, § 5144, maliciously setting prairie fire.
See infra, § 5285, engines without spark-arrester.
See infra, § 5146, kindling without malice.
See infra, § 5148, kindling while hunting or fishing.
See infra, § 5147, setting to lumber and produce.

§ 2523. Negligent Fires.

Every person who shall willfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, or who shall fail to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor. [L. '09, p. 974, § 271.]

Compare Minn. Code, § 4997; N. Y. P. C., § 413.
See, also, §§ 5144, 5145, 5284, infra.
See infra, § 6074, negligence of fire marshal.

§ 2524. Operating Dangerous Engine.

Every person who shall operate or permit to be operated in dangerous proximity to any brush, grass or other inflammable material, any engine or boiler which is not equipped with a modern spark-arrester, in good condition, shall be guilty of a misdemeanor. [L. '09, p. 974, § 272.]

For former laws, see infra, § 5285.

§ 2525. Door of Public Buildings to Swing Outward.

The doors of all theaters, opera houses, school buildings, churches, public halls, or places used for public entertainments, exhibitions or meetings, which are used exclusively or in part for admission to or egress from the same, or any part thereof, shall be so hung and arranged as to open outwardly, and

during any exhibition, entertainment or meeting, shall be kept unlocked and unfastened, and in such condition that in case of danger or necessity, immediate escape from such building shall not be prevented or delayed; and every agent or lessee of any such building who shall rent the same or allow it to be used for any of the aforesaid public purposes without having the doors thereof hung and arranged as hereinbefore provided, shall, for each violation of any provision of this section, be guilty of a misdemeanor. [L. '09, p. 974, § 273.]

Compare Minn. Code, § 5179.

§ 2526. Engineer Who cannot Read.

Every person who, as an officer of a corporation or otherwise, shall knowingly employ as an engineer or engine driver, to run a locomotive or train on any railway, any person who cannot read time tables and ordinary handwriting; and every person who, being unable to read time tables and ordinary handwriting, shall act as an engineer or run a locomotive or train on any railway, shall be guilty of a gross misdemeanor. [L. '09, p. 975, § 274.]

Compare Minn. Code, § 4999; N. Y. P. C., § 418.

§ 2527. Intoxication of Employees.

Every person who, being employed upon any railway, as engineer, motorman, gripman, conductor, switch tender, fireman, bridge tender, flagman or signalman, or person having charge of stations, starting, regulating or running trains upon a railway, or person employed as captain, engineer or other officer of a vessel propelled by steam, or being the driver of any animal or vehicle upon any public street, shall be intoxicated while engaged in the discharge of any such duties, shall be guilty of a gross misdemeanor. [L. '09, p. 975, § 275.]

Compare Minn. Code, § 5000; N. Y. P. C., § 420.

§ 2528. Failure to Ring Bell.

Every engineer driving a locomotive on any railway who shall fail to ring the bell or sound the whistle upon such locomotive, or cause the same to be rung or sounded at least eighty rods from any place where such railway crosses a traveled road or street on the same level (except in cities), or to continue the ringing of such bell or sounding of such whistle until such locomotive shall have crossed such road or street, shall be guilty of a misdemeanor. [L. '09, p. 975, § 276.]

Compare Minn. Code, § 5001; N. Y. P. C., § 421.

See infra, § 8661, failing to stop at crossings.

§ 2529. Other Violations of Duty.

Every engineer, motorman, gripman, conductor, brakeman, switch tender, train dispatcher or other officer, agent or servant of any railway company, who shall be guilty of any willful violation or omission of his duty as such officer agent, or servant, by which human life or safety shall be endangered, for which no punishment is specially prescribed, shall be guilty of a misdemeanor. [L. '09, p. 976, § 277.]

Compare Minn. Code, § 5002.

See infra, §§ 8607, 8642, discrimination.

See infra, §§ 8637, 8651, refusing inspection of books, etc.

See infra, § 8639, failing to report to commission.
 See infra, §§ 8653-8658, 8672-8687, requirements as to railroad equipment.
 See infra, § 8660, violation of commission act.
 See infra, § 8717, cruelty to stock in transit.
 See infra, § 8720, failure to redeem ticket.
 See infra, § 8787, refusing to accept weights.
 See infra, § 9073, equipment of street-cars.
 See infra, § 9078, incompetent street-car employees.

§ 2530. Obstructing and Delaying Train.

Every person who shall willfully obstruct, hinder or delay the passage of any car lawfully operated upon any railway, shall be guilty of a misdemeanor. [L. '09, p. 976, § 278.]

Compare Minn. Code, § 5177.

§ 2531. Speed of Automobile.

Every person who shall drive or operate, and every owner, lessee or other person in charge thereof who shall permit to be driven or operated, any automobile or motor vehicle on any public road, highway, park or parkway, street or avenue, within this state—

(1.) Within a thickly settled or business portion of any city or town, at a rate of speed faster than one mile in five minutes; or,

(2.) Over any crossing, cross-walk or street intersection within the limits of any city or town, when any person is upon the same, at a rate of speed faster than one mile in fifteen minutes; or,

(3.) At any other place, at a rate of speed faster than one mile in two and one-half minutes; or,

(4.) Upon any public road, highway, park or parkway, street or avenue, at any unsafe or unreasonable rate of speed, having proper regard to the safety of any other person or persons using the same, shall be guilty of a misdemeanor. [L. '09, p. 976, § 279.]

See infra, §§ 5571-5574, exceeding speed limit.

See infra, § 5559, law of the road.

§ 2532. Liability of Person Handling Steamboat or Steam Boiler.

Every person who shall apply, or cause to be applied to a steam boiler a higher pressure of steam than is allowed by law, or by an inspector, officer or person authorized to limit the same; every captain or other person having charge of the machinery or boiler in a steamboat used for the conveyance of passengers on the waters of this state, who, from ignorance or gross neglect, or for the purpose of increasing the speed of such boat, shall create or cause to be created an undue or unsafe pressure of steam; and every engineer or other person having charge of a steam boiler, steam engine or other apparatus for generating or employing steam, who shall willfully or from ignorance or gross neglect, create or allow to be created such an undue quantity of steam as to burst the boiler, engine or apparatus, or cause any other accident, whereby human life is endangered, shall be guilty of a gross misdemeanor. [L. '09, p. 977, § 280.]

For former laws, see infra, § 2736.

§ 2533. Endangering Life by Refusal to Labor.

Every person who shall willfully and maliciously, either alone or in combination with others, break a contract of service or employment, knowing

or having reasonable cause to believe that the consequence of his so doing will be to endanger human life or to cause grievous bodily injury, or to expose valuable property to destruction or serious injury, shall be guilty of a misdemeanor. [L. '09, p. 977, § 281.]

§ 2534. Disturbance on Highway.

Every person who shall ride or drive any horse upon a public highway, in a manner likely to endanger the safety or life of another, or on such highway shall create or participate in any noise, disturbance or other demonstration calculated or intended to frighten, intimidate or disturb any person, shall be guilty of a misdemeanor. [L. '09, p. 977, § 282.]

For former laws, see *infra*, §§ 2770, 5561.

See *infra*, §§ 2718, 2719, unlawful use of bridges.

See *infra*, § 2720, throwing glass on highway.

See *infra*, §§ 2949, 2950, obstructing highways.

See *infra*, § 5561, racing horses on highway.

See *infra*, § 5891, trespass on closed highway.

See *infra*, § 7762, unlawful use of bicycle paths.

§ 2535. Dangerous Exhibitions.

Every proprietor, lessee or occupant of any place of amusement, or any plat of ground or building, who shall allow it to be used for the exhibition of skill in throwing any sharp instrument or in shooting any bow gun, pistol or firearm of any description, at or toward any human being, shall be guilty of a misdemeanor. [L. '09, p. 977, § 283.]

Compare Minn. Code, § 5004; N. Y. P. C., § 427.

§ 2536. Sale of Cigarettes and Cigarette Materials.

Every person who shall manufacture, sell, give away or distribute, or have in his possession any cigarettes, cigarette papers or cigarette wrappers, shall be guilty of a misdemeanor. [L. '09, p. 978, § 284.]

For former laws, see *infra*, § 2968.

See *infra*, §§ 2697-2701, prohibited sales of cigarettes and materials.

§ 2537. Deposit of Unwholesome Substance.

Every person who shall deposit, leave or keep, on or near a highway or route of public travel, on land or water, any unwholesome substance; or who shall establish, maintain or carry on, upon or near a highway or route of public travel, on land or water, any business, trade or manufacture which is noisome or detrimental to the public health; or who shall deposit or cast into any lake, creek or river, wholly or partly in this state, the offal from or the dead body of any animal, shall be guilty of a gross misdemeanor. [L. '09, p. 978, § 285.]

Compare Minn. Code, § 5007; N. Y. P. C., § 431.

See *infra*, § 6073, refusing to remove a nuisance.

See, also, *infra*, § 8308.

§ 2538. Allowing Vicious Animal at Large.

Every person having the care or custody of any animal known to possess any vicious or dangerous tendencies, who shall allow the same to escape or run at large in any place or manner liable to endanger the safety of any person, shall be guilty of a misdemeanor; and any person may lawfully kill such

animal when reasonably necessary to protect his own or the public safety. [L. '09, p. 978, § 286.]

See *infra*, §§ 3171, 3182, stock running at large, unlawful when.

§ 2539. Exposing Contagious Disease.

Every person who shall willfully expose himself to another, or any animal affected with any contagious or infectious disease, in any public place or thoroughfare, except upon his or its necessary removal in a manner not dangerous to the public health; and every person so affected who shall expose any other person thereto without his knowledge, shall be guilty of a misdemeanor. [L. '09, p. 978, § 287.]

Compare Minn. Code, § 5008; N. Y. P. C., § 434.

See *infra*, § 5553, regulations as to tuberculosis in cities.

§ 2540. Diseased Animals.

Every owner or person having charge thereof, who shall import or drive into this state, or who shall turn out or suffer to run at large upon any highway or uninclosed lands, or upon any lands adjoining the inclosed lands kept by any person for pasture; or who shall keep or allow to be kept in any barn with other animals, or water or allow to be watered at any public drinking fountain or watering place, any animal having any contagious or infectious disease; or who shall sell, let or dispose of any such animal knowing it to be so diseased, without first apprising the purchaser or person taking it of the existence of such disease, shall be guilty of a misdemeanor. [L. '09, p. 978, § 288.]

Compare Minn. Code, §§ 5009, 5010.

Former laws, see *infra*, § 2969.

See *infra*, §§ 3207, 3231, failure to report.

See *infra*, §§ 3210, 3214, 3228, importation of infected cattle and sheep.

See *infra*, § 3224, violating sheep quarantine.

See *infra*, § 3229, sale of diseased sheep.

See *infra*, § 3235, injuries by inspectors.

See *infra*, § 3281, abandonment of old or diseased animals.

See *infra*, § 3264, sale of infected bees.

§ 2541. Diseased Animals—Disposal of Carcasses.

Every person owning or having in charge any animal that has died or been killed on account of disease, shall immediately bury the carcass thereof at least three feet underground, or cause the same to be consumed by fire. No person shall sell or offer to sell or give away the carcass of any animal which died or was killed on account of disease, or convey the same along any public road or land not his own. Every violation of any provision of this section shall be a misdemeanor. [L. '09, p. 979, § 289.]

Compare Minn. Code, § 5011.

§ 2542. Polluting Water Supply.

Every person who shall deposit or suffer to be deposited in any spring, well, stream, river or lake, the water of which is or may be used for drinking purposes, or on any property owned, leased or otherwise controlled by any municipal corporation, corporation or person as a watershed or drainage basin for a public or private water system, any matter or thing whatever, dangerous or deleterious to health, or any matter or thing which may or

could pollute the waters of such spring, well, stream, river, lake or water system, shall be guilty of a gross misdemeanor. [L. '09, p. 979, § 290.]

Compare Minn. Code, § 5012.

See *infra*, § 5198, corrupting waters with explosives.

See *infra*, § 5200, casting sawdust in streams.

See *infra*, § 7992, nuisance by pollution of water supply.

§ 2543. **Furnishing Impure Water.**

Every owner, agent, manager, operator or other person having charge of any waterworks furnishing water for public or private use, who shall knowingly permit any act or omit any duty or precaution by reason whereof the purity or healthfulness of the water supplied shall become impaired, shall be guilty of a gross misdemeanor. [L. '09, p. 979, § 291.]

§ 2544. **Practicing Medicine Without a License.**

Every person who shall practice medicine or surgery or dentistry without having obtained and filed in the office of the county clerk where he resides, a license as required by law, shall be guilty of a gross misdemeanor. [L. '09, p. 980, § 292.]

See *infra*, § 2673, engaging in any pursuit without required license.

See *infra*, §§ 8400, 8411, practicing medicine without a license.

See *infra*, § 8421, practicing dentistry without a license.

See *infra*, §§ 8427, 8439, practicing veterinary without a license.

§ 2545. **Unlicensed Pilotage.**

Every person not duly licensed thereto, who shall pilot or offer to pilot any vessel into, within or out of the waters of Juan de Fuca Strait or Puget Sound, shall be guilty of a misdemeanor: Provided, that nothing herein shall prohibit a master of a vessel acting as his own pilot, nor compel a master or owner of any vessel to take out a pilot license for that purpose. [L. '09, p. 980, § 293.]

See *infra*, §§ 8243, 8245, piloting without a license.

CHAPTER VIII.

CRIMES AGAINST THE PUBLIC PEACE.

§ 2546. **Armed Association.**

It shall not be lawful for any body of men other than the National Guard or troops of the United States, to associate themselves together as a military company with arms, without the consent of the governor; but members of social and benevolent associations are not prohibited from wearing swords. Every person who shall associate with others in violation of this section shall be guilty of a misdemeanor. [L. '09, p. 980, § 294.]

See § 2775, *infra*, armed bodies of men for any purpose.

§ 2547. **Disturbing Meeting.**

Every person who, without [authority] of law, shall willfully disturb any assembly or meeting not unlawful in its character, shall be guilty of a misdemeanor. [L. '09, p. 980, § 295.]

Compare Minn. Code, § 5013; N. Y. P. C., § 448.

See *supra*, § 2499, disturbing religious meeting.

See *infra*, § 4697, disturbing school.

§ 2548. Riot Defined.

Whenever three or more persons, having assembled for any purpose, shall disturb the public peace by using force or violence to any other person, or to property, or shall threaten or attempt to commit such disturbance, or to do any unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they shall be guilty of a riot. [L. '09, p. 980, § 296.]

Compare Minn. Code, § 5014; N. Y. P. C., § 449.
For former laws, see *infra*, §§ 2763, 2764.

§ 2549. Riot—Penalty.

Every person who shall be guilty of riot or of participating therein, by being present at, or by instigation, permitting or aiding the same shall be punished as follows:

(1.) If the purpose of the assembly or the acts done therein, or intended by the persons engaged, shall be to resist the enforcement of a statute of this state or of the United States, or to obstruct any public officer of this state or the United States in serving or executing any process or other mandate of a court, or in the performance of any other duty, or if at the time of the riot the offender shall carry a firearm or any other dangerous weapon, or shall be disguised, by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars.

(2.) If the offender shall direct, advise, encourage or solicit other persons present or participating in a riot or assembly to acts of force or violence, by imprisonment in the state penitentiary for not more than two years, or by a fine of not more than one thousand dollars.

(3.) In every other case, by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars. [L. '09, p. 981, § 297.]

Compare Minn. Code, § 5015; N. Y. P. C., § 450.
For former laws, see *infra*, § 2764.

§ 2550. Unlawful Assembly.

Whenever three or more persons shall assemble with intent—

(1.) To commit any unlawful act by force; or,

(2.) To carry out any purpose in such manner as to disturb the public peace; or,

(3.) Being assembled, shall attempt or threaten any act tending toward a breach of the peace, or an injury to persons or property, or any unlawful act—such an assembly is unlawful, and every person participating therein by his presence, aid or instigation, shall be guilty of a gross misdemeanor. [L. '09, p. 981, § 298.]

Compare Minn. Code, § 5016; N. Y. P. C., § 451.
Former laws, see *infra*, § 2764.

§ 2551. Remaining After Warning.

Every person who shall remain present at the place of an unlawful meeting after having been warned to disperse by a magistrate or public officer, unless as a public officer or at the request of such officer he is assisting in dispersing the same, or in protecting persons or property or in arresting offenders, shall be guilty of a misdemeanor. [L. '09, p. 981, § 299.]

Compare Minn. Code, § 5017; N. Y. P. C., § 454.
Former laws, see *infra*, § 2765.

§ 2552. Destruction of Property.

Whenever any of the persons so unlawfully assembled, shall pull down or destroy any dwelling-house or other building, or any shop, steamboat or vessel, he shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars. [L. '09, p. 982, § 300.]

Compare Minn. Code, § 5018.
Former laws, see *infra*, § 2768.

§ 2553. Disguised and Masked Persons.

Any assemblage of three or more persons, disguised by having their faces painted, discolored, colored or concealed, shall be unlawful; and every person so disguised present thereat, shall be guilty of a gross misdemeanor; but nothing herein shall be construed as prohibiting any peaceful assemblage for a masquerade or fancy dress ball or entertainment. [L. '09, p. 982, § 301.]

Compare N. Y. P. C., § 452.

§ 2554. Owner of Premises Allowing Masqueraders.

Every person, being the owner, lessee or occupant of any building, boat, or part thereof, who shall knowingly permit therein any unlawful assemblage of masked persons, shall be guilty of a gross misdemeanor. [L. '09, p. 982, § 302.]

Compare N. Y. P. C., § 453.

§ 2555. Combination to Resist Process.

Every person who shall enter into a combination with another to resist the execution of any legal process or other mandate of a court of competent jurisdiction, under circumstances not amounting to a riot, shall be guilty of a gross misdemeanor. [L. '09, p. 982, § 303.]

Compare Minn. Code, § 5019; N. Y. P. C., § 457.
See *supra*, § 2366, resisting officer.

§ 2556. Prize-fighting—Aiding, Betting or Stake-holding.

Every person who shall engage in, instigate, aid, encourage, or do any act to further an encounter or fight with or without weapons, between two or more persons, or a fight commonly called a ring or prize-fight, or an encounter commonly called a sparring match, with or without gloves, or who shall send a challenge or acceptance of a challenge for such an encounter or fight; or who shall carry or deliver such a challenge or acceptance, or shall train or assist any person in training or preparing for such an encounter or fight; or who shall bet, stake or wager money or other property upon the result of such encounter or fight; or hold or undertake to hold any money or other property so staked or wagered, to be delivered to, or for the benefit of the winner thereof, shall be guilty of a gross misdemeanor: Provided, that nothing in this section shall be so construed as to interfere with members of private clubs sparring or fencing for exercise among themselves. [L. '09, p. 982, § 304.]

Compare Minn. Code, §§ 5020, 5021; N. Y. P. C., § 458.
For former laws as to affrays, see *infra*, §§ 2769, 2908, 2909, 2910.

§ 2557. Apprehension of Persons About to Fight.

Whenever it shall be made to appear to any magistrate that there are reasonable grounds to apprehend that an offense specified in section 2556 is about to be committed within his jurisdiction, or by any person therein, he shall issue his warrant for the arrest of the person or persons so about to offend, and if upon any such person being brought before him it shall appear that there is reasonable ground to believe that he is about to commit such an offense he shall require him to give bond to the state, approved by him, in a sum not exceeding one thousand dollars, with or without sureties, conditioned that such person shall not within one year thereof commit such an offense. On failure to furnish such bond such person shall be committed to the county jail. [L. '09, p. 983, § 305.]

Compare Minn. Code, § 5022; N. Y. P. C., § 463.
For former laws, see *infra*, § 2910.

§ 2558. Forcible Entry and Detainer.

Every person who shall unlawfully use, or encourage or assist another in unlawfully using, any force or violence in entering upon or detaining any lands or other possessions of another; and every person who, having removed or been removed therefrom pursuant to the order or direction of any court, tribunal or officer, shall afterwards return to settle or reside unlawfully upon, or take possession of, such lands or possessions, shall be guilty of a misdemeanor. [L. '09, p. 983, § 306.]

Compare Minn. Code, § 5023; N. Y. P. C., §§ 465, 466.
For former laws, see *infra*, § 2821.

§ 2559. Aiming or Discharging Firearms.

Every person who shall aim any gun, pistol, revolver or other firearm, whether loaded or not, at or toward any human being, or who shall willfully discharge any firearm, air gun or other weapon, or throw any deadly missile in a public place, or in any place where any person might be endangered thereby, although no injury result, shall be guilty of a misdemeanor. [L. '09, p. 984, § 307.]

Compare Minn. Code, § 5024.
For former laws, compare §§ 2371-2373.

§ 2560. Use of Firearms by Minor.

No minor under the age of fourteen years shall handle or have in his possession or under his control, except while accompanied by or under the immediate charge of his parent or guardian, any firearm of any kind for hunting or target practice or for other purposes. Every person violating any of the foregoing provisions, or aiding or knowingly permitting any such minor to violate the same, shall be guilty of a misdemeanor. [L. '09, p. 984, § 308.]

Compare Minn. Code, § 5025.
See *supra*, § 2445, giving toy pistol, revolver, etc.

§ 2561. Offenses in Public Conveyances.

Every person who shall willfully use profane, offensive, or indecent language or engage in any quarrel in any public conveyance, or interfere with or annoy any passenger therein, or, having refused to pay the proper fare, shall fail to leave any such conveyance upon demand, or, with intent to

avoid the payment of fare shall ride upon any car or engine not commonly used for the carriage of passengers, shall be guilty of a misdemeanor. [L. '09, p. 984, § 309.]

Compare Minn. Code, § 5026.

§ 2562. Criminal Anarchy Defined.

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocating of such doctrine either by word of mouth or writing is a felony. [L. '09, p. 984, § 310.]

Compare N. Y. P. C., § 468a.

For former laws, see *infra*, §§ 2781, 2782.

§ 2563. Advocacy of Criminal Anarchy.

Every person who—

(1.) By word of mouth or writing shall advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or

(2.) Shall print, publish, edit, issue or knowingly circulate, sell, distribute or publicly display any book, paper, document, or written or printed matter in any form containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

(3.) Shall openly, willfully and deliberately justify by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or

(4.) Shall organize or help to organize or become a member of or voluntarily assemble with any society, group or assembly of persons formed to teach or advocate such doctrine,

Shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 984, § 311.]

For former laws, see *infra*, §§ 2781, 2782.

§ 2564. Publishing Matter Inciting Breach of Peace.

Every person who shall willfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor. [L. '09, p. 985, § 312.]

§ 2565. Liability of Editors and Others.

Every editor or proprietor of a book, newspaper or serial and every manager of a partnership or incorporated association by which a book, news-

paper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution therefor, the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes by another who had no authority from him to make the publication, and was retracted by him as soon as known. [L. '09, p. 985, § 313.]

For former laws, see *infra*, § 2782.

§ 2566. Assemblages of Anarchists.

Whenever two or more persons assemble for the purpose of advocating or teaching the doctrines of criminal anarchy, as defined in section 2562, such an assembly is unlawful, and every person voluntarily participating therein by his presence, aid or instigation, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or both. [L. '09, p. 986, § 314.]

For former laws, see *infra*, § 2783.

§ 2567. Permitting Premises to be Used for Assemblages of Anarchists.

Every owner, agent, superintendent, janitor, caretaker or occupant of any place, building or room, who shall willfully and knowingly permit therein any assemblage of persons prohibited by section 2566, or who, after notification that the premises are so used, shall permit such use to be continued, shall be guilty of a gross misdemeanor. [L. '09, p. 986, § 315.]

§ 2568. Witness' Privilege.

No person shall be excused from giving evidence upon an investigation or prosecution for any of the offenses specified in sections 2563 or 2566, upon the ground that the evidence might tend to criminate himself. [L. '09, p. 986, § 316.]

CHAPTER IX.

CRIMES AGAINST PROPERTY.

§ 2569. Misappropriation and Falsification of Accounts by Public Officer.

Every public officer, and every other person receiving money on behalf or for or on account of the people of the state or of any department of the state government or of any bureau or fund created by law in which the people are directly or indirectly interested, or for or on account of any county, city, town or any school, diking, drainage or irrigation district, who—

(1.) Shall appropriate to his own use or the use of any person not entitled thereto, without authority of law, any money so received by him as such officer or otherwise; or

(2.) Shall knowingly keep any false account, or make any false entry or erasure in any account, of or relating to any money so received by him; or

(3.) Shall fraudulently alter, falsify, conceal, destroy or obliterate any such account; or

(4.) Shall willfully omit or refuse to pay over to the state, its officer or agent authorized by law to receive the same, or to such county, city, town or such school, diking, drainage or irrigation district or to the proper officer or authority empowered to demand and receive the same, any money received by him as such officer when it is a duty imposed upon him by law to

pay over and account for the same, shall be punished by imprisonment in the state penitentiary for not more than fifteen years. [L. '09, p. 986, § 317.]

Compare Minn. Code, § 5029.

For former laws, see *infra*, §§ 2878, 2879.

See *infra*, § 2812, making profit out of public funds.

See *infra*, §§ 4079-4083, taking illegal fees by county officers.

See *infra*, § 4090, accepting fees, pension papers.

See *infra*, § 4688, failure of county superintendent to pay over moneys.

See *infra*, § 5026, creating deficiencies by officers.

See *infra*, § 5031, failure of officers to pay money into state treasury.

§ 2570. Other Violations by Officers.

Every officer or other person mentioned in section 2569, who shall willfully disobey any provision of law regulating his official conduct in cases other than those specified in said section, shall be guilty of a gross misdemeanor. [L. '09, p. 987, § 318.]

Compare Minn. Code, § 5030.

For former laws, see *infra*, §§ 2878, 2879.

§ 2571. Misappropriation, etc., by Treasurer.

Every state, county, city or town treasurer who shall willfully misappropriate any moneys, funds or securities received by or deposited with him as such treasurer, or who shall be guilty of any other malfeasance or willful neglect of duty in his office, shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than five thousand dollars. [L. '09, p. 987, § 319.]

Compare Minn. Code, § 5031.

See *infra*, § 9032, embezzlement by state treasurer.

See § 2569, misappropriation by public officer.

§ 2572. Arson—First Degree.

Every person who shall willfully—

(1.) Burn or set on fire in the night-time the dwelling-house of another, or any building in which there shall be at the time a human being; or

(2.) Set any fire manifestly dangerous to any human life, shall be guilty of arson in the first degree and be punished by imprisonment in the state penitentiary for not less than five years. [L. '09, p. 987, § 320.]

Compare Minn. Code, § 5036; N. Y. P. C., § 486.

For former laws, see *infra*, § 2784.

§ 2573. Arson—Second Degree.

Every person who, under circumstances not amounting to arson in the first degree, shall willfully burn or set on fire any building, or any structure or erection appurtenant to or adjoining any building, or any wharf, dock, threshing-machine, threshing-engine, bridge or trestle, or any hay, grain, crop or timber, whether cut or standing, or any lumber, shingle or other timber products, shall be guilty of arson in the second degree, and shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars. [L. '09, p. 988, § 321.]

Compare Minn. Code, § 5037; N. Y. P. C., § 487.

See *infra*, § 5146, setting fire on another's land.

See *infra*, § 5147, setting to lumber and produce.

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§ 2574. Contiguous Fires.

Whenever any building or structure which may be the subject of arson in either the first or second degree shall be so situated as to be manifestly endangered by any fire and shall subsequently be set on fire thereby, any person participating in setting such fire shall be deemed to have participated in setting such building or structure on fire. [L. '09, p. 988, § 322.]

Compare Minn. Code, § 5039.

§ 2575. "Set on Fire" Defined.

A building, structure or any property mentioned in section 2573 shall be deemed "set on fire," whenever any part thereof or anything therein shall be scorched, charred or burned. [L. '09, p. 988, § 323.]

§ 2576. Ownership of Building.

To constitute arson it shall not be necessary that another person than the defendant should have had ownership in the building or structure set on fire. [L. '09, p. 988, § 324.]

Compare Minn. Code, § 5040.

§ 2577. Preparation is Attempt.

Any willful preparation made by any person with a view to setting fire to any building or structure shall be deemed to be an attempt to commit the crime of arson, and shall be punished as such. [L. '09, p. 988, § 325.]

For former laws, see *infra*, § 2790, identical section.

See *supra*, § 2264, attempts, how punished.

§ 2578. Burglary—First Degree.

Every person who, with intent to commit some crime therein, shall enter in the night-time, the dwelling-house of another in which there shall be at the time a human being—

(1.) Being armed with a dangerous weapon; or

(2.) Arming himself therein with such weapon; or

(3.) Being assisted by a confederate actually present; or

(4.) Who, while engaged in the night-time in effecting such entrance, or in committing any crime in such building or in escaping therefrom, shall assault any person; or

(5.) Who, with intent to commit some crime therein, shall break and enter any bank, postoffice, railway express or railway mail-car, shall be guilty of burglary in the first degree and shall be punished by imprisonment in the state penitentiary for not less than five years. [L. '09, p. 989, § 326.]

Compare N. Y. P. C., § 496.

For former laws, see *infra*, § 2794.

§ 2579. Burglary—Second Degree.

Every person who, with intent to commit some crime therein shall, under circumstances not amounting to burglary in the first degree, enter the dwelling-house of another or break and enter, or, having committed a crime therein, shall break out of, any building or part thereof, or a room or other structure wherein any property is kept for use, sale or deposit, shall be guilty of burglary in the second degree and shall be punished by imprisonment in the state penitentiary for not more than fifteen years. [L. '09, p. 989, § 327.]

For former laws, see *infra*, § 2794.

§ 2580. Presumption of Intent.

Every person who shall unlawfully break and enter or unlawfully enter any building or structure enumerated in sections 2578 and 2579 shall be deemed to have broken and entered or entered the same with intent to commit a crime therein, unless such unlawful breaking and entering or unlawful entry shall be explained by testimony satisfactory to the jury to have been made without criminal intent. [L. '09, p. 989, § 328.]

For former laws, see *infra*, § 2795.

§ 2581. Crime in Building—Punished Separately.

Every person who, in the commission of a burglary shall commit any other crime, shall be punished therefor as well as for the burglary, and may be prosecuted for each crime separately. [L. '09, p. 990, § 329.]

Compare Minn. Code, § 5045.

§ 2582. Making or Having Burglar Tools.

Every person who shall make or mend or cause to be made or mended, or have in his possession in the day or night time, any engine, machine, tool, false key, pick lock, bit, nippers or implement adapted, designed or commonly used for the commission of burglary, larceny or other crime, under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a crime, or knowing that the same is intended to be so used, shall be guilty of a gross misdemeanor. The possession thereof except by a mechanic, artificer or tradesman at and in his established shop or place of business, open to public view, shall be *prima facie* evidence that such possession was had with intent to use or employ or allow the same to be used or employed in the commission of a crime. [L. '09, p. 990, § 330.]

Compare Minn. Code, § 5046; N. Y. P. C., § 508.

For former laws, see *infra*, §§ 2796, 2797.

§ 2583. Forgery—First Degree.

Every person who, with intent to defraud, shall forge any writing or instrument by which any claim, privilege, right, obligation or authority, or any right or title to property, real or personal, is or purports to be, or upon the happening of some future event may be, evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, or any request for the payment of money or delivery of property or any assurance of money or property, or any writing or instrument for the identification of any person, or any public record or paper on file in any public office, or any certified or authenticated copy of such record or paper, or any entry in any public or private record of account, or any judgment, decree, order, mandate, return, writ or process of any court, tribunal, judge, justice of the peace, commissioner or magistrate, or the official return or report of, or a license issued by, any public officer, or any pleading, demurrer, motion, affidavit, appearance, notice, cost-bill, statement of facts, bill of exceptions or proposed statement of facts, or bill of exceptions in any action or proceeding whether pending or not, or the draft of any bill or resolution that has been presented to either house of the legislature of this state, whether engrossed or not, or the great seal of this state, the seal of any public officer, court, notary public or corporation, or any public seal author-

ized or recognized by the laws of this or any other state or government, or any impression of any such seal; or shall forge or counterfeit any coin or money of any state or government, or any bank or treasury bill, any note or postage or revenue stamp; or who, without authority shall make or engrave any plate in the form or similitude of any writing, instrument, seal, coin, money, stamp or thing which may be the subject of forgery, shall be guilty of forgery in the first degree, and shall be punished by imprisonment in the state penitentiary for not more than twenty years. [L. '09, p. 990, § 331.]

Compare Minn. Code, § 5048; N. Y. P. C., §§ 509, 511.
For former laws, see *infra*, § 2816.

§ 2584. False Certificate to Certain Instruments.

Every officer authorized to take a proof or acknowledgment of an instrument which by law may be recorded, who shall willfully certify falsely that the execution of such instrument was acknowledged by any party thereto, or that the execution thereof was proved, shall be guilty of forgery in the first degree. [L. '09, p. 991, § 332.]

Compare Minn. Code, § 5049; N. Y. P. C., § 510.
See *supra*, § 2380, false certificates by officers.

§ 2585. Forgery—Second Degree.

Every person who, with intent to injure or defraud shall—

(1.) Make any false entry in any public or private record or account; or
(2.) Fail to make a true entry of any material matter in any public or private record or account; or

(3.) Forge any letter or written communication or copy or purported copy thereof, or send or deliver, or connive at the sending or delivery of any false or fictitious telegraph message or copy or purported copy thereof, whereby or wherein the sentiments, opinions, conduct, character, purpose, property, interests or rights of any person shall be misrepresented or may be injuriously affected, or, knowing any such letter, communication or message or any copy or purported copy thereof to be false, shall utter or publish the same or any copy or purported copy thereof as true, shall be guilty of forgery in the second degree, and shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than five thousand dollars. [L. '09, p. 991, § 333.]

Compare Minn. Code, §§ 5051, 5053; N. Y. P. C., §§ 514, 515.
See *infra*, § 4839, forgery in primary elections.
See *infra*, § 8900, forgery in land registrations.

§ 2586. Falsely Indicating Person as Corporate Officer.

The false making or forging of any instrument or writing purporting to have been issued by or in behalf of a corporation or association, state or government and bearing the pretended signature of any person therein falsely indicated as an agent or officer of such corporation, association, state or government, is forgery in the same degree as if that person were in truth such officer or agent of such corporation, association, state or government. [L. '09, p. 992, § 334.]

Compare Minn. Code, § 5059; N. Y. P. C., § 519.

§ 2587. Uttering Forged Instruments, Coins, etc., Forgery.

Every person who, knowing the same to be forged or altered, and with intent to defraud, shall utter, offer, dispose of or put off as true, or have in his possession with intent so to utter, offer, dispose of or put off any forged writing, instrument or other thing, the false making, forging or altering of which is punishable as forgery, shall be guilty of forgery in the same degree as if he had forged the same. [L. '09, p. 992, § 335.]

Compare Minn. Code, § 5060.

For former laws, see *infra*, § 2816.

§ 2588. True Writing Signed by Wrongdoer's Name.

Whenever the false making or uttering of any instrument or writing is forgery in any degree, every person who, with intent to defraud shall offer, dispose of or put off such an instrument or writing subscribed or indorsed in his own name or that of any other person, whether such signature be genuine or fictitious, under the pretense that such subscription or indorsement is the act of another person of the same name, or that of a person not in existence, shall be forgery in the same degree. [L. '09, p. 992, § 336.]

Compare Minn. Code, § 5061; N. Y. P. C., § 522.

§ 2589. Misconduct in Signing a Petition.

Every person who shall willfully sign the name of another person or of a fictitious person, or for any consideration, gratuity or reward shall sign his own name to or withdraw his name from any referendum or other petition circulated in pursuance of any law of this state or any municipal ordinance; or in signing his name to such petition shall willfully subscribe to any false statement concerning his age, citizenship, residence or other qualifications to sign the same; or knowing that any such petition contains any such false or wrongful signature or statement, shall file the same, or put the same off with intent that it should be filed, as a true and genuine petition, shall be guilty of a misdemeanor. [L. '09, p. 993, § 337.]

§ 2590. Definitions.

Within the provisions of this subdivision relating to forgery, a "written instrument," or a "writing," shall include an instrument partly written and partly printed or wholly printed with a written signature thereto, or any signature or writing purporting to be a signature of or intended to bind an individual, partnership, corporation or association or an officer thereof.

The words "forge," "forgery," "forged," and "forging," shall include false making, "counterfeiting" and the alteration, erasure or obliteration of a genuine instrument in whole or in part, the false making or counterfeiting of the signature of a party or witness, real or fictitious, and the placing or connecting together with intent to defraud, of different parts or the whole of several genuine instruments.

A plate is in the "form and similitude," of the genuine instrument forged, if the finished parts of the engraving thereupon shall resemble or conform to the similar parts of the genuine instrument. [L. '09, p. 993, § 338.]

Compare Minn. Code, § 5047.

⁴ "This subdivision" in this section refers to §§ 2585 to 2590, inclusive.

§ 2591. Possession of Counterfeit Coin.

Every person who shall have in his possession a counterfeit of any gold or silver coin, whether of the United States or any foreign country or government, knowing the same to be counterfeit, with intent to sell, utter, use, circulate or export the same as true or as false, or to cause the same to be so uttered or used, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 994, § 339.]

Compare Minn. Code, § 5062; N. Y. P. C., § 527.
For former laws, see *infra*, § 2819.

§ 2592. Advertising Counterfeit Money.

Every person who, with intent to defraud, shall print, circulate or distribute a letter, circular, card, pamphlet, handbill or any other written or printed matter offering or purporting to offer for sale, exchange or as a gift, counterfeit coin or paper money, or giving or purporting to give information where counterfeit coin or paper money can be procured, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than five thousand dollars. [L. '09, p. 994, § 340.]

Compare Minn. Code, § 5063; N. Y. P. C., § 527.

§ 2593. False Certificate of Registration of Animals—False Representation as to Breed.

Every person who, by color or aid of any false pretense, representation, token or writing shall obtain from any club, association, society or company for the improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal or bird in a herd-book, or other register of any such association, society or company, or a transfer of any such registration, and every person who shall knowingly represent an animal or bird for breeding purposes to be of a greater degree of any particular strain of blood than such animal actually possesses, shall be guilty of a gross misdemeanor. [L. '09, p. 994, § 341.]

Compare Minn. Code, § 5064; N. Y. P. C., § 566a.
For former laws, see §§ 2846, 2847.

§ 2594. Removing Lawful Brands.

Every person who shall willfully deface, obliterate, remove or alter any mark or brand placed by or with the authority of the owner thereof on any shingle bolt, log or stick of timber, or on any horse, mare, gelding, mule, cow, steer, bull, sheep, goat or hog, shall be punished by imprisonment in the state penitentiary for not more than five years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment. [L. '09, p. 994, § 342.]

Compare Minn. Code, § 5065.
For former laws, see §§ 2814, 2816, 2841, *infra*.

§ 2595. Imitating Lawful Brand.

Every person who, in any county, shall place upon any property, any brand or mark in the likeness or similitude of another brand or mark filed with the county auditor of such county by the owner thereof as a brand or mark for the designation or identification of a like kind of property, shall—

(1.) If done with intent to confuse or commingle such property with, or to appropriate to his own use, the property of such other owner, be guilty of a felony, and be punished by imprisonment in the state penitentiary for not more than five years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment; or

(2.) If done without such intent, shall be guilty of a misdemeanor. [L. '09, p. 995, § 343.]

Former laws, see *infra*, § 2816.

See *infra*, § 3160, violating private brands of stock.

§ 2596. Counterfeiting Trademark, Brand, etc.

Every person who shall use or display or have in his possession with intent to use or display, the genuine label, trademark, term, design, device, or form of advertisement of any person, corporation, association or union, lawfully filed for record in the office of the secretary of state, or the exclusive right to use which is guaranteed to any person, corporation, association or union, by the laws of the United States, without the written authority of such person, corporation, association or union, or who shall willfully forge or counterfeit or use or display or have in his possession with intent to use or display any representation, likeness, similitude, copy or imitation of any genuine label, trademark, term, design, device, or form of advertisement, so filed or protected, or any die, plate, stamp or other device for manufacturing the same, shall be guilty of a gross misdemeanor. [L. '09, p. 995, § 344.]

Compare Minn. Code, § 5056.

Former laws, see *infra*, § 2816.

See *infra*, § 5475, counterfeiting seal of standard milk.

See *infra*, §§ 9492-9495, 9502, counterfeiting and unlawful use of trademarks, etc.

See *infra*, §§ 7096, 7097, counterfeiting marks and brands on logs.

§ 2597. Displaying Goods with False Trademark.

Every person who shall knowingly sell, display or advertise, or have in his possession with intent to sell, any goods, wares, merchandise, mixture, preparation or compound having affixed thereto any label, trademark, term, design, device, or form of advertisement lawfully filed for record in the office of the secretary of state by any person, corporation, association or union, or the exclusive right to the use of which is guaranteed to such person, corporation, association or union under the laws of the United States, which label, trademark, term, design, device or form of advertisement shall have been used or affixed thereto without the written authority of such person, counterfeit representation, likeness, similitude, copy or imitation thereof, shall be guilty of a misdemeanor. [L. '09, p. 996, § 345.]

Compare Minn. Code, § 5068.

See *infra*, § 5456, and notes, sale of misbranded articles.

§ 2598. When Deemed Affixed.

A label, trademark, term, design, device or form of advertisement shall be deemed to be affixed to any goods, wares, merchandise, mixture, preparation or compound whenever it is in any manner placed in or upon either the article itself, or the box, bale, barrel, bottle, case, cask or other vessel or package, or the cover, wrapper, stopper, brand, label or other thing in, by

or with which the goods are packed, inclosed or otherwise prepared for sale or distribution. [L. '09, p. 996, § 346.]

Compare Minn. Code, § 5071.

§ 2599. Fraudulent Registration of Trademark.

Every person who shall for himself, or on behalf of any other person, corporation, association or union, procure the filing of any label, trademark, term, design, device or form of advertisement, with the secretary of state by any fraudulent means, shall be guilty of a misdemeanor. [L. '09, p. 996, § 347.]

Compare Minn. Code, § 5075.

§ 2600. Form and Similitude, Defined.

A plate, label, trademark, term, design, device or form of advertisement is in the form and similitude of the genuine instrument imitated if the finished parts of the engraving thereupon shall resemble or conform to the similar parts of the genuine instrument. [L. '09, p. 996, § 348.]

Compare Minn. Code, § 5047.

§ 2601. Larceny.

Every person who, with intent to deprive or defraud the owner thereof—

(1.) Shall take, lead or drive away the property of another; or

(2.) Shall obtain from the owner or another the possession of or title to any property by color or aid of any order for the payment or delivery of property or money or any check or draft, knowing that the maker or drawer of such order, check or draft was not authorized or entitled to make or draw the same, or by color or aid of any fraudulent or false representation, personation or pretense or by any false token or writing or by any trick, device, bunco game or fortune-telling; or

(3.) Having any property in his possession, custody or control, as bailee, factor, pledgee, servant, attorney, agent, employee, trustee, executor, administrator, guardian or officer of any person, estate, association or corporation, or as a public officer, or a person authorized by agreement or by competent authority to take or hold such possession, custody or control, or as a finder thereof, shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; or

(4.) Having received any property by reason of a mistake, shall with knowledge of such mistake secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; and

(5.) Every person who, knowing the same to have been so appropriated, shall bring into this state, or buy, sell, receive or aid in concealing or withholding any property wrongfully appropriated, whether within or outside of this state, in such manner as to constitute larceny under the provisions of this act—

Steals such property and shall be guilty of larceny. [L. '09, p. 997, § 349.]

Compare Minn. Code, §§ 5080, 5078, 5093; N. Y. P. C., §§ 528, 564.

For former laws, see *infra*:

§ 2799, petit larceny, defined;

§ 2800, bonds, notes, etc., subjects of larceny;

§ 2801, larceny of fixtures;

§ 2802, dogs subjects of larceny;
§ 2805, obtaining property under false pretense, larceny;
§ 2806, buying or receiving stolen property;
§ 2807, conversion of personal property, larceny;
§ 2808, larceny by embezzlement;
§ 2812, embezzlement of public funds a felony.
See infra, §§ 3256, 3257, conversion of estrays.
See infra, § 3153, driving another's stock from range.
See infra, § 3155, separation of stock.
See infra, § 4081, failure of officer to pay over fees.
See infra, § 6346, taking water from irrigation ditch.
See infra, §§ 6383a-6383c, stealing water from irrigation ditch.
See infra, § 7103, unlawful taking up and sale of logs adrift.
See infra, § 8897, stealing certificates of land registration.

§ 2602. Commission or Part Ownership No Defense.

It shall be no defense to a prosecution for larceny that the accused was entitled to a commission out of the money or property appropriated, as compensation for collecting or receiving the same for or on behalf of the owner thereof, or that the money or property appropriated was partly the property of another and partly the property of the accused; but it shall not be larceny for any bailee, factor, pledgee, servant, attorney, agent, employee, or trustee, executor, administrator, guardian, officer or other person to retain his reasonable collection fee or charges. [L. '09, p. 998, § 350.]

Compare Minn. Code, § 5079.

§ 2603. Sale of Mortgaged Property—When Larceny.

Every person who shall sell or mortgage any personal property which is at the time mortgaged or upon which any lien has been or may lawfully be filed, without informing the purchaser or mortgagee thereof, before the payment of the purchase price or money loaned, of the several amounts of all such mortgages and liens, shall be deemed to have made a false representation within the meaning of section 2601, subdivision 2. [L. '09, p. 998, § 351.]

For former laws, see infra, § 3669.

See infra, §§ 2629, 3669, removal of mortgaged property.

§ 2604. Contractor Failing to Pay for Labor or Material.

Every person having entered into a contract to supply any labor or materials for the value or price of which any lien might lawfully be filed upon the property of another, who shall receive the full price or consideration thereof, or the amount of any account stated thereon, shall be deemed within the meaning of section 2601, subdivision 3, to receive the same as the agent of the party with whom such contract was made, his successor or assign, for the purpose of paying all claims for labor and materials supplied. [L. '09, p. 998, § 352.]

§ 2605. Grand Larceny—Penalty.

Every person who shall steal or unlawfully obtain, appropriate, bring into this state, buy, sell, receive, conceal or withhold in any manner specified in section 2601—

(1.) Property of any value by taking the same from the person of another or from the body of a corpse; or

(2.) Property of any value by taking the same from any building that is on fire or by taking the same after it has been removed from a building in consequence of an alarm of fire; or

(3.) A record of a court or officer, or a writing, instrument or record kept, filed or deposited according to law with or in the keeping of any public officer or officers; or

(4.) From any range or pasture, any horse, mare, gelding, foal or filly, ass or mule, one or more head of neat cattle or any sheep; or

(5.) Property of the value of more than twenty-five dollars, in any manner whatever,

Shall be guilty of grand larceny and be punished by imprisonment in the state penitentiary for not more than fifteen years.

Every other larceny shall be petit larceny and shall be a gross misdemeanor. [L. '09, p. 998, § 353.]

Compare Minn. Code, §§ 5081, 5082; N. Y. P. C., §§ 530, 531, 532, 533, 534, 535.
For former laws, see §§ 2793, 2798, 2803.

§ 2606. Value—How Ascertained.

The value of all instruments not having a market value, whether issued or delivered or not, by which any claim, privilege, right, obligation or authority or any right or title to property, real or personal, is, or purports to be, or upon the happening of some future event may be, evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, shall be deemed to be the amount of money due thereon or secured to be paid thereby and unpaid, or which in any contingency might be collected thereon or thereby, or the value of the property transferred or affected or the title to which is shown thereby, or the sum which might be recovered for the want thereof, as the case may be. In every other case not otherwise regulated by statute, "value" shall be deemed to mean market value. [L. '09, p. 999, § 354.]

Compare Minn. Code, § 5090; N. Y. P. C., §§ 545-547.

§ 2607. Stealing Railway Tickets.

If any person in the employ of a railway or steamboat company shall fraudulently neglect to cancel or to return to the proper officer or agent of such company, any ticket, coupon or pass, with intent to permit the same to be used in fraud of any railway or steamboat company, or if any person shall steal or fraudulently stamp, print, sign, sell or put into circulation any such ticket, coupon or pass, he shall be guilty of larceny. [L. '09, p. 1000, § 355.]

Compare Minn. Code, § 5186.

§ 2608. Claim of Title—When Ground of Defense.

In any prosecution for larceny it shall be a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim be untenable. [L. '09, p. 1000, § 356.]

Compare Minn. Code, § 5091; N. Y. P. C., § 548.

§ 2609. Restoration of Stolen Property—Duty of Officers.

The officer arresting any person charged as principal or accessory in any robbery or larceny shall use reasonable diligence to secure the property alleged to have been stolen, and after seizure shall be answerable therefor while it remains in his hands, and shall annex a schedule thereof to his return of the warrant.

Whenever the prosecuting attorney shall require such property for use as evidence upon the examination or trial, such officer, upon his demand, shall deliver it to him, and take his receipt therefor, after which such prosecuting attorney shall be answerable for the same. [L. '09, p. 1000, § 357.]

Compare Minn. Code, § 5095.

§ 2610. Extortion.

Every person, who, under circumstances not amounting to robbery, shall extort or gain any money, property or advantage, or shall induce or compel another to make, subscribe, execute, alter or destroy any valuable security or instrument or writing affecting or intended to affect any cause of action or defense, or any property, by means of force or any threat, either—

- (1.) To accuse any person of a crime; or
- (2.) To do any injury to any person or to any property; or
- (3.) To publish or connive at publishing any libel; or
- (4.) To expose or impute to any person any deformity or disgrace; or
- (5.) To expose any secret,

Shall be guilty of extortion and shall be punished by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 1000, § 358.]

Compare Minn. Code, § 5196.

For former laws, see *infra*, § 2776.

See *infra*, § 2715, extortion by ferryman, toll-gate keeper, etc.

§ 2611. Oppression Under Color of Office.

Every officer, or person pretending to be such, who unlawfully and maliciously, under pretense or color of official authority, shall—

- (1.) Arrest another or detain him against his will; or
- (2.) Seize or levy upon another's property; or
- (3.) Dispossess another of any lands or tenements; or
- (4.) Do any act whereby another person shall be injured in his person, property or rights, commits oppression, shall be guilty of a gross misdemeanor.

(5.) No officer or person having the custody and control of the body or liberty of any person under arrest, shall refuse permission to such arrested person to communicate with his friends or with an attorney, nor subject any person under arrest to any form of personal violence, intimidation, indignity or threats for the purpose of extorting from such person incriminating statements or a confession. Any person violating the provisions of this section shall be guilty of a misdemeanor. [L. '09, p. 1001, § 359.]

Compare Minn. Code, § 5098; N. Y. P. C., § 556.

§ 2612. Extortion by Public Officer.

Every public officer who shall ask or receive, or agree to receive a fee or other compensation for his official service, either—

- (1.) In excess of the fee or compensation allowed to him by statute therefor; or
- (2.) Where no fee or compensation is allowed to him by statute therefor, commits extortion, and is guilty of a misdemeanor. [L. '09, p. 1001, § 360.]

Compare Minn. Code, § 5099; N. Y. P. C., § 557.

For former laws, see *infra*, § 2884.

See *infra*, §§ 4079-4088, county officer taking illegal fees.

§ 2613. Blackmail.

Every person who, with intent thereby to extort or gain any money or other property or to compel or induce another to make, subscribe, execute, alter or destroy any valuable security or instrument or writing affecting or intending to affect any cause of action or defense, or any property, or to influence the action of any public officer, or to do or abet or procure any illegal or wrongful act, shall threaten directly or indirectly—

- (1.) To accuse any person of a crime; or
- (2.) To do any injury to any person or to any property; or
- (3.) To publish or connive at publishing any libel; or
- (4.) To expose or impute to any person any deformity or disgrace; or
- (5.) To expose any secret,

Shall be punished by imprisonment in the state penitentiary for not more than five years or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment. [L. '09, p. 1002, § 361.]

Compare Minn. Code, § 5100; N. Y. P. C., § 558.
For former laws, see *infra*, § 2776.

§ 2614. Coercion.

Every person who, with intent to compel another to do or abstain from doing any act which such other person has a right to do, or abstain from doing, shall wrongfully and unlawfully—

- (1.) Use violence or inflict injury upon such other person or any of his family, or upon his property, or threaten such violence or injury; or
 - (2.) Deprive such person of any tool, implement or clothing, or hinder him in the use thereof; or
 - (3.) Attempt to intimidate such person by threats or force,
- Shall be guilty of a misdemeanor. [L. '09, p. 1002, § 362.]

Compare Minn. Code, § 5140.

§ 2615. Falsely Personating Another.

Every person who shall falsely personate another, and in such assumed character, shall—

- (1.) Marry or pretend to marry or sustain the marriage relation towards another; or
- (2.) Become bail or surety for a party in an action or special proceeding, civil or criminal, before a court or officer authorized to take such bail or surety; or
- (3.) Confess a judgment; or
- (4.) Subscribe, verify, publish, acknowledge or approve a written instrument which by law may be recorded, with intent that the same may be delivered or issued as true; or
- (5.) Appear for arraignment, trial or judgment in any criminal proceeding; or
- (6.) Do any other act in the course of any action or proceeding wherein, if it were done by the person falsely personated such person might in any event become liable to an action or special proceeding, civil or criminal, or to pay a sum of money, or to incur a charge, forfeiture, or penalty, or whereby any benefit might accrue to the offender or to any other person,

Shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 1003, § 363.]

See *infra*, § 8401, false personation by physician.
Compare Minn. Code, § 5102; N. Y. P. C., § 562.

§ 2616. Personating an Officer.

Every person who shall falsely personate a public officer, civil or military, or a policeman, or a private individual having special authority by law to perform an act affecting the rights or interests of another, or who, without authority shall assume any uniform or badge by which such an officer or person is lawfully distinguished, and in such assumed character shall do any act purporting to be official, whereby another is injured or defrauded, shall be guilty of a gross misdemeanor. [L. '09, p. 1003, § 364.]

Compare Minn. Code, § 5104; N. Y. P. C., § 565.

§ 2617. Use of False Permit, License or Diploma.

Every person who shall conduct any business or perform any act under color of, or file for record with any public officer, any false or fraudulent permit, license, diploma or writing, or any permit, license, diploma or writing not lawfully belonging to such person, or who shall obtain any permit, license, diploma or writing by color or aid of any false representation, pretense, personation, token or writing, shall be guilty of a gross misdemeanor. [L. '09, p. 1003, § 365.]

See *infra*, §§ 3339, 3340, false pretense as to incorporation or banking.

§ 2618. Concealing Foreign Matter in Merchandise.

Every person who, with intent to defraud, shall place or conceal any foreign substance in any barrel, bag, bale, box or other package containing any article of merchandise, shall be guilty of a gross misdemeanor. [L. '09, p. 1004, § 366.]

§ 2619. Obtaining Signature by False Pretense.

Every person who, with intent to cheat or defraud another, shall designedly by color or aid of any false token or writing or other false pretense, representation or presentation, obtain the signature of any person to a written instrument, shall be punished by imprisonment in the state penitentiary for not more than five years or in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment. [L. '09, p. 1004, § 367.]

Compare Minn. Code, § 5105; N. Y. P. C., § 567a.

§ 2620. False Representation Concerning Credit.

Every person who, with intent thereby to obtain credit or financial rating, shall willfully make any false statement in writing of his assets or liabilities to any person with whom he may be either actually or prospectively engaged in any business transaction or to any commercial agency or other person engaged in the business of collecting or disseminating information concerning financial or commercial ratings, shall be guilty of a misdemeanor. [L. '09, p. 1004, § 368.]

§ 2621. False Representation Concerning Title.

Every person who shall maliciously or fraudulently execute or file for record any instrument, or put forward any claim, by which the right or title

of another to any real property is, or purports to be transferred, encumbered or clouded, shall be guilty of a gross misdemeanor. [L. '09, p. 1004, § 369.]

Compare Minn. Code, § 5106.

§ 2622. Publishing False Statement to Affect Market Price.

Every person who, with intent to affect the market price of any security or property shall put off, circulate or publish any false or misleading writing, statement or intelligence, shall be guilty of a gross misdemeanor. [L. '09, p. 1005, § 370.]

§ 2623. Obtaining Employment by False Letter or Certificate.

Every person who shall obtain employment or appointment to any office or place of trust, by color or aid of any false or forged letter or certificate of recommendation, shall be guilty of a misdemeanor. [L. '09, p. 1005, § 371.]

Compare Minn. Code, § 5107; N. Y. P. C., § 570.

§ 2624. Fraud by Employment Agent.

Every employment agent or broker who, with intent to influence the action of any person thereby, shall misstate or misrepresent verbally, or in any writing or advertisement, any material matter relating to the demand for labor, the conditions under which any labor or service is to be performed, the duration thereof or the wages to be paid therefor, shall be guilty of a misdemeanor. [L. '09, p. 1005, § 372.]

§ 2625. Frauds on Innkeeper.

Every person who shall obtain any food, lodging or accommodation at any hotel, restaurant, boarding-house or lodging-house without paying therefor, with intent to defraud the proprietor or manager thereof, or who shall obtain credit at a hotel, restaurant, boarding-house or lodging-house by color or aid of any false pretenses, representation, token or writing, or who after obtaining board, lodging or accommodation at a hotel, restaurant, boarding-house or lodging-house shall abscond or surreptitiously remove his baggage therefrom without paying for such food, lodging or accommodation, shall be guilty of a misdemeanor. [L. '09, p. 1005, § 373.]

For former laws, see *infra*, § 2848.

Proof of fraudulent intent, see § 2849, *infra*, which is probably still in force.

§ 2626. Improper Use of Insignia.

Every person who shall willfully wear the badge, button, insignia or rosette of any military order or of any secret order or society, or any similitude thereof; or who shall use any such badge, button, insignia or rosette to obtain aid or assistance, or any other benefit or advantage, unless he shall be entitled to so wear or use the same under the constitution, by-laws, rules and regulations of such order or society, shall be guilty of a misdemeanor. [L. '09, p. 1005, § 374.]

Compare Minn. Code, § 5167.

For former laws, see *infra*, § 2989.

§ 2627. Fraudulently Presenting Claim to Public Officer.

Every person who, with the intent to defraud, shall knowingly present for audit, allowance or payment to any officer or board of the state or of any county, city, town or school district, authorized to audit, allow or pay

bills, claims or charges, any false or fraudulent claim, account, writing or voucher or any bill, account or demand containing false or fraudulent charges, items or claims, shall be guilty of a gross misdemeanor. [L. '09, p. 1005, § 375.]

§ 2628. Fraud by Bailee of Animal.

Every person who shall obtain from another the possession or use of any horse or other draft animal or any vehicle or automobile, without paying therefor, with intent to defraud the owner thereof, or who shall obtain the possession or use thereof by color or aid of any false or fraudulent representation, pretense, token or writing, or shall obtain credit for such use by color or aid of any false or fraudulent representation, pretense, token or writing; or who having hired property, shall recklessly, willfully, wantonly or by gross negligence injure or destroy or cause, suffer, allow or permit the same, or any part thereof, to be injured or destroyed; or who, having hired any horse or other draft animal upon an understanding or agreement that the same shall be ridden or driven a specified distance or to a specified place, shall willfully and fraudulently ride or drive or cause, permit or allow the same to be ridden or driven a longer distance, or to a different place, shall be guilty of a misdemeanor. [L. '09, p. 1006, § 376.]

§ 2629. Destruction or Removal of Mortgaged Property.

Every person being in possession thereof, who shall remove, conceal or destroy or connive at or consent to the removal, concealment or destruction of any personal property or any part thereof, upon which a mortgage, lien, conditional sales contract or lease exists, in such a manner as to hinder, delay or defraud the holder of such mortgage, lien or conditional sales contracts, or such lessor, or who, with intent to hinder, delay or defraud the holder of such mortgage, lien or conditional sales contract, or such lessor, shall sell, remove, conceal or destroy or connive at or consent to the removal, concealment or destruction of such property, shall be guilty of a gross misdemeanor.

In any prosecution under this section any allegation containing a description of the mortgage, lien, conditional sales contract or lease by reference to the date thereof and names of the parties thereto, shall be sufficiently definite and certain. [L. '09, p. 1006, § 377.]

See supra, § 2603, sale of mortgaged personalty.

See infra, §§ 3669, 3672, removal of mortgaged personalty.

§ 2630. Mock Auctions.

Every person who shall obtain any money or property from another or shall obtain the signature of another to any writing the false making of which would be forgery, by color or aid of any false or fraudulent sale of property or pretended sale of property by auction, or by any of the practices known as mock auction, shall be punished by imprisonment in the state penitentiary for not more than five years or in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment.

Every person who shall buy or sell or pretend to buy or sell any goods, wares or merchandise, exposed to sale by auction, if an actual sale, purchase

and change of ownership therein does not thereupon take place, shall be guilty of a misdemeanor. [L. '09, p. 1007, § 378.]

Compare N. Y. P. C., § 574.

See *infra*, § 5314, unlawful sales by auctioneers.

§ 2631. Fraudulent Removal of Property.

Every person who, with intent to defraud a prior or subsequent purchaser thereof, or to prevent any of his property being made liable for the payment of any of his debts, or levied upon by an execution or warrant of attachment, shall remove any of his property, or secrete, assign, convey or otherwise dispose of the same, or with intent to defraud a creditor shall remove, secrete, assign, convey or otherwise dispose of any of his books or accounts, vouchers or writings in any way relating to his business affairs, or destroy, obliterate, alter or erase any of such books of account, accounts, vouchers or writing or any entry, memorandum or minute therein contained, shall be guilty of a gross misdemeanor. [L. '09, p. 1007, § 379.]

Compare N. Y. P. C., § 587.

See *infra*, § 3672, fraudulent disposition of personal property.

§ 2632. Knowingly Receiving Fraudulent Conveyance.

Every person who shall receive any property or conveyance thereof from another, knowing that the same is transferred or delivered to him in violation of, or with the intent to violate section 2631, shall be guilty of a misdemeanor. [L. '09, p. 1008, § 380.]

§ 2633. Fraud in Assignment for Benefit of Creditors.

Every person who, having made, or being about to make, a general assignment of his property to pay his debts, shall by color or aid of any false or fraudulent representation, pretense, token or writing induce any creditor to participate in the benefits of such assignments, or to give any release or discharge of his claim or any part thereof, or shall connive at the payment in whole or in part of any false, fraudulent or fictitious claim, shall be guilty of a gross misdemeanor. [L. '09, p. 1008, § 381.]

§ 2634. Willful Destruction of Vessel.

Every person who shall wreck, burn, sink, scuttle or otherwise injure or destroy a vessel or its cargo, or willfully permit the same to be done, with the intent to prejudice or defraud an insurer or any other person, or who shall fit out a vessel, or shall load any cargo on board thereof with intent to permit or cause the same to be wrecked, sunk or otherwise injured or destroyed, and thereby defraud or prejudice an insurer or other person, shall be punished by imprisonment in the state penitentiary for not more than twenty years. [L. '09, p. 1008, § 382.]

Compare Minn. Code, § 5112; N. Y. P. C., §§ 575, 576.

§ 2635. Making False Manifest, Invoice, etc.

Every person who shall prepare, make or subscribe a false or fraudulent manifest, invoice, bill of lading, ship's register, or protest, with intent to defraud another, shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 1009, § 383.]

Compare Minn. Code, § 5113; N. Y. P. C., § 577.

§ 2636. Fraudulent Destruction of Insured Property.

Every person who, with intent to defraud or prejudice the insurer thereof, shall willfully injure or destroy any property not specified or included hereinbefore in this subdivision, which is insured at the time against loss or damage by fire or other causality [casualty], shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 1000, § 384.]

"This subdivision" in this section refers to §§ 2634 to 2636, inclusive.
Compare Minn. Code, § 5114.

§ 2637. Using False Weights and Measures.

Every person who shall injure or defraud another by using, with knowledge that the same is false, a false weight, measure or other apparatus for determining the quantity of any commodity or article of merchandise, or by knowingly misrepresenting the quantity thereof bought or sold; or who shall retain in his possession any weight or measure, knowing it to be false, unless it appears beyond a reasonable doubt that it was so retained without intent to use it or permit it to be used in violation of the foregoing provisions of this section, shall be guilty of a gross misdemeanor. [L. '09, p. 1009, § 385.]

Compare Minn. Code, § 5115; N. Y. P. C., §§ 580, 581.

For former laws, see *infra*, §§ 2844, 2845.

See *infra*, § 7087, weights of lumber and shingles.

See *infra*, §§ 9518, 9523, 9525, 9528, 9533, penalties for unlawful or short weights and measures.

§ 2638. Fraud in Stock Subscription.

Every person who shall sign the name of a fictitious person to any subscription for or any agreement to take stock in any corporation existing or proposed, and every person who shall sign to any such subscription or agreement the name of any person, knowing that such person does not intend in good faith to comply with the terms thereof, or upon any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced, shall be guilty of a gross misdemeanor. [L. '09, p. 1009, § 386.]

Compare Minn. Code, § 5116.

See *infra*, §§ 3339, 3340, false pretenses as to incorporation.

§ 2639. Fraudulent Issue of Stock, Scrip, etc.

Every officer, agent or other person in the service of a joint stock company or corporation, domestic or foreign, who, willfully and knowingly with intent to defraud, shall—

(1.) Sell, pledge or issue or cause to be sold, pledged or issued, or sign or execute or cause to be signed or executed, with intent to sell, pledge or issue, or cause to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of ownership of any share or shares of such company or corporation, or any conveyance or encumbrance of real or personal property, contract, bond, or evidence of debt, or writing purporting to be a conveyance or encumbrance of real or personal property, contract, bond or evidence of debt of such company or corporation, without being first duly authorized by such company or corporation, or contrary to the charter or laws under which such company or corporation exists, or in excess of the power of such company or corporation, or of the

limit imposed by law or otherwise upon its power to create or issue stock or evidence of debt; or,

(2.) Reissue, sell, pledge or dispose of, or cause to be reissued, sold, pledged or disposed of, any surrendered or canceled certificate or other evidence of the transfer of ownership of any such share or shares:

Shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 1010, § 387.]

Compare Minn. Code, § 5117; N. Y. P. C., § 591.

See infra, §§ 3623, 6324, unlawful issue of stock by building and loan association.

See infra, § 3335, fraudulent certificate of check by bank.

§ 2640. Insolvent Bank Receiving Deposit.

Every owner, officer, stockholder, agent or employee of any person, firm, corporation or association engaged, wholly or in part, in the business of banking or receiving money or negotiable paper or securities on deposit or in trust, who shall accept or receive, with or without interest, any deposit, or who shall consent thereto or connive thereat, when he knows or has good reason to believe that such person, firm, corporation or association is unsafe or insolvent, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than ten thousand dollars. [L. '09, p. 1010, § 388.]

Compare Minn. Code, § 5118.

Former laws, see §§ 2810, 2811, infra.

See infra, § 3331, bank receiving deposit when insolvent.

§ 2641. Corporation Doing Business Without License.

Every corporation, whether domestic or foreign, and every person representing or pretending to represent such corporation as an officer, agent or employee thereof, who shall transact, solicit or advertise for any business in this state, before such corporation shall have obtained from the officer lawfully authorized to issue the same, a certificate that such corporation is authorized to transact business in this state, shall be guilty of a gross misdemeanor. [L. '09, p. 1011, § 389.]

See infra, § 3317, bank doing business without fully paid up capital.

See infra, § 3367, foreign bank doing business without a license.

See infra, § 3323, branch banks without required capital.

See infra, §§ 3623, 3624, building and loan associations.

See infra, § 3723, failure to file charter and appointment of agent.

See infra, § 3729, foreign corporation doing business without registration.

See infra, §§ 6079, 6080, insurance company acting without authority.

See infra, §§ 6087, 6093, 6119-6121, 6140-6143, 6151, 6157, 6181, 6193, 6195, 6202, 6232, 6233, prohibited insurance writing, transactions, and business.

§ 2642. False Report of Corporation.

Every director, officer or agent of any corporation or joint stock association, and every person engaged in organizing or promoting any enterprise, who shall knowingly make or publish or concur in making or publishing any written prospectus, report, exhibit or statement of its affairs or pecuniary condition, containing any material statement that is false or exaggerated, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars. [L. '09, p. 1011, § 390.]

See infra, § 3298, failure to report to bank examiner.

See infra, § 3314, false statement or entry a felony.

See *infra*, § 3345, failure of bank to make annual statement.

See *infra*, § 3353, false statement by trust company to examiner.

See *infra*, § 3729, misdemeanor by agent on assessment for taxes.

See *infra*, § 6134, failure of insurance company to make annual statement.

See *infra*, § 6179, false statement in insurance report.

See *infra*, §§ 6134, 6144, 6160, false entries and representations by insurance companies.

§ 2643. Warehouseman or Carrier Refusing to Issue Receipt.

Every person or corporation, and every officer, agent and employee thereof, receiving any goods, wares or merchandise, for sale or on commission, for storage, carriage or forwarding, who, having an opportunity to inspect the same, shall fail or refuse to deliver to the owner thereof a receipt duly signed, bearing the date of issuance, describing the goods, wares or merchandise received and the quantity, quality and condition thereof, and specifying the terms and conditions upon which they are received, shall be guilty of a misdemeanor. [L. '09, p. 1011, § 391.]

§ 2644. Fictitious Bill of Lading and Receipt.

Every person or corporation engaged wholly or in part in the business of a common carrier or warehouseman, and every officer, agent or employee thereof, who shall issue any bill of lading, receipt or other voucher by which it shall appear that any goods, wares or merchandise have been received by such carrier or warehouseman, unless the same have been so received and shall be at the time actually under his control, or who shall issue any bill of lading, receipt or voucher containing any false statement concerning any material matter, shall be guilty of a gross misdemeanor. But no person shall be convicted under this section for the reason that the contents of any barrel, box, case, cask or other closed vessel or package mentioned in the bill of lading, receipt or voucher did not correspond with the description thereof in such instrument, if such description corresponds substantially with the mark on the outside of such barrel, box, case, cask, vessel or package, unless it appears that the defendant knew that such marks were untrue. [L. '09, p. 1012, § 392.]

Compare Minn. Code, § 5121; N. Y. P. C., § 629.

For former laws, see *infra*, § 2818.

§ 2645. Warehouseman Fraudulently Mixing Goods.

Every person mentioned in section 2644, who shall fraudulently mix or tamper with any goods, wares or merchandise under his control, shall be guilty of a gross misdemeanor. [L. '09, p. 1012, § 393.]

§ 2646. Duplicate Receipt.

Every person mentioned in section 2644, who shall issue any second or duplicate receipt or voucher of the kind specified in said section, while a former receipt or voucher for the goods, wares or merchandise specified in such second receipt is outstanding and uncanceled, without writing across the face of the same the word "Duplicate," in a plain and legible manner, shall be guilty of a misdemeanor. [L. '09, p. 1012, § 394.]

Compare Minn. Code, § 5123; N. Y. P. C., § 631.

§ 2647. Bill of Lading or Receipt must be Canceled on Redelivery of Property.

Each person mentioned in section 2644, who shall deliver to another any goods, wares or merchandise for which a bill of lading, receipt or voucher

has been issued, unless such bill of lading, receipt or voucher is surrendered and canceled or a lawful and sufficient bond or undertaking is given therefor at the time of such delivery, or unless, in case of a partial delivery, a memorandum thereof is indorsed upon such bill of lading, receipt or voucher, shall be guilty of a misdemeanor. [L. '09, p. 1013, § 395.]

See infra, § 3389, fraudulent negotiation of bill of lading.

See infra, § 3376, criminal prosecutions for violation of regulations.

§ 2648. Regulating Sale of Passage Tickets.

It shall be the duty of every person or corporation engaged wholly or in part in the business of carrying passengers for hire, to provide every agent authorized to sell its passage tickets in this state, with a certificate of his authority, attested by its seal and the signature of its manager, secretary or general passenger agent, which shall contain a designation of the place of business at which such authority shall be exercised.

Every person and every corporation or association, and every officer, agent or employee thereof who shall sell, exchange or transfer, or have in his possession with intent to sell, exchange or transfer, or maintain, conduct or operate any office or place of business for the sale, exchange or transfer of any passage ticket or pass or part thereof, or any other evidence of a right to travel upon any railroad or boat, whether the same be owned or operated within or without the limits of this state, in any place except his place of business, or within such place of business without having rightfully in his possession and posted in a conspicuous place therein the certificate of authority hereinabove provided for, shall be guilty of a misdemeanor. [L. '09, p. 1013, § 396.]

See infra, §§ 8720-8724, sale of railroad tickets.

§ 2649. Redemption of Unused Passage Ticket.

Every person or corporation engaged wholly or in part in the business of carrying passengers for hire in this state, and every authorized ticket agent thereof, to whom there shall be presented by the holder thereof, within one year after its expiration, any passage ticket or part thereof, or other evidence of right to travel, wholly or in part upon the railroad or boat of such person or corporation, which shall be wholly or partially unused, who shall fail to redeem the same within three days after presentation, upon the following terms, to wit:

- (1.) When wholly unused, for the price paid therefor; and
- (2.) When partially unused, for the price paid therefor, less the regular toll or charge for the passage had;

Shall be punished by a fine of not more than five hundred dollars, and in addition thereto shall forfeit to the holder of such ticket or part thereof or other evidence of a right to travel, three times the redeemable value thereof. [L. '09, p. 1013, § 397.]

See infra, §§ 8725, 8726, redemption of unsold railroad tickets.

§ 2650. Malicious Mischief—Injury to Railway.

Every person who, in such manner as might, if not discovered, endanger the safety of any engine, motor, car or train, or any person thereon, shall in any manner interfere or tamper with or obstruct any switch, frog, rail, road-bed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure or

appliance pertaining to or connected with any railway, or any train, engine, motor, or car on such railway; and every person who shall discharge any firearm or throw any dangerous missile at any train, engine, motor or car on any railway, shall be punished by imprisonment in the state penitentiary for not more than twenty-five years. [L. '09, p. 1014, § 398.]

Compare Minn. Code, § 5124; N. Y. P. C., § 635.

For former laws, see *infra*, § 2727.

§ 2651. Attempt to Commit Train Robbery.

Every person who, with intent to commit any robbery, burglary or larceny, shall go upon or board any train, motor, car or engine; mask, extinguish or alter any light or other signal; exhibit or compel any other person to exhibit any false light or signal; or stop any such train, car or engine or slacken the speed thereof or compel or attempt to compel any other person in charge or control thereof to stop such train, car or engine or slacken the speed thereof, shall be punished by imprisonment in the state penitentiary for not less than five years. [L. '09, p. 1014, § 399.]

See *supra*, § 2264, attempts to commit crime.

§ 2652. Endangering Life and Property by Explosives.

Every person who shall maliciously place any explosive substance or material in, upon, under, against or near any building, car, vessel, railroad track or structure, in such manner or under such circumstances as to destroy or injure the same if exploded, shall be guilty of a felony, and if the circumstances and surroundings are such that the safety of any person might be endangered by the explosion thereof, shall be punished by imprisonment in the state penitentiary for not more than twenty years; and in every other case by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 1015, § 400.]

Compare Minn. Code, § 5125.

See *supra*, § 2403, killing by explosives unlawfully kept.

See *supra*, § 2504, keeping explosives unlawfully.

See *supra*, § 2506, transporting explosives.

§ 2653. Damaging Building, etc., by Explosion.

Every person who shall maliciously, by the explosion of gunpowder or any other explosive substance or material, destroy or damage any building, car, vessel, railroad track or structure, shall be punished as follows:

(1.) If thereby the life or safety of a human being is endangered, by imprisonment in the state penitentiary for not more than twenty years.

(2.) In every other case by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 1015, § 401.]

Compare N. Y. P. C., § 636.

§ 2654. False Signals for Vessels, etc.

Every person who, in such manner as might, if not discovered, endanger a vessel, railway engine, motor, train or car, shall show, mask, extinguish, alter or remove any light or signal, or exhibit any false light or signal, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 1015, § 402.]

Compare Minn. Code, § 5127.

§ 2655. Injury to United States Light.

Every person who shall willfully break, injure, deface or destroy any lighthouse station, post, platform, step, lamp or other structure pertaining to such lighthouse station, or shall extinguish or tamper with any light erected by the United States upon or along the navigable waters of this state to aid in the navigation thereof, in case no punishment is provided therefor by the laws of the United States, shall be punished as follows:

(1.) Whenever such act may endanger the safety of any vessel navigating such waters, or jeopardize the safety of any person or property in or upon such vessel, by imprisonment in the state penitentiary for not more than ten years.

(2.) In all other cases by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 1015, § 403.]

Compare Minn. Code, § 5128.

§ 2656. Injuring Public Utilities.

Every person who shall willfully or maliciously remove, damage or destroy:

(1.) A highway or a private way laid out by authority of law, or a bridge upon such public or private road, or willfully or maliciously causes to be placed thereon any substance or thing dangerous to any person or animal traveling thereon or which might injure or puncture the tire of any vehicle; or,

(2.) A pile or other material fixed in the ground and used for securing any bank or dam of any river or other water, or any dike, dock, quay, jetty or lock; or,

(3.) A buoy or beacon lawfully placed in any waters within this state; or,

(4.) A tree, rock, post or other monument erected or marked for the purpose of designating a point on the boundary of the state, of a county, city, town or a farm, tract or lot of land, or any mark or inscription thereon; or,

(5.) A mile-board, mile-stone or guide-post erected upon a highway, or any inscription thereon; or,

(6.) A telegraph, telephone or electric transmission line or any part thereof, or any appurtenance thereto, or apparatus connected with the operation thereof; or,

(7.) A fence, gate, cattle-guard, bridge, water-tank, mile-post, car, engine, motor or other useful structure on the line of any railway; or,

(8.) A pipe or main for conducting gas, water or oil, or any works erected for the purpose of supplying buildings therewith, or any appurtenance or appendage thereto; or,

(9.) A sewer or drain, or a pipe or main connected therewith or forming a part thereof; or,

(10.) A ditch or flume lawfully erected for carrying water or draining land; or,

(11.) Any engine, hose, hose-cart, truck, ladder, extinguisher or other apparatus used by any fire company or fire department, or any rope, wire, bell, signal, instrument or apparatus for the communication of alarms of fire or police calls; or,

(12.) Any public building, or building used for educational, scientific, charitable or religious purpose, or any useful or ornamental thing therein; or,

(13.) Any work of literature or art or copy thereof, object of curiosity or scientific interest, statue, picture or engraving, displayed, kept or erected in any public building, street, park or other public place or in any collection, exhibition, museum, fair, gallery or library, or in any building devoted to educational, scientific, charitable or religious purposes; or,

(14.) A monument erected in any cemetery, street, park or other public place; or,

(15.) A sign or notice erected or posted by any officer under lawful authority, or by the owner or occupant of the premises where posted; or,

(16.) A legal notice or other legal paper posted in compliance with the requirement of any statute of this state, or under the direction or order of a court; and,

Every person—

(17.) Who shall moor any vessel, scow, barge, raft or boom to any bridge or to any buoy or beacon lawfully in any waters within this state; or,

(18.) Who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line; or,

(19.) Who shall erect or maintain any unlawful structure in any stream or river;

Shall be guilty of a misdemeanor. [L. '09, p. 1016, § 404.]

Compare Minn. Code, § 5130; N. Y. P. C., § 639.

See *infra*, §§ 6824-6827, injury to public lands.

See *infra*, § 6981, mutilation of library, etc.

For former laws, see *infra*:

§ 2705, injury to buildings or contents.

§ 2832, malicious injury to railway structure, etc.

§ 2833, willful injury to bridges, etc.

§ 2835, destruction of dams, dikes, etc.

§ 2914, willful injury to cemetery.

§ 2951, injury to improved roads, bridges, telegraphs, etc.

§ 2953, willful injury to guide-boards, monuments, etc.

§ 2954, willful injury to public property.

§ 2956, obstructing public ditches or drains.

§ 2957, mooring vessel or boom of logs to bridge.

§ 2958, mooring vessel to buoys or beacons.

§ 2972, willful interference with telegraphic communications, etc.

§ 2978, unlawful taking of information from wire.

§ 2980, malicious injury to telegraph apparatus, etc.

§ 2657. Unlawful Interference with Gas, Electric, Steam or Water Appliance.

Every person who, with intent to injure or defraud, shall—

(1.) Break or deface the seal of any gas, electric, steam or water meter; or,

(2.) Obstruct, alter, injure or prevent the action of any meter or other instrument used to measure or register the quantity of gas, electricity, steam or water supplied to a consumer thereof; or,

(3.) Make any connections by means of a wire, pipe, conduit or otherwise with any wire, main or pipe used for the delivery of gas, electricity, steam or water to a consumer thereof, in such manner as to take gas, electricity, steam or water from said wire, main or pipe without its passage through the

meter or other instrument provided for registering the amount or quantity consumed; or use any gas, electricity, steam or water so obtained; or,

(4.) Make any connection or reconnection with such wire, main or pipe, or turn on or off, or in any manner interfere with any valve, stop-cock or other appliances connected therewith; or,

(5.) Prevent by the erection of any device or construction, or by any other means, free access to any meter or other instrument for registering or measuring the amount of gas, electricity, steam or water consumed, or interfere with, obstruct or prevent, by any means, the reading or inspection of such meter or instrument, by the person, company or corporation owning the same; or,

(6.) Take or use any water from any irrigation flume, ditch or lateral, without the consent of the owners thereof, or open, close or interfere with any gate connected therewith;

Shall be guilty of a misdemeanor. [L. '09, p. 1018, § 405.]

Compare N. Y. P. C., § 651.

For former laws, see §§ 2836, 2837, 2974.

See *infra*, § 6383, tampering with irrigation appliances.

See *infra*, §§ 6383a-6383c, unlawful taking of water.

See *infra*, §§ 6394-6396, tampering with and failure to repair canal head-gates.

See *infra*, § 6402, failure to provide canal head-gates.

See *infra*, §§ 6404-6407, unlawful flow of artesian wells.

§ 2658. Interfering with Dam, Reservoir, etc.

Every person who shall willfully or maliciously displace, remove, injure or destroy any pier, boom, or dam lawfully erected or maintained upon, in or across any water in this state, or any dam or reservoir lawfully maintained for impounding water; or hoist any gate in or about such dam or reservoir, shall be guilty of a gross misdemeanor. [L. '09, p. 1018, § 406.]

Compare Minn. Code, § 5131.

For former laws, see §§ 2835, 2840.

See notes to last section.

§ 2659. Injury to Property.

Every person who shall willfully—

(1.) Cut down, destroy or injure any wood, timber, grain, grass or crop, standing or growing, or which has been cut down and is lying upon the lands of another, or of the state; or,

(2.) Cut down, girdle or otherwise injure a fruit, shade or ornamental tree standing on the land of another or of the state, or in any road or street; or,

(3.) Dig, take or carry away without lawful authority or consent, from any lot or land in any city, or town, or from any lands included within the limits of a street or avenue in such city or town, any earth, soil or stone; or,

(4.) Enter without the consent of the owner or occupant, any orchard, garden or vineyard, with intent to take, injure or destroy anything there grown or growing; or,

(5.) Cut down, destroy or in any way injure any shrub, tree, vine or garden produce grown or growing within any such orchard, garden or vineyard, or any framework or erection therein; or,

(6.) Damage or deface any building or part thereof, or throw any stone or other missile at any building or part thereof; or,

(7.) Destroy or damage, with intent to prevent or delay the use thereof, any engine, machine, tool or implement intended for use in trade or husbandry; or,

(8.) Untie, unfasten or liberate, without authority, the horse or team of another; or lead, ride or drive away, without authority, the horse, team, automobile or other vehicle of another from the place where left by the owner or person in charge thereof; or,

(9.) Kill, maim or disfigure any animal belonging to another, or expose any poisons or noxious substance with intent that it should be taken by such animal; or,

(10.) Take, carry away, interfere with or disturb any oysters or other shell-fish of another in any river, bay, or other water of this state, or remove, pull up or destroy any stake or buoy used for designating any oyster-bed; or,

(11.) Intrude or place any hovel, shanty or building upon or within the limits of any lot or piece of land within any city or town, without the consent of the owner, or within the boundaries of any street in such city or town; or,

(12.) Kill, wound or trap any animal or bird within the limits of any cemetery, park or pleasure ground, or remove therefrom or destroy the young of any such animal or the egg of any such bird; or,

(13.) Injure, destroy or tamper with any rope, line, cable or chain with which any vessel, scow, boom, beacon or buoy shall be anchored or moored, or the steering-gear, bell gear, engine, machinery, lights or other equipment of any vessel; or,

(14.) Place upon or affix to any real property or any rock, tree, wall, fence or other structure thereupon, without the consent of the owner thereof, any word, character or device designed to advertise any article, business, profession, exhibition, matter or event; or,

(15.) Suffer any animal to go upon the inclosed right of way of any railway company, or leave open any gate or bars so that an animal might stray upon such right of way;

Shall be guilty of a misdemeanor. [L. '09, p. 1019, § 407.]

Compare Minn. Code, § 5133; N. Y. P. C., § 640.

Former laws, see *infra*, §§ 2826-2828, 2830, 2843. Other property, see § 2842.

See *infra*, §§ 3272, 3281, 3285, 3288, injury or cruelty to animals.

See *infra*, § 6981, mutilation of library.

See *infra*, § 3551, mutilation of monuments in cemeteries.

See *infra*, § 4699, mutilating school property.

See *infra*, § 5622, injury to trees in highway.

See *infra*, §§ 6824-6827, injury to public lands.

§ 2660. Tampering with Papers.

Every person who shall willfully or maliciously destroy, alter, erase, obliterate or conceal any letter, telegraph message, book or record of account, or any writing or instrument by which any claim, privilege, right, obligation or authority, or any right or title to property, real or personal, is, or purports to be, or upon the happening of some future event may be, evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, shall be guilty of a gross misdemeanor. [L. '09, p. 1020, § 408.]

See *infra*, § 4962, tampering with ballots by officers.

§ 2661. Falsifying Accounts.

Every person who shall willfully or maliciously make any false entry, or fail to make an entry of any material matter, in any book or record of account, shall be guilty of a gross misdemeanor. [L. '09, p. 1020, § 409.]

§ 2662. Divulging Telegram.

Every person who shall wrongfully obtain or attempt to obtain, any knowledge of a telegraphic message, by connivance with the clerk, operator, messenger or other employee of a telegraph company, and every clerk, operator, messenger or other employee of such company who shall willfully divulge to any but the person for whom it was intended, any telegraphic message or dispatch intrusted to him for transmission, or delivery, or the nature or contents thereof, or shall willfully refuse, neglect or delay duly to transmit or deliver the same, shall be guilty of a misdemeanor. [L. '09, p. 1021, § 410.]

Compare Minn. Code, § 5134; N. Y. P. C., § 641.
For former laws, see *infra*, §§ 2973, 2976, 2977, 2979.
See *infra*, § 3917, failure to transmit telegram.

§ 2663. Opening Sealed Letter.

Every person who shall willfully open or read, or cause to be opened or read, any sealed message, letter or telegram intended for another person, or publish the whole or any portion of such a message, letter or telegram, knowing it to have been opened or read without authority, shall be guilty of a misdemeanor. [L. '09, p. 1021, § 411.]

Compare Minn. Code, § 5135; N. Y. P. C., § 642.

§ 2664. Trespass on Railway Track.

Every person who, without permission from the person or corporation owning or operating the same, shall enter, or take any animal or vehicle upon any railway, bridge or trestle, or ride, operate or propel a handcar, velocipede, track bicycle or tricycle on or along the track of any railway, shall be guilty of a misdemeanor. [L. '09, p. 1021, § 412.]

Compare Minn. Code, § 5148.

§ 2665. Trespass upon Land of Another, Warning.

Every person who shall go upon the land of another with intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act, or shall willfully go or remain upon any land after having been warned by the owner or occupant thereof not to trespass thereon, shall be guilty of a misdemeanor.

Every owner or other occupant of any land shall be deemed to have given a sufficient warning against trespassing, within the meaning of this section, who shall post in a conspicuous manner on each side thereof, upon or near the boundary, at intervals of not more than seven hundred feet, signs legibly printed or painted in the English language, warning persons not to trespass.

An entryman on land under the laws of the United States shall be deemed an owner within the meaning of this section. [L. '09, p. 1021, § 413.]

For former laws, see *infra*, §§ 2822-2825.
See *infra*, §§ 2704, 2705, injury to buildings, etc., of settlers on public lands.
See *infra*, § 3198, driving sheep on land of another.
See *infra*, §§ 6824-6827, trespass on state lands.

§ 2666. Injury to Baggage.

Every person employed by any person or corporation engaged wholly or in part in the business of carrying passengers or baggage for hire, and every express agent, stage driver, drayman, expressman or hackman who shall willfully or carelessly break, injure or destroy any trunk, valise, box, pack-

age or other baggage, shall be guilty of a misdemeanor. [L. '09, p. 1022, § 414.]

Compare Minn. Code, § 5150.

§ 2667. Injury to Other Property.

Every person who shall willfully or maliciously destroy or injure any real or personal property of another, for the destruction or injury of which no special punishment is otherwise specially prescribed, shall—

(1.) If the value of the property destroyed, or the diminution in value by the injury, shall be less than twenty dollars, be guilty of a misdemeanor.

(2.) If the value of the property destroyed, or the diminution in value by the injury, shall be twenty dollars or more, be guilty of a gross misdemeanor. [L. '09, p. 1022, § 415.]

Compare Minn. Code, § 5141.

For former laws, see § 2842, *infra*.

See *infra*, § 3265, poisoning honey bees.

CHAPTER X.

MISCELLANEOUS CRIMES.

§ 2668. Drunkenness.

Every person who shall become intoxicated by voluntarily drinking intoxicating liquors, and who, while intoxicated shall loiter about any place where intoxicating liquors are sold or kept for sale, or create any disturbance or use any profane or indecent language in any public place, street or meeting, or commit any assault or breach of the peace, shall be guilty of a misdemeanor. [L. '09, p. 1022, § 416.]

Compare Minn. Code, § 5161.

§ 2669. Common Drunkard.

Every person who shall be three times convicted of a violation of section 2668, or of any municipal ordinance defining and punishing drunkenness or any crime of which drunkenness shall be an element, or who shall squander his property in drink, or who, as a result of the use of intoxicating liquors shall abuse or fail properly to support or care for his wife or any minor child lawfully in his custody, shall be a common drunkard, and shall be adjudged so to be by any magistrate before whom he may be brought on a charge of committing any crime of which drunkenness is an element, in addition to any other punishment inflicted therefor. [L. '09, p. 1023, § 417.]

§ 2670. Opium Joints.

Every person who shall open, conduct or maintain, as owner or employee, any place where opium, morphine, alkaloid cocaine or alpha or beta eucaine or any derivative, mixture or preparation of any of them, shall be in any manner used by persons resorting thereto for the purpose; and every person who shall visit or resort to such place for the purpose of using in any manner any of said drugs, shall be guilty of a gross misdemeanor. [L. '09, p. 1023, § 418.]

Compare Minn. Code, § 5162.

For former laws, see *infra*, § 2945.

See *infra*, § 2946, smoking opium.

§ 2671. Solemnizing Unlawful Marriage.

Every person who shall solemnize a marriage when either party thereto is known to him to be under the age of legal consent, or to be an idiot, insane person, habitual criminal or common drunkard, or a marriage to which, within his knowledge, any legal impediment exists, shall be guilty of a gross misdemeanor. [L. '09, p. 1023, § 419.]

Compare Minn. Code, § 5165.

See infra, §§ 7153, 7167, prohibited solemnization of marriage.

See infra, § 7160, failure to record marriage.

§ 2672. Obstructing Public Officer.

Every person who, after due notice, shall refuse or neglect to make or furnish any statement, report or information lawfully required of him by any public officer, or who, in such statement, report or information shall make any willfully untrue, misleading or exaggerated statement, or who shall willfully hinder, delay or obstruct any public officer in the discharge of his official powers or duties, shall be guilty of a misdemeanor. [L. '09, p. 1023, § 420.]

See supra, § 2367, and notes, resisting officer.

§ 2673. Acting Without Lawful Authority.

Every person who shall in any case not otherwise specially provided for, do any act, for the doing of which a license or other authority is required by law, without having such license or other authority as required by law, shall be guilty of a misdemeanor. [L. '09, p. 1024, § 421.]

Former laws, see § 2961, infra.

See supra, § 2641, and notes, corporation doing business without a license.

§ 2674. Collecting for Benefit Without Authority.

Every person who shall sell a ticket to any ball, benefit or entertainment, or ask or receive any subscription or promise thereof, for the benefit or pretended benefit of any person, association or order, without being duly authorized thereto by the person, association or order for whose benefit or pretended benefit the same is done, shall be guilty of a misdemeanor. [L. '09, p. 1024, § 422.]

§ 2675. Desecration of Flag.

Every person who, for exhibition or display, shall cause to be placed upon or affixed to any flag, standard, color or ensign of the United States, or upon a flag, standard, color or ensign purporting to be such, any inscription, design, device, symbol, name, advertisement, words, characters, picture, mark or notice whatever; or who shall display or exhibit any such flag, standard, color or ensign to which any such inscription, design, device, symbol, name, advertisement, words, characters, photograph, mark or notice whatever; or who shall publicly mutilate, trample upon, deface, jeer at or defy any such flag, standard, color or ensign, shall be guilty of a misdemeanor. [L. '09, p. 1024, § 423.]

For former laws, see infra, § 2990.

§ 2676. Bribery of Labor Representative.

Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any duly constituted representative of

a labor organization, with intent to influence him in respect to any of his acts, decisions or other duties as such representative, or to induce him to prevent or cause a strike by the employees of any person or corporation, shall be guilty of a gross misdemeanor. [L. '09, p. 1024, § 424.]

§ 2677. Labor Representative Receiving Bribe.

Every person who, being the duly constituted representative of a labor organization, shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon any agreement or understanding that any of his acts, decisions or other duties as such representative, or any act to prevent or cause a strike of the employees of any person or corporation shall be influenced thereby, shall be guilty of a gross misdemeanor. [L. '09, p. 1025, § 425.]

§ 2678. Corrupt Influencing of Agent.

Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any agent, employee or servant of any person or corporation, with intent to influence his action in relation to his principal's, employer's or master's business, shall be guilty of a gross misdemeanor. [L. '09, p. 1025, § 426.]

§ 2679. Grafting by Employee.

Every agent, employee or servant of any person or corporation who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon any agreement or understanding that he shall act in any particular manner in connection with his principal's, employer's or master's business; or who, being authorized to purchase or contract for materials, supplies or other articles or to employ servants or labor for his principal, employer or master, shall ask or receive, directly or indirectly, for himself or another, a commission, discount, bonus or promise thereof from any person with whom he may deal in relation to such matters, shall be guilty of a gross misdemeanor. [L. '09, p. 1025, § 427.]

For former laws, see *infra*, § 2991.

§ 2680. Use of the Words "Sterling Silver," etc.

Every person who shall make, sell or offer to sell or dispose of, or have in his possession with intent to sell or dispose of any metal article marked, stamped or branded with the words "sterling silver," or "solid silver," unless nine hundred twenty-five one-thousandths of the component parts of the metal of which such article and all parts thereof is manufactured is pure silver, shall be guilty of a gross misdemeanor. [L. '09, p. 1025, § 428.]

§ 2681. Use of Words "Coin Silver," etc.

Every person who shall make, sell or offer to sell or dispose of, or have in his possession with intent to dispose of any metal article marked, stamped or branded with the words "coin," or "coin silver," unless nine hundred one-thousandths of the component parts of the metal of which such article and all parts thereof is manufactured, is pure silver, shall be guilty of a gross misdemeanor. [L. '09, p. 1026, § 429.]

§ 2682. Use of the Word "Sterling," on Mounting.

Every person who shall make, sell, offer to sell or dispose of, or have in his possession with intent to sell or dispose of, any article comprised of

leather, shell, ivory, celluloid, pearl, glass, porcelain, pottery, steel or wood, to which is applied or attached a metal mounting marked, stamped or branded with the words "sterling," or "sterling silver," unless nine hundred twenty-five one thousandths of the component parts of the metal of which such metal mounting is manufactured is pure silver, shall be guilty of a gross misdemeanor. [L. '09, p. 1026, § 430.]

§ 2683. Use of the Words "Coin Silver," on Mounting.

Every person who shall make, sell, offer to sell or dispose of, or have in his possession with intent to sell or dispose of, any article comprised of leather, shell, ivory, celluloid, pearl, glass, porcelain, pottery, steel or wood, to which is applied or attached a metal mounting marked, stamped or branded with the words "coin" or "coin silver," unless nine hundred one-thousandths of the component parts of the metal of which such metal mounting is manufactured is pure silver, shall be guilty of a gross misdemeanor. [L. '09, p. 1027, § 431.]

§ 2684. Unlawfully Marking Article "Made of Gold."

Every person who shall make, sell, offer to sell or dispose of, or have in his possession with intent to sell or dispose of, any article constructed wholly or in part of gold, or of an alloy of gold, and marked, stamped or branded in such manner as to indicate that the gold or alloy of gold in such article is of a greater degree or carat of fineness, by more than one carat, than the actual carat, or fineness of such gold or alloy of gold, shall be guilty of a gross misdemeanor. [L. '09, p. 1027, § 432.]

§ 2685. "Marked, Stamped or Branded," Defined.

An article shall be deemed to be "marked, stamped or branded" whenever such article, or any box, package, cover or wrapper in which the same is inclosed, encased or prepared for sale or delivery, or any card, label or placard with which the same may be exhibited or displayed, is so marked, stamped or branded. [L. '09, p. 1027, § 433.]

§ 2686. Protecting Civil Public Rights.

Every person who shall deny to any other person because of race, creed or color, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement, shall be guilty of a misdemeanor. [L. '09, p. 1027, § 434.]

Former laws, see §§ 2760, 2761, *infra*.

§ 2687. Master of Vessel Bringing a Foreign Convict.

Every person who, being the master or commander of any vessel or boat arriving from a foreign country, shall knowingly bring into this state a person who has been or is a foreign convict of any offense, which, if committed in this state would be punishable under the laws thereof, shall be guilty of a misdemeanor. [L. '09, p. 1027, § 435.]

§ 2688. Vagrancy.

Every—

(1.) Person who asks or receives any compensation, gratuity or reward for practicing fortune telling, palmistry or clairvoyance; or,

(2.) Person who keeps a place where lost or stolen property is concealed; or,

(3.) Person practicing or soliciting prostitution or keeping a house of prostitution; or,

(4.) Common drunkards found in any place where intoxicating liquors are sold or kept for sale, or in an intoxicated condition; or,

(5.) Common gambler found in any place where gambling is conducted or where gambling paraphernalia or devices are kept; or,

(6.) Healthy person who solicits alms; or,

(7.) Lewd, disorderly or dissolute person; or,

(8.) Person who wanders about the streets at late or unusual hours of the night without any visible or lawful business; or,

(9.) Person who lodges in any barn, shed, shop, outhouse, vessel, car, saloon or other place not kept for lodging purposes, without the permission of the owner or person entitled to the possession thereof; or,

(10.) Person who lives or works in a house of prostitution or solicits for any prostitute or house of prostitution; or,

(11.) Person who solicits business for an attorney around any court, jail, morgue or hospital, or elsewhere; or,

(12.) Habitual use of opium, morphine, alkaloid cocaine or alpha or beta eucaine, or any derivation, mixture or preparation of any of them; or,

(13.) Person having no visible means of support, who does not seek employment, nor work when employment is offered to him; or,

(14.) Person who by his own confession thereto or prior conviction thereof is known to have been guilty of larceny, burglary, robbery or any crime of which fraud or intent to defraud is an element, who shall be found in any drinking saloon or cellar, or any public dance-hall or music-hall where intoxicating liquors are sold, or be found intoxicated, or who, except upon lawful business, shall go about any dark street or alley or any residence section of any city or town in the night-time, or loiter about any steamboat landing, passenger depot, banking institution or crowded street, shop or thoroughfare, or any public meeting or gathering, or place where people gather in crowds—

Is a vagrant, and shall be punished by imprisonment in the county jail for not more than six months, or by a fine of not more than five hundred dollars. [L. '09, p. 1027, § 436.]

For former laws, see § 1967, *supra*.

§ 2689. Admitting Convict to Saloon, and Selling Liquor to Drunkard.

Every person, being the owner or manager of, or an employee in any drinking-saloon, drinking cellar or public dance-hall or music-hall where intoxicating liquors are sold or kept for sale, who shall knowingly permit to enter such saloon, cellar or hall, or give employment to, or sell or give any intoxicating liquor to, [any female person], any person previously convicted, whether in this state or elsewhere, of a crime of which fraud or the intent to defraud is an element, or of petit larceny, or of any crime which under the laws of this state would amount to a felony, or who shall sell or give any intoxicating liquor to any person [known or] adjudged to be a common drunkard, or to any person in an intoxicated condition, shall be guilty of a misdemeanor. [L. '09, p. 1029, § 437; L. '09, Ex. Ses., p. 67, § 2.]

This section was amended by Laws 1909, Ex Ses., p. 67, § 2, but a doubt exists as to the sufficiency of the title. See note to § 2445, supra. The amendment to this section omitted the words "any female person" and added the words "known or," in brackets. See infra, § 2696, and note, violations of liquor laws.

§ 2690. Performing or Selling Undedicated Play.

Every person who, without the consent of the owner thereof, shall cause to be publicly performed any dramatic composition, or dramatic musical composition commonly called an opera, or any substantial part thereof, which has been copyrighted under the laws of the United States, or shall knowingly participate in the performance or representation of any substantial part thereof, or knowingly sell a substantial copy of any substantial part thereof, shall be guilty of a misdemeanor. [L. '09, p. 1029, § 438.]

§ 2691. Soliciting or Receiving Tips.

Every employee of a public house or public service corporation who shall solicit or receive any gratuity from any guest shall be guilty of a misdemeanor. [L. '09, p. 1029, § 439.]

§ 2692. Same—Penalty.

Every person giving any such gratuity mentioned in section 2691 shall be guilty of a misdemeanor. [L. '09, p. 1029, § 440.]

§ 2693. Prohibiting Drinking in Public Conveyances.

Every person who shall drink any intoxicating liquor in any public conveyance, except in a compartment or place where sold or served under the authority of a license lawfully issued, shall be guilty of a misdemeanor. [L. '09, p. 1029, § 441.]

See note to § 2696.

§ 2694. Common Carrier not to Permit Drinking in Public Conveyance.

Every person engaged wholly or in part in the business of carrying passengers for hire, and every agent, servant, or employee of such person, who shall knowingly permit any person to drink any intoxicating liquor in any public conveyance, except in the compartment where such liquor is sold or served under the authority of a license lawfully issued, shall be guilty of a misdemeanor. [L. '09, p. 1030, § 442.]

See note to § 2696.

§ 2695. Selling Liquors not Aged.

Every person who, as principal, agent or otherwise, shall sell or offer for sale any spirituous or distilled intoxicating liquor known as whisky (except Scotch or Irish whisky), any part of which has not been aged for a period of four years in wooden barrels or casks, or who shall, as principal, agent or otherwise, sell or offer for sale any malt liquor that has not been aged for a period of more than sixty (60) days, or which contains more than eight (8) % alcohol by weight shall be guilty of a gross misdemeanor. [L. '09, p. 1030, § 443.]

See note to § 2696.

§ 2696. Mixing, Distilling, Selling, etc., Low Wines or Spirits.

Every person who, by mixing, compounding or distilling low wines or ardent spirits, or who, by adding thereto any flavoring or other substance,

shall produce, or who shall sell or offer for sale or have in his possession with intent to sell, any liquor known as whisky, gin or brandy so produced, shall be guilty of a gross misdemeanor. [L. '09, p. 1030, § 444.]

See *supra*, § 2495, obstructing front of saloon.
 See *infra*, §§ 2962, 6263, sale without license.
 See *infra*, § 2963, sale of liquor to minors.
 See *infra*, §§ 2966, 6288, sale to Indians.
 See *infra*, § 6276, druggist, unlawful sales.
 See *infra*, § 6308, druggist failing to keep record of liquor sales.
 See *infra*, § 6281, sale without United States revenue stamp.
 See *infra*, § 6272, sale without state license.
 See *infra*, § 6262, selling liquors not inspected.
 See *infra*, § 4968, sale on election day.
 See *infra*, §§ 4742-4745, prohibited sales near schools.
 See *infra*, § 6284, saloon-keeper failing to display sign.
 See *infra*, § 6304, place of selling liquor a nuisance.
 See *infra*, § 6285, employing females in saloon.

CHAPTER XI.

CRIMES UNDER ACTS NOT REPEALED BY THE PENAL CODE OF 1909.

§ 2697. (2953.) Selling Cigarettes Containing Injurious Drug—Penalty.

Any person [selling or giving away cigarettes without a license, or] selling or giving away any cigarette or cigarettes containing any injurious drug, narcotic or other deleterious matter, is guilty of a misdemeanor, and shall on conviction thereof be subject to a fine of fifty dollars for each offense, or be imprisoned for sixty days in a common jail or penitentiary, and any person [having a license, or any person not licensed,] who sells or gives away any cigarette or cigarettes, of any and every kind whatsoever, to a minor under the age of eighteen years, shall be subjected to the same penalty as herein provided. [L. '95, p. 126, § 5.]

Superseded as to words in brackets by § 2968, *infra*.

All of the existing provisions of the old Criminal Code relating to crimes and punishments, as well as the later penal enactments, which were not expressly repealed by the act of 1909, are retained in this compilation; but this chapter embraces only part of such enactments, most of which are placed under specific subjects. See the following sections: 3257; 5144 to 5149, inclusive; 3289, 3265, 3123, 3340, 5232, 6284, 6285, 5315, 5316, 5317, 6566, 8293, 8294, 8385; 5342 to 5344, inclusive; 5354, 5353, 5352, 5356, 5358, 5357, 5372, 5358½, 5326, 5355; 5336 to 5338, inclusive; 5380 to 5383, inclusive; 5208, 5195; 5197 to 5207, inclusive; 5188, 5189, 8717; 3284 to 3288, inclusive; 4958 to 4971, inclusive.

As to sale of cigarettes, see § 2536, *supra*.

§ 2698. (2954.) Sale of Any Cigarettes Except in Original Package.

Any person selling cigarettes of any and every kind whatsoever, except in an original and full package, is guilty of a misdemeanor, and shall on conviction thereof be subject to the same penalty as in the section last above provided. [L. '95, p. 126, § 6.]

This section may have been superseded by § 2968, *infra*, covering much more than this section; but in so far as the acts are not inconsistent, the penalty for the violation of this section is greater than that fixed by § 2968.

§ 2699. (2955.) Sale to Minors—Civil Liability to Parents of Minor.

In addition to the penalty above provided for, the sale or giving away of cigarettes to a minor under the age of eighteen years, the parent or guardian of such minor or any individual or association suing in behalf or for the

benefit of such minor, may prosecute, in a civil action, any person so violating this chapter, for the penalty of two hundred and fifty dollars and the costs of the action, one-half of which amount shall be paid to any person as his moiety share who furnished the information upon which the action is brought and penalty recovered. [L. '95, p. 126, § 7.]

See note to § 2697.

§ 2700. Same—Wrappers or Substitutes—Persuading Minor to Smoke.

It shall hereafter be unlawful in the state of Washington for any corporation, company, firm or person to sell, barter, furnish or give away, directly or indirectly, to any minor under eighteen years of age any cigarette, cigarette wrappers or any substitute for either; or to procure for, or to persuade, advise, counsel or compel any minor under said age to smoke cigarettes or for any minor under said age to smoke any cigarette. [L. '01, p. 261, § 1.]

A portion at least of this section was not superseded by § 2968, *infra*.

§ 2701. Same—Penalty—Duty of Prosecutors.

Any such corporation, company, firm or person, violating any of the provisions of the preceding section shall, for the first offense, upon conviction thereof, be fined in any sum not more than fifty dollars, nor less than ten dollars; and for a second and any subsequent offense, such corporation, company, firm or person shall, upon conviction thereof, be fined in any sum not more than five hundred dollars nor less than ten dollars, and to which may be added imprisonment in the county jail for any period not exceeding sixty days. It is hereby made the special duty of prosecuting attorneys to enforce the provisions of this act, and he may summon any minor under eighteen years of age who may have or had had in his possession any cigarettes, and compel him to testify before the mayor of a city or a justice of the peace as to where and of whom he obtained such cigarettes. [L. '01, p. 262, § 2.]

"Act" in this section refers to §§ 2700, 2701.

§ 2702. (7133.) Counterfeiting Uncoined Gold, etc.

Any person who shall counterfeit any kind or species of gold dust, gold bullion or bars, lumps, pieces of nuggets of gold, or any description whatsoever of uncoined gold, currently passing in this state, or shall alter or put off any kind of uncoined gold mentioned in this section, for the purpose of defrauding any person or persons, body, politic or corporate, or shall make any instrument for counterfeiting any kind [of] uncoined gold as aforesaid, knowing the purpose for which such instrument was made, or shall knowingly have in his possession and secretly keep any instrument for the purpose of counterfeiting any kind of uncoined gold as aforesaid, every such person so offending, or any person or persons aiding or abetting in or about said offense or offenses shall be deemed guilty of counterfeiting, and upon conviction thereof shall be punished by imprisonment in the penitentiary for a term not less than one year nor more than fourteen years. [L. '62, p. 15, § 7; Cd. '81, § 857; 2 H. P. C., § 66.]

§ 2703. (7146.) Robbing Sluice-boxes, etc.

Any person who shall break or rob in any manner, or who shall attempt to break or rob, any flume, rocker, quartz-mill, quartz vein or lode, bedrock

sluice, sluice-box, or mining claim not his own, or who shall trespass upon such mining claim with the intent to commit a felony, shall, upon conviction thereof, be punished by imprisonment in the penitentiary of this state not less than one nor more than five years, or by fine not less than one hundred dollars nor more than one thousand dollars, or by both such imprisonment and fine as the court or judge thereof may direct. [L. '90, p. 126, § 6; 2 H. P. C., § 79.]

§ 2704. (7157.) Malicious Injury to Settlers on Unsurveyed Lands.

Any person or persons who shall willfully and maliciously disturb, or in anywise injure or destroy, the dwelling-house or other building, or any fence inclosing or being on the claim, of any settler upon the unsurveyed public lands in this state, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than one hundred dollars for each and every offense, to which may be added imprisonment in the county jail not exceeding ninety days. [Cf. L. '83, p. 71, § 2; L. '91, p. 124, § 17; 2 H. P. C., § 89.]

Superseded in part by the next section.

§ 2705. Injury to Buildings or Contents.

If any person shall maliciously or wantonly destroy or deface any cabin or other building or place of shelter or any of the contents of such cabin, building or shelter constructed by any person or persons or society of persons upon any public land of the state of Washington, or of the United States within the state of Washington, or upon any land not owned by such person so destroying or defacing the same, he shall be deemed guilty of a misdemeanor: Provided, that the provisions of this act shall not apply to bona fide settlers on government lands. [L. '99, p. 186, § 1.]

"Act" in this section refers to §§ 2705-2707.

§ 2706. Destruction of Monuments, Records, etc.

If any person shall maliciously or wantonly remove, destroy or carry away any record or record book or document of any kind or any box or other receptacle for containing the same or any instrument or device for scientific purposes established or placed upon any mountain peak or summit or at any other place of resort, or upon any land belonging to this state or to the United States, or in or upon any body or stream of water within this state, such person shall be deemed guilty of a misdemeanor. [L. '99, p. 186, § 2.]

§ 2707. Penalty.

Every person convicted of a violation of any of the provisions of this act shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail not less than ten days nor more than six months or by both such fine and imprisonment. Any person acting as informer, in case of conviction, under this act, shall be entitled to one-half of the fine imposed. [L. '99, p. 186, § 3.]

"Act" in this section refers to §§ 2705-2707.

§ 2708. (7158.) Posting Advertisements on Public Property.

Every person who willfully commits any trespass by either putting up, affixing, fastening, printing, or painting upon any property belonging to the

state, or to any county, city, town, or village, or dedicated to the public, or upon any property of any person or corporation without license from the owner, any notice, advertisement, or designation of, or any name for any commodity, whether for sale or otherwise, or any picture, sign, or device intended to call attention thereto, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars, or by imprisonment in the county jail not more than twenty days, or by both such fine and imprisonment: Provided, that nothing contained in this section shall be construed to prohibit the posting of legal notices. [L. '86, p. 78, § 1, subd. 5; 2 H. P. C., § 90.]

§ 2709. To Prevent Removal of Mortgaged Property.

That when any real estate in this state is subject to, or is security for, any mortgage, mortgages, lien or liens, other than general liens arising under personal judgments, it shall be unlawful for any person who is the owner, mortgagor, lessee, or occupant of such real estate to destroy or remove or to cause to be destroyed or removed from said real estate any fixtures, buildings, or permanent improvements, not including crops growing thereon, without having first obtained from the owners or holders of each and all of such mortgages or other liens his or their written consent for such removal or destruction. Any person willfully violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a period not to exceed six months, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment. [L. '99, p. 122, §§ 1, 2.]

See supra, § 2603, sale of mortgaged personal property.

See supra, § 2629, and infra, § 3669, removal of mortgaged personalty.

§ 2710. Prohibiting Advertising of Treatment of Certain Diseases.

Any person who shall advertise that he will treat or cure venereal diseases or disorders, or any venereal disease or disorder, shall be guilty of a misdemeanor, and upon conviction thereof shall be imprisoned in the county jail for a period of not less than one month nor more than six months. Any owner or managing officer of any newspaper in whose paper shall be printed or published such advertisement as is described in this section shall be guilty of a misdemeanor, and upon conviction thereof shall be imprisoned in the county jail for a period of not less than one month nor more than six months. [L. '05, p. 142, § 1.]

§ 2711. (7169.) False Pretenses, etc., in Selling Mines.

Any person who shall, with intent to cheat, wrong, or defraud, place in or upon any mine or mineral claim any ores or specimens of ores not extracted therefrom, or exhibit any ore, or certificate of assay of ore, not extracted therefrom, for the purpose of selling any mine or mining claim, or interest therein, or who shall obtain any money or property by any such false pretenses or artifices, shall be deemed guilty of a felony. [L. '90, p. 99, § 1; 2 H. P. C., § 238.]

§ 2712. (7170.) Altering Sample or Certificate of Assay.

Any person who shall interfere with, or in any manner change samples of ores or bullion produced for sampling, or change or alter samples or pack-

ages of ores or bullion which have been purchased for assaying, or who shall change or alter any certificate of sampling or assaying, with intent to cheat, wrong, or defraud, shall be deemed guilty of a felony. [L. '90, p. 99, § 2; 2 H. P. C., § 239.]

§ 2713. (7171.) Making False Sample or Assay of Ore.

Any person who shall, with intent to cheat, wrong, or defraud, make or publish a false sample of ore or bullion, or who shall make or publish or cause to be published a false assay of ore or bullion, shall be deemed guilty of a felony. [L. '90, p. 99, § 3; 2 H. P. C., § 240.]

§ 2714. (7172.) Penalty for Violation of Last Three Sections.

Any person violating any of the provisions of the last three preceding sections shall be deemed guilty of a felony, and upon conviction thereof shall be fined in any sum not less than fifty nor more than one thousand dollars, or by imprisonment in the penitentiary for not less than one year nor more than five years, or by both such fine and imprisonment. [L. '90, p. 99, § 4; 2 H. P. C., § 241.]

§ 2715. (7318.) Extortion by Ferryman, Toll-gate Keeper, etc.

If any ferry-man, ferry owner, ferry-keeper, or keeper of a toll bridge or toll gate, himself, or by any person in his employment, shall demand or receive any greater fees on account of ferriage or toll than is or may be fixed by law, or by the proper board doing county business, as the rates of ferriage or toll to be received by such person, upon conviction thereof he shall be fined in any sum not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding one month. [L. '54, p. 95, § 108; Cd. '81, § 923; 2 H. P. C., § 156.]

See *infra*, § 5008, order of carriage by ferryman, penalty.

See *infra*, § 5011, maintaining ferry without a license.

§ 2716. Mutilation of Sign-boards, Mile-posts, etc.

Any person or persons who shall deface, mutilate, tear down or destroy any sign-board or post, or any mile-board or post, erected or set up by the authorities of any city, town or county, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine in any sum less than twenty dollars, or by imprisonment in the county jail not exceeding twenty days, or both. [L. '01, p. 25, § 1.]

§ 2717. Protection to Mile-boards Used for Advertising.

Any person, firm, company or corporation desiring to erect or set up sign-boards or posts, or mile-boards or posts, as a means of advertising, and desiring to have the protection of the provisions of the foregoing sections in so doing, shall satisfy the proper officers of the city, town or county that said boards or posts will be set up at correct distances and at proper points and in all other respects be serviceable to the public as sign-boards or posts, or as mile-boards or posts; whereupon said person, firm, company or corporation shall be permitted to place on said boards or posts the words "by authority," and the authorities granting such permission shall make a record of such action in the records of their proceedings; and any sign-board or post, or any mile-board or post, set up by such permission, and having on its

face in clear, bold letters the words "by authority," shall have the same protection on [as] such boards or posts set up by the authorities of any city, town or county, and any person or persons who shall deface, mutilate, tear down or destroy any such board or post so set up, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine in any sum less than twenty dollars, or by imprisonment in the county jail not exceeding twenty days, or both. [L. '01, p. 25, § 2.]

§ 2718. (7297.) Fast Driving Over Bridge.

Any person or persons riding or driving faster than a walk over any bridge located on any county or state road, composed of one or more spans, upon conviction thereof shall be fined in any sum not to exceed ten dollars nor less than five dollars, to be collected by any court having competent jurisdiction thereof, and all moneys so collected shall be paid into the county treasury and become a part of the school fund: Provided, that this section shall apply only to bridges over thirty feet in length. [L. '79, p. 148, § 1; Cd. '81, § 931; 2 H. P. C., § 165.]

§ 2719. (7302.) Unlawful Use of Traction Engine on Highways.

Whenever any person in charge of and running any traction engine propelled by steam upon any county road or public highway, except in towns, cities, or villages, shall meet or come in close proximity to any person driving a team of horses, it shall be the duty of the person in charge of such engine to come to a full stop, and remain standing until the team has passed. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than ten nor more than fifty dollars. [L. '90, p. 523, §§ 1, 2; 2 H. P. C., § 233.]

§ 2720. Throwing Glass or Tacks in Highway—Penalty.

Any person or persons, corporation or corporations who shall throw, place or deposit, in any road, street, alley, or highway, in the state of Washington, any bottle, bottles, glass, glassware, tacks, or nails, shall be guilty of a misdemeanor, and on conviction thereof, shall be fined not less than twenty-five dollars nor more than fifty dollars, together with the costs and disbursements of the prosecution, and shall be committed to the county jail until such fine and costs are paid. [L. '09, p. 56, § 1.]

§ 2721. Race-track Gambling a Felony—Penalty.

Any person who receives, records or registers bets, stakes or wagers, or who sells pools, or makes a book or books, upon any horserace, or upon the result of any trial or contest of speed or power of endurance of any animal, whether such race, trial or contest takes place within or without this state; or any person who receives, registers, records, forwards or transmits, or purports or pretends to receive, register, record, forward or transmit, in any manner whatsoever, any money, checks, credits, or any other representative of value, or any property, thing or consideration of value whatsoever, bet, staked, or wagered, by or for any other person, upon any such race or result, whether to be bet, staked or wagered within or outside this state; or any person who uses, or has in his possession for use, any book, paper, board, device, apparatus or paraphernalia, for the purpose, actual or pretended, of receiving, recording, registering, forwarding or transmitting any bets, stakes

or wagers, or of book-making or pool-selling, upon any such race or result; or any person who keeps, manages, conducts, maintains or occupies any house, room, shop; shed, tenement, tent, booth, building, float or vessel, or any part thereof, or who keeps, manages, conducts, maintains or occupies any place or stand, of any kind, upon any public or private ground, street, park, garden, inclosure or place, for the purpose of receiving, recording, registering, forwarding or transmitting any bets, stakes or wagers, or of selling pools, or of book-making, upon any such race or result; or any person who being the owner, lessee or occupant of any house, room, shop, shed, tenement, tent, booth or building, float or vessel, or part thereof, or of any ground, park, garden, inclosure or place, knowingly permits the same to be used or occupied for any of the purposes herein prohibited, or who knowingly permits to be kept, exhibited or used therein any book, paper, board, device, apparatus or paraphernalia, for the purpose of recording or registering such bets, stakes or wagers, or for the purpose of such pool-selling or book-making; or any person, whether as principal, employer, owner, proprietor agent, employee or assistant, or as officer, agent or employee of a corporation, who aids, assists or abets, in any manner, any of the said acts or things which are hereby forbidden, is guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary for a period of not less than one, nor more than three, years. [L. '09, p. 7, § 1.]

See *supra*, § 2473, pool-selling and book-making.

§ 2721½. Indecent Language Practices and Drunkenness.

Any person who shall use in the presence of any person any indecent or vulgar language, or who shall appear upon any public road or street or in any or upon any public place or conveyance in any indecent, drunken or maudlin condition or boisterous manner shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished accordingly. [L. '09, Ex. Ses., p. 61, § 1.]

TITLE XV. APPENDIX.

OFFENSES AND PUNISHMENTS UNDER FORMER LAWS.

(Governing offenses committed prior to June 9, 1909.)

See separate index to this appendix immediately following.

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CHAPTER I.

CLASSIFICATION OF OFFENSES.

§ 2722. (6773.) Public Offenses, Classified and Defined.

Public offenses are divided into,—

1. Felonies; and
2. Misdemeanors.

A felony is punishable by death or imprisonment in the penitentiary. All other offenses are misdemeanors. [Cf. L. '54, p. 78, § 11; Cd. '81, § 781; 2 H. C., § 1184.]

This chapter governs as to all offenses committed prior to June 9th, 1909. See § 2294, *supra*.

As to repeal of this section, see § 2304, and note. Present law, see § 2253, *supra*.

See *infra*, § 4756, infamous crime defined.

Cited in 6 Wash. 570; 14 Wash. 240; 31 Wash. 247; 36 Wash. 445.

Under our statute petit larceny is not an infamous crime: *State v. Payne*, 6 Wash. 563, 570.

The violation of a municipal ordinance is a public offense, and properly prosecuted in the name of the state, under § 27. Article IV, of the Constitution: *State v. Fountain*, 14 Wash. 236.

§ 2723. (6774.) Common-law Offenses, Jurisdiction of.

For all offenses at common law which are not hereinafter defined by statute, the offender may be tried in the superior courts of this state. [Cf. L. '60, p. 105, § 9; Cd. '81, § 782; L. '91, p. 46, § 1; 2 H. C., § 1185.]

As to repeal of this section, see § 2304, and note. Present law, see § 2299, *supra*.

Cited in 5 Wash. 774; 48 Wash. 107.

Under this section, the common-law offense of conspiracy is indictable; and an indictment which contains sufficient to charge the crime at common law will support a judgment of conviction: *Bradshaw v. Territory*, 3 W. T. 265. Conspiracy to defraud a person is indictable at common law: *Id*.

Although the penal code does not define the crime against nature known as sodomy, nor impose a penalty for its commission, yet, under the statutory provisions making all common-law crimes indictable, a prosecution will be sustained for an assault with an intent to commit such crime: *State v. Place*, 5 Wash. 773.

§ 2724. (6775.) Willful Neglect of Public Duty, a Misdemeanor.

When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision has been made for the punishment of such delinquency, is a misdemeanor. [Cd. '81, § 783; 2 H. C., § 1186.]

As to repeal of this section, see § 2304, and note. Present law, see § 2268, *supra*.

§ 2725. (6776.) Prohibited Acts a Misdemeanor, When.

When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor. [Cd. '81, § 784; 2 H. C., § 1187.]

As to repeal of this section, see § 2304, and note. Present law, see § 2268, *supra*.

See *infra*, § 2984, punishment for misdemeanor where no provision is made by statute.

Cited in 47 Wash. 331.

CHAPTER II.

OFFENSES AGAINST THE PERSON.

§ 2726. (7035.) **Murder in First Degree, Defined.**

Every person who shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another, shall be deemed guilty of murder in the first degree, and upon conviction thereof, shall suffer death. But this shall in no case prevent the exercise of the pardoning power of the governor, or the authority to commute the punishment from that of death to imprisonment for life. [Cf. L. '54, p. 78, § 12; Cd. '81, § 786; L. '91, p. 119, § 1; 2 H. P. C., § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2392, *supra*.

See notes to § 2065, sufficiency of indictment, etc.

See *supra*, § 2145, defendant to be personally present.

See *supra*, § 2146, attempt to commit murder.

See notes to § 2152, evidence, etc., variance.

See *supra*, § 2157 and notes, jury may find the degree.

See notes to § 2158, instructions, etc.

See *supra*, § 2223, pardoning power.

See *infra*, § 2729, murder in second degree defined.

Cited in 4 Wash. 107; 11 Wash. 246; 13 Wash. 211; 33 Wash. 261; 51 Wash. 225, 228.

First degree: See 1 Remington's Digest, p. 1399, §§ 83, 85.

A homicide on an Indian reservation is within the federal jurisdiction: *Shapoonmash v. United States*, 1 W. T. 188.

In capital cases presumptions are not made in favor of the regularity of the proceedings: *Id.*

Murder in the first degree is defined by this section in clear, precise and comprehensive language, and sets out every act necessary to be alleged in charging the crime: *State v. Day*, 4 Wash. 104, 197.

Unless deliberation and premeditation exist the killing can only be murder in the second degree: *Freidrich v. Territory*, 2 Wash. 358, 369.

A defendant charged with murder in the first degree by administering poison may be convicted of murder in the second degree, or of manslaughter, pursuant to the provisions of § 2167, *supra*, permitting convictions for inferior degrees when the offense consists of different degrees: *State v. Greer*, 11 Wash. 244.

The fact that wounds inflicted by shooting were not skillfully treated or accorded the best medical treatment is no defense to a prosecution for homicide where it is not shown that neglect or unskillfulness was the sole cause of the death: *State v. Baruth*, 47 Wash. 283.

An indictment charging murder, as at common law, is sufficient to sustain a verdict of murder in the first degree under our statute. The peculiar circumstances distinguishing murder in the first degree need not be set out; and the jury, from the evidence, are to determine the degree: *Leschi v. Territory*, 1 W. T. 13.

Murder is now purely statutory, and not a common-law crime, and, in order to constitute murder in either degree, it is necessary that there must have been a specific intent or purpose to kill: *Blanton v. State*, 1 Wash. 265, 268.

One who kills a person by mistake or misadventure, while attempting with deliberate and premeditated malice to kill another, is guilty of murder in the first degree: *State v. McGonigle*, 14 Wash. 594.

Excusable or justifiable homicide: See 1 Remington's Digest, pp. 1383, 1384, §§ 14-19; *White v. Territory*, 3 W. T. 397; *Watts v. Territory*, 1 W. T. 409; *State v. Carter*, 15 Wash. 121; *State v. McCann*, 16 Wash. 249.

It is not incumbent upon one assailed while on his own premises outside of his dwelling-house to retreat, or consider whether a retreat can be safely made, before availing himself of the right of self-defense, where he has reasonable grounds to believe, and does in good faith believe, that his assailant intends to take his life or do him great bodily harm: *State v. Cushing*, 14 Wash. 527.

Under this section an information is not bad for duplicity in alleging, in the language of the statute, a killing, purposely and of deliberate and premeditated malice and while engaged in the perpetration and attempt to perpetrate the crimes of robbery and burglary; in view of § 2022, *supra*, abolishing all forms of pleading, and § 2065, *supra*, providing that no information shall be deemed insufficient if the crime is set forth in ordinary language in such a manner that a person of ordinary understanding may know what was intended: *State v. Fillpot*, 51 Wash. 223.

Under this section it is not necessary to state the details of the acts included in the crimes of robbery and burglary alleged, but it is sufficient to allege the per-
petration or attempt to commit any of the included crimes in the language of the statute: *Id.*

§ 2727. (7036.) Endangering Life by Obstructions on Railways, etc.

Any person or persons who shall willfully or maliciously place any obstruction on any railroad track or roadbed, or street-car track in this state, or who shall loosen, tear up, remove or misplace any rail, switch, frog, guard-rail, cattle-guard, or any part of such railroad track or roadbed, or street-car track, or who shall tamper with or molest any such road, roadbed or track, or who shall destroy or damage any locomotive, motor or car on said track, or who shall otherwise interfere with the maintenance or operation of such road so as to endanger the safety of any train, car, motor or engine, or so as to endanger [life] or injure any passenger or person riding thereon, or being about the same, shall, upon conviction thereof, be punished by imprisonment in the penitentiary for any term not exceeding twenty years nor less than one year. [Cf. Cd. '81, §§ 788, 789; L. '91, p. 120, § 4; 2 H. P. C., §§ 24, 25; L. '95, p. 94, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2650, *supra*.

The act of 1895 has no repealing clause, but is believed to supersede §§ 24 and 25 of 2 Hill's Penal Code. Said § 25 is as follows:

"Section 25. Any person who shall willfully and maliciously displace any switch or rail, or disturb, injure, or destroy any part of a track or bridge, of any railroad, or place any obstruction thereon, with intent that any person or property passing over said railroad shall thereby be injured, and thereby endangering and not destroying human life, or thereby causing injury or destruction of property, upon conviction thereof shall be punished by imprisonment in the penitentiary for a term of not less than one nor more than ten years, and shall be kept at hard labor."

§ 2728. (7037.) Death Caused by Obstructing Railroad, etc.—Murder.

Any person or persons who shall, within this state, willfully or maliciously place any obstruction upon any railroad track or roadbed, or street-car track, or shall misplace, remove, obstruct, detach, damage or destroy any rail, switch, frog, guard-rail, cattle-guard or any other part of such railroad, track or roadbed, or street-car track, or who shall otherwise interfere with the maintenance and operation of such road, thereby causing the death of any person, whether passenger or employee of such railroad or street railway or otherwise, shall, upon conviction thereof, be deemed guilty of a felony and shall be punished as for murder in the first degree. [Cf. L. '73, p. 182, § 13; Cd. '81, § 787; 2 H. P. C., § 2; L. '95, p. 95, § 2.]

As to repeal of this section, see § 2304, and note. Present law, see § 2392, *supra*.

§ 2729. (7038.*) Murder in Second Degree, Defined.

Every person who shall purposely and maliciously, but without deliberation and premeditation, kill another, shall be deemed guilty of murder in the second degree, and upon conviction thereof shall be imprisoned in the penitentiary for a term of not less than ten years, or during life, in the discretion of the trial court, and kept at hard labor. [L. '03, p. 240, § 1. Cf. L. '54, p. 78, § 13; Cd. '81, § 790; 2 H. P. C., § 3.]

As to repeal of this section, see § 2304, and note. Present law, see § 2393, *supra*.

See notes to § 2065, sufficiency of indictment, etc.

See notes to § 2152, evidence, etc., on trial.

See notes to § 2158, instructions, etc., on trial.

See notes to § 2726, murder in first degree.

Cited in 8 Wash. 464; 13 Wash. 211.

If a homicide has been proven, the presumption is that it was murder in the second degree, and such presumption must be given force unless there is something in the case to rebut it: *State v. Payne*, 10 Wash. 545.

In a prosecution for homicide by the rigging of a spring gun in a trunk, it is error

to sanction the prosecuting attorney's statement that the defendant would be guilty of murder in the second degree, if death resulted from his act in setting a spring-gun, and that the same would be a question of law for the court; since the elements of both malice and intent must be determined by the jury: *State v. Marfaudille*, 48 Wash. 117.

§ 2730. (7039.) Killing in Dueling, Murder in Second Degree.

If either party to a duel be killed, the survivor shall be deemed guilty of murder in the second degree. [L. '54, p. 78, § 14; Cd. '81, § 791; 2 H. P. C., § 4.]

As to repeal of this section, see § 2304, and note. Present law, see § 2394, supra. See infra, §§ 2743, 2744, punishment for engaging in or encouraging dueling.

§ 2731. (7040.) Mortal Wound Inflicted in Dueling Outside State—Venue.

If any person shall by previous appointment made within fight a duel without this state, and in so doing shall inflict a mortal wound upon any person, whereof the person so injured shall die, such person so offending shall be deemed guilty of murder in the second degree within any county in this state. [L. '54, p. 78, § 15; Cd. '81, § 792; 2 H. P. C., § 5.]

As to repeal of this section, see § 2304, and note. Present law, see § 2422, supra. See Const., Art. I, § 22, right to jury trial in county where offense committed.

§ 2732. (7041.) Seconds in Dueling Guilty of Manslaughter, When.

Any person who shall be present at a duel as second, when either party thereto shall be killed, or a mortal wound inflicted, and whereof death shall ensue, shall be deemed guilty of manslaughter. [L. '54, p. 79, § 20; Cd. '81, § 797; 2 H. P. C., § 6.]

As to repeal of this section, see § 2304, and note. Present law, see § 2420, supra.

§ 2733. (7042.) Manslaughter, Defined.

Every person who shall unlawfully kill any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, shall be deemed guilty of manslaughter. [L. '54, p. 78, § 16; Cd. '81, § 793; L. '91, p. 119, § 2; 2 H. P. C., § 7.]

As to repeal of this section, see § 2304, and note. Present law, see § 2395, supra.

See notes to § 2065, sufficiency of indictment, etc.

See notes to § 2152, evidence, etc., on trial.

See § 2158 and notes, instructions, etc.

Cited in 8 Wash. 16; 17 Wash. 506; 24 Wash. 38; 48 Wash. 262.

Elements of manslaughter: See 1 Remington's Digest, p. 1382, §§ 5-9; *State v. Robinson*, 12 Wash. 349; *State v. McPhail*, 39 Wash. 199; *State v. Symes*, 20 Wash. 484; *State v. Gile*, 8 Wash. 12.

The evidence is sufficient to sustain a conviction for manslaughter, where it appears from the testimony of the defendant that he was attacked by the deceased,

who was unarmed and a much smaller man than himself, that he might have avoided the attack after the altercation commenced by shutting a door and keeping deceased out of his room, which he failed to do, but admitted him to the room, and in the encounter that ensued used an open knife upon the deceased, stabbing him while pushing him out of the room; whether defendant was justified in using a knife being a question for the jury: *State v. Johnson*, 47 Wash. 227.

§ 2734. (7043.) Assisting Commission of Self-murder, Manslaughter.

Every person deliberately assisting another in the commission of self-murder shall be deemed guilty of manslaughter. [L. '54, p. 78, § 17; Cd. '81, § 794; 2 H. P. C., § 8.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2387, 2388, *supra*.

§ 2735. (7044.) Overloading Vessel Causing Death, Manslaughter.

Any person navigating any boat or vessel for gain, who shall willfully or negligently receive so many passengers, or such a quantity of other lading, that by means thereof such boat or vessel shall sink or overset, and thereby any human being shall be drowned or otherwise killed, shall be deemed guilty of manslaughter. [L. '54, p. 78, § 18; Cd. '81, § 795; 2 H. P. C., § 9.]

As to repeal of this section, see § 2304, and note. Present law, see § 2400, *supra*.

§ 2736. (7045.) Steamboat Officers Guilty of Manslaughter, When.

If the captain or any other person having charge of any steamboat used for the conveyance of passengers, or if the engineer or other person having charge of the boiler of such boat, or of any other apparatus for the generation of steam, shall, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, create, or allow to be created, such an undue quantity of steam as to burst or break the boiler or other apparatus in which it shall be generated, or any apparatus or machinery connected therewith, by which bursting or breaking any person shall be killed, every such captain, engineer, or other person shall be deemed guilty of manslaughter. [L. '54, p. 78, § 19; Cd. '81, § 796; 2 H. P. C., § 10.]

As to repeal of this section, see § 2304, and note. Present law, see § 2401, *supra*.

§ 2737. (7046.) Punishment for Manslaughter.

Any person convicted of manslaughter shall be punished by imprisonment in the penitentiary not less than one year nor more than twenty years, and shall be fined in any sum not exceeding five thousand dollars. [L. '54, p. 79, § 21; Cd. '81, § 798; 2 H. P. C., § 11.]

As to repeal of this section, see § 2304, and note. Present law, see § 2395, *supra*.

§ 2738. (7047.) Malicious Mayhem, Defined.

Every person who, on purpose, and of malice aforethought, shall unlawfully disable the tongue, put out an eye, cut or bite off the nose, ear, lip, or other member of any person, with intent to disfigure or disable such person, shall be deemed guilty of malicious mayhem, and upon conviction thereof shall be imprisoned in the penitentiary not more than fourteen years nor less than one year, and be fined in any sum not exceeding one thousand dollars. [L. '54, p. 79, § 26; Cd. '81, § 803; 2 H. P. C., § 12.]

As to repeal of this section, see § 2304, and note. Present law, see § 2407, *supra*.

See notes to § 2158, instructions, etc.

See *State v. Conahan*, 10 Wash. 268.

§ 2739. (7048.) Simple Mayhem, Defined.

Every person who shall violently and unlawfully, but without premeditation, deprive another of the use of any bodily member, or who shall unlawfully and willfully, but without premeditation, disable the tongue or eye, or bite the nose, ear, or lip of another, shall be deemed guilty of simple

mayhem, and on conviction thereof, shall be imprisoned in the county jail not more than one year nor less than one month, and be fined in any sum not exceeding two thousand dollars, or fined only. [L. '54, p. 80, § 32; Cd. '81, § 804; 2 H. P. C., § 13.]

As to repeal of this section, see § 2304, and note. Present law, see § 2407, *supra*.

§ 2740. (7049.*) Kidnaping, Defined—Penalty.

Every person who shall steal and take, or forcibly and unlawfully arrest any person, and convey such person to parts without the state of Washington, or aid or abet therein, or who shall forcibly and unlawfully take or assist, or aid or abet, in forcibly and unlawfully taking or arresting any person, with intent to take such person to parts without said state, shall be deemed guilty of kidnaping, and upon conviction thereof shall be imprisoned in the penitentiary not more than twenty-one nor less than three years, and be fined not more than five thousand dollars nor less than one hundred dollars. And every person who shall entice, decoy, take, steal, abduct, kidnap or restrain, or forcibly and unlawfully detain any person, or who shall entice, decoy, take, steal, abduct, kidnap or restrain, or forcibly and unlawfully detain any person with intent thereby to extort money or any pecuniary advantage whatever from any person, or who shall by verbal or written communication, or otherwise, threaten to do any physical injury to any person so enticed, decoyed, taken, stolen, abducted, kidnaped or restrained, or forcibly or unlawfully detained, or who shall assist, aid or abet therein, shall be deemed guilty of kidnaping and upon conviction thereof shall be imprisoned in the penitentiary not more than twenty-one years nor less than three years, and be fined not more than five thousand dollars nor less than one hundred dollars. [L. '01, p. 78, § 1. Cf. L. '54, p. 81, § 35; Cd. '81, § 817; 2 H. P. C., § 14.]

As to repeal of this section, see § 2304, and note. Present law, see § 2410, *supra*.

§ 2741. (7050.) Kidnaping Child.

If any person maliciously, forcibly, or fraudulently lead, take, decoy, or entice away any child under the age of twelve years, with the intent to detain or conceal such child from its parent, guardian, or other person having the lawful charge of such child, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. [Cd. '81, § 818; 2 H. P. C., § 15.]

As to repeal of this section, see § 2304, and note. Present law, see § 2410, *supra*.

In a prosecution for a kidnaping under this section, the consent of the child constitutes no defense: *State v. Rhoades*, 29 Wash. 61.

§ 2742. (7051.) Venue of Offense of Kidnaping—Consent as Defense.

Every offense mentioned in the last two sections may be tried either in the county in which the same may have been committed, or in any county in or to which the person so seized, taken, inveigled, kidnaped, shall have been taken, confined, held, carried, or brought; and upon the trial of any such offense, the consent thereto of the person so taken, inveigled, kidnaped, or confined shall not be a defense, unless it shall be made satisfactorily to

appear to the jury that such consent was not obtained by fraud, nor extorted by duress or by threats. [L. '54, p. 84, § 36; Cd. '81, § 819; 2 H. P. C., § 16.]

As to repeal of this section, see § 2304, and note. Present law, see § 2413, supra.

The words "or sold, or whose services shall be sold or transferred," in former codifications, are omitted as a relic of the "Fugitive Slave Law."

§ 2743. (7052.) Punishment for Dueling.

Every person who shall engage in a duel with any deadly weapon, although no homicide ensue, or shall challenge another to fight a duel, or shall send or deliver any written or verbal message purporting or intending to be such challenge, although no duel ensue, shall be imprisoned, on conviction thereof, in the penitentiary not more than ten years nor less than one year. [L. '54, p. 79, § 22; Cd. '81, § 799; 2 H. P. C., § 31.]

As to repeal of this section, see § 2304, and note. Present law, see § 2419, supra.

See supra, §§ 2730-2732, killing in dueling, etc.

§ 2744. (7053.) Punishment for Sending or Accepting Challenge.

Every person who shall accept such challenge, or who shall knowingly carry or deliver any such challenge or message, whether a duel ensue or not, and every person who shall be present at the fighting of a duel, with deadly weapons, as an aid or second, or who shall advise, encourage, or promote such duel, shall, on conviction thereof, be imprisoned in the penitentiary not more than five years nor less than six months. [L. '54, p. 79, § 23; Cd. '81, § 800; 2 H. P. C., § 32.]

As to repeal of this section, see § 2304, and note. Present law, see § 2420, supra.

§ 2745. (7054.) Assault and Battery, Defined.

Assault and battery is the unlawful beating of another; and a person duly convicted thereof shall be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year. [L. '69, p. 203, § 30; Cd. '81, § 808; 2 H. P. C., § 19.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2413-2415.

Cited in 10 Wash. 93; 20 Wash. 96.

Actual violence alleged as a fact in the transaction of an assault with an intent to commit rape will justify a conviction of an assault and battery: *State v. Keen*, 10 Wash. 93.

A person may be guilty of assault where he advances toward another threatening

to "put him out of his misery," and at the same time deliberately drawing a revolver from his pocket which is taken from him by the bystanders after some considerable effort; and the question of his guilt or innocence is one for the jury: *State v. McFadden*, 42 Wash. 1.

§ 2746. (7055.) Assault, Defined.

An assault is an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution, and every person convicted thereof shall be fined in any sum not exceeding five hundred dollars, to which may be added imprisonment in the county jail not exceeding six months. [L. '54, p. 80, § 29; Cd. '81, § 805; 2 H. P. C., § 20.]

As to repeal of this section, see § 2304, and note. Present law, see § 2415, supra.

Cited in 12 Wash. 463; 19 Wash. 37; 20 Wash. 96; 23 Wash. 550.

The words "to kill with a pistol" are of more extensive signification than either of the words "touch," "strike," "beat" or "wound" used in the statute, and include

all that is signified by either, or all of them: *State v. Fearnster*, 12 Wash. 461, 464.

"Assault" in its legal sense means an attack with "the ability to carry it into effect": *State v. Levan*, 23 Wash. 547.

There is no such offense as assault with a deadly weapon, under the law of this state, and rejecting the words "with a deadly weapon" as surplusage in an in-

dictment the defendant may be found guilty of assault which is necessarily included in the offense charged: *State v. Snider*, 32 Wash. 229.

§ 2747. (7056.) Provoking Assault, etc.—Jurisdiction.

Every person who shall, by word, sign, or gestures, willfully provoke or attempt to provoke another person to commit an assault and battery or other breach of the peace shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding twenty-five dollars, and shall stand committed until such fine and costs are paid. Justices of the peace shall have exclusive original jurisdiction of prosecutions under this section within their respective counties. [L. '86, p. 79, § 1; 2 H. P. C., § 21.]

As to repeal of this section, see § 2304, and note. Present law, see § 2417, *supra*.

§ 2748. (7057.) Assault with Intent to Commit Felony.

An assault with an intent to commit murder, rape, the infamous crime against nature, mayhem, robbery, or grand larceny shall subject the offender to imprisonment in the penitentiary for a term of not less than one year nor more than fourteen years. [L. '54, p. 80, § 27; L. '69, p. 203, § 28; Cd. '81, § 806; 2 H. P. C., § 22.]

As to repeal of this section, see § 2304, and note. Present law, see § 2413, *supra*.

See notes to § 2065, sufficiency of indictment, etc.

See notes to § 2152, evidence, etc.

See *infra*, § 2986, attempts to commit crime.

See notes to § 2158, instruction.

See notes to § 2753, punishment for rape.

See *infra*, § 2889, sodomy defined, punishment for.

Cited in 5 Wash. 774; 10 Wash. 278; 12 Wash. 463; 17 Wash. 500; 19 Wash. 277; 21 Wash. 286; 23 Wash. 550; 29 Wash. 373; 32 Wash. 301.

Although this section does not define sodomy, nor impose a penalty for its commission, yet, under the statutory provision of § 2723, *supra*, making all common-law offenses indictable, a prosecution will be sustained for an assault with intent to commit such crime: *State v. Place*, 5 Wash. 773.

Assault with intent to commit murder: See 1 Remington's Digest, p. 1383, §§ 10-13; *State v. Dolan*, 17 Wash. 499; *State v. Williams*, 36 Wash. 143; *State v. Levan*, 23 Wash. 547.

To constitute assault with intent to commit murder, there must coexist a consum-

mated assault, as contradistinguished from the mere attempt, and a specific intent to commit murder: *State v. Feamster*, 12 Wash. 461, 463.

Assault with intent to commit rape: See 2 Remington's Digest, p. 2453, § 4; *State v. Hunter*, 18 Wash. 670; *State v. Smith*, 19 Wash. 376.

Actual violence alleged as a fact in the transaction of an assault with intent to commit rape will justify a conviction of an assault and battery under § 2745, *supra*: *State v. Keen*, 10 Wash. 93.

Assault with intent to commit robbery: See 2 Remington's Digest, p. 2512, § 5; *State v. Costello*, 29 Wash. 366; *State v. Fenton*, 30 Wash. 325.

§ 2749. (7058.) Assault with Deadly Weapon, etc., to Do Bodily Harm.

An assault with a deadly weapon, instrument, or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show a willful, malignant, and abandoned heart, shall subject the offender to imprisonment in the penitentiary not exceeding two years, or to a fine not exceeding five thousand dollars, or to both such fine and imprisonment. [L. '69, p. 203, § 29; Cd. '81, § 807; 2 H. P. C., § 23.]

As to repeal of this section, see § 2304, and note. Present law, see § 2414, *supra*.

See notes to § 2065, sufficiency of indictment, etc.

See *supra*, § 2746, assault defined.

§§ 2750-2753 OFFENSES AND PUNISHMENTS UNDER FORMER LAWS. [TITLE XV

Cited in 7 Wash. 464; 8 Wash. 465; 14 Wash. 623; 22 Wash. 275; 23 Wash. 656; 32 Wash. 301; 48 Wash. 220.

In order to charge the statutory felony under this section, it was necessary to set forth in the information, not only that the

assault was with a deadly weapon with intent to inflict bodily injury, but the further fact that it was without considerable provocation, or that it was the impulse of the willful, abandoned and malignant heart: State v. Ackles, 8 Wash. 462, 465.

§ 2750. (7059.) **Assault with Whip and Armed with Deadly Weapon.**

Every person who shall assault and beat another with a cowhide or whip, having with him at the time a pistol or other deadly weapon, shall, on conviction thereof, be imprisoned in the county jail not more than one year nor less than three months, and be fined in any sum not exceeding one thousand dollars. [L. '54, p. 80, § 28; Cd. '81, § 809; 2 H. P. C., § 39.]

As to repeal of this section, see § 2304, and note. For present law, see § 2414, supra.

§ 2751. (7060.) **Administering Poison with Intent to Kill.**

Every person who shall administer, or procure to be administered, any poison to any other human being, with intent to kill the person to whom the same shall be administered, if death do not ensue, upon conviction thereof shall be imprisoned in the penitentiary not more than twenty years nor less than two years. [L. '54, p. 79, § 24; Cd. '81, § 801; 2 H. P. C., § 26.]

As to repeal of this section, see § 2304, and note.

This section is not covered by the act of 1909, except by § 2264, relating to attempts. See note to § 2301, supra.

Cited in 51 Wash. 36, 37.

§ 2752. (7061.) **Poisoning Food, etc., with Intent to Injure.**

Every person who shall mingle poison with any food, drink or medicine, with intent to injure any human being, or who shall poison any spring, well, or reservoir of water, with such intent, shall, upon conviction thereof, be imprisoned in the penitentiary not more than fourteen years nor less than one year. [L. '54, p. 79, § 25; Cd. '81, § 802; 2 H. P. C., § 27.]

As to repeal of this section, see § 2304, and note. Present law, see § 2516, supra.

§ 2753. (7062.) **Rape.**

A person shall be deemed guilty of rape who,—

1. Shall, by force and against her will, ravish and carnally know any female of the age of eighteen years or more;

2. Shall, by deceit, deception, imposition or fraud induce a female to submit to sexual intercourse;

3. Shall carnally know any female child under the age of eighteen years.

Any person convicted of the crime of rape, as defined by this section, shall be punished by imprisonment in the penitentiary for life or any term of years. [Cf. L. '54, p. 80, § 33; Cd. '81, § 812; L. '86, p. 84, § 1; 2 H. P. C., § 28; L. '97, p. 19, §§ 1, 2.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2435, 2436, supra.

See notes to § 2065, sufficiency of indictment, etc.

See notes to § 2152, evidence, etc.

See notes to § 2158, instructions, etc.

Cited in 1 Wash. 387; 7 Wash. 266; 10 Wash. 278, 279; 14 Wash. 308, 309; 15 Wash. 454; 18 Wash. 175, 675; 19 Wash. 377; 21 Wash. 396; 22 Wash. 182; 30 Wash. 696; 32 Wash. 76, 280.

Rape—Offenses and responsibility therefor: See 2 Remington's Digest, p. 2452, §§ 1-6; State v. Hunter, 18 Wash. 670; State v. Smith, 19 Wash. 376; State v. Roller, 30 Wash. 692; State v. Gifford,

19 Wash. 464; *State v. Scott*, 32 Wash. 279; *State v. Falsetta*, 43 Wash. 159.

This section punishes carnal knowledge and abuse of any female under the age of consent, without regard to the question of violence, and § 2986, *infra*, punishes an unsuccessful attempt to commit a crime: *State v. Berzaman*, 10 Wash. 277, 278.

Under this section and § 2986, *infra*, subdivision 1, a sentence of imprisonment for ten years is warranted upon a conviction

of an attempt to commit the crime of carnal intercourse with a female under the age of consent, and is not excessive: *State v. Berzaman*, *supra*.

In a prosecution for rape, a statement by defendant antedating the commission of the crime is admissible, where it showed his state of mind and intention to commit the crime: *State v. Winnett*, 48 Wash. 93.

§ 2754. (7063.) Rape by Administering Drugs, etc.

If any person unlawfully have carnal knowledge of any female by administering to her any substance or by any other means producing such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, or have such carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance, he shall, upon conviction, be punished as provided in the last preceding section. [Cd. '81, § 814; 2 H. P. C., § 29.]

As to repeal of this section, see § 2304, and note. Present law, see § 2435, *supra*.

See notes to § 2065, sufficiency of indictment, etc.

See notes to § 2152, evidence, etc.

See notes to § 2158, instructions, etc.

§ 2755. (7064.) Forcing Woman to Marry or be Defiled.

If any person take any woman unlawfully and against her will, and by force, menace, or duress compel her to marry him or any other person, or to be defiled, he shall be fined not exceeding one thousand dollars, and imprisoned in the penitentiary not exceeding ten years. [Cd. '81, § 813; 2 H. P. C., § 36.]

As to repeal of this section, see § 2304, and note. Present law, see § 2438, *supra*.

§ 2756. (7065.) Enticing Female Child for Prostitution.

If any person take or entice away any unmarried female under the age of fifteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, he shall, upon conviction, be punished with imprisonment in the penitentiary for not more than three years, or by a fine of not more than one thousand dollars, and imprisonment in the county jail not more than one year. [Cd. '81, § 815; 2 H. P. C., § 34.]

As to repeal of this section, see § 2304, and note. Present law, see § 2439, *supra*.

§ 2757. (7060.*) Seduction—Subsequent Marriage.

If any person seduce and debauch any unmarried woman of previously chaste character, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. If before judgment upon an information or indictment the defendant marry the woman seduced, all proceedings under such information or indictment shall be stayed, and no further proceedings shall be had thereunder so long as the defendant shall live with, provide for and support his wife; but if at any time within three years from the date of such marriage the defendant shall wrongfully fail to support or to provide for or shall wrongfully desert or abandon his wife, prosecution shall proceed under said information or in-

dictment in the same manner as though no marriage had taken place. [L. '05, p. 57, § 1. Cf. Cd. '81, § 816; 2 H. P. C., § 35.]

As to repeal of this section, see § 2304, and note. Present law, see § 2441, *supra*.
See *supra*, notes to § 2152, evidence.

Cited in 36 Wash. 518.

Seduction: See 1 Remington's Digest, p. 2567, §§ 1-6; State v. O'Hare, 36 Wash. 516; State v. Rogan, 18 Wash. 43.

Inducements held sufficient to constitute the offense of seduction, considering the tender age of the girl: State v. Carter, 8 Wash. 272, 274.

Carnal intercourse with an unmarried girl of sixteen, attained by overpowering and tickling her until she yields, accompanied merely by promises not to get her into trouble, etc., does not constitute seduction: State v. Cochran, 10 Wash. 562; State v. Carter, 8 Wash. 272.

§ 2758. (7067.) **Feticide.**

Every person who shall administer to any woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, on conviction thereof, be imprisoned in the penitentiary not more than twenty years nor less than one year. [L. '54, p. 81, § 37; Cd. '81, § 820; 2 H. P. C., § 30.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2397, 2448, *supra*.

§ 2759. (7068.) **Miscarriage of Pregnant Woman Procured.**

Every person who shall administer to any pregnant woman whom he supposes to be pregnant any medicine, drug, or substance whatever, or shall use or employ any instrument or other means thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall, on conviction thereof, be imprisoned in the penitentiary not more than five years, nor less than one year, or be imprisoned in the county jail not more than twelve months nor less than one month, and be fined in any sum not exceeding one thousand dollars. [L. '54, p. 81, § 38; Cd. '81, § 821; 2 H. P. C., § 33.]

As to repeal of this section, see § 2304, and note. Present law, see § 2448, *supra*.

Cited in 24 Wash. 38.

§ 2760. (7069.) **Guarantee of Civil and Legal Rights.**

All persons within the jurisdiction of the state of Washington shall be entitled to the full and equal enjoyment of the public accommodations and advantages, facilities and privileges of inns, restaurants, eating-houses, barber-shops, public conveyances on land or water, theaters and other places of public accommodation and amusement, subject only to the condition and limitations established by law and applicable alike to all citizens. [Cf. L. '90, p. 54, § 1; 1 H. C., § 2959; L. '95, p. 92, § 1.]

As to repeal of this section, see § 2304, and note.

This section is not covered by the act of 1909, except by § 2686, *supra*, denials of accommodations, etc., "because of race, creed or color."

§ 2761. (7070.) **Penalty for Violation of Last Section.**

Any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of whatever race, color, or nationality, the full enjoyment of any of the public accommoda-

tions, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than fifty dollars nor more than three hundred dollars, or shall be imprisoned not less than thirty days nor more than six months. [L. '90, p. 54, § 2; 1 H. C., § 2960.]

As to repeal of this section, see § 2304, and note. See note to last section.

§ 2762. (7071.) Cruelty to Children.

Whosoever shall torture, maim, cruelly beat, whip or punish, deprive of necessary food or clothing, or compel to labor an unreasonable length of time without proper rest and nourishment, or otherwise cruelly treat any minor, or being the parent or guardian, or having the charge of such minor, shall do, cause or permit to be done any of the acts above mentioned, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding one hundred dollars, or imprisonment in the county jail any length of time not exceeding three months. [L. '93, p. 40, § 1.]

As to repeal of this section, see § 2304, and note.

This section is not covered by the act of 1909. See note to § 2301.

See *infra*, § 3286, who may arrest under this section.

See *infra*, § 3287, disposition of fines under this section.

CHAPTER III.

OFFENSES AGAINST THE PUBLIC PEACE.

§ 2763. (7073.) Riot, Defined.

If three or more persons shall do an act in a violent and tumultuous manner, they shall be deemed guilty of riot, and upon conviction thereof shall be imprisoned in the county jail not exceeding one year, and be fined in any sum not exceeding five hundred dollars, or be fined only. [L. '54, p. 87, § 64; Cd. '81, § 859; 2 H. P. C., § 92.]

As to repeal of this section, see § 2304, and note. Present law, see § 2548, *supra*.

§ 2764. (7074.) Unlawful Assembly, Dispersion of.

If three or more persons shall be unlawfully, riotously, or tumultuously assembled, any justice of the peace, sheriff, deputy sheriff, constable, or marshal of a city, or mayor or alderman thereof, shall go among the persons so assembled, or as near to them as possible, and shall command them in the name of the state of Washington immediately to disperse. If the persons so assembled do not immediately disperse, it shall be lawful for every such officer to command sufficient aid to seize, arrest, and secure in custody all such persons, and, if necessary, an armed force may be called out, and shall obey the orders of any two of the magistrates or officers mentioned in this section. and if any such persons shall be killed or wounded by reason of their resisting the persons endeavoring to disperse or seize them, the magistrates or officers shall be held guiltless; and if three or more persons shall be unlawfully, riotously, or tumultuously assembled at or near the residence of other persons, or where such other persons may be peaceably assembled, and disturb or annoy such persons by loud or unusual shouting,

the discharging of firearms, or by creating any unusual noise which is calculated or intended to annoy or in any manner disturb the inmates of said residence or said persons so peaceably assembled, they shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than twenty dollars nor more than two hundred dollars each, or be imprisoned in the county jail not less than twenty days nor more than one year, or both fined and imprisoned. [Cf. L. '54, p. 87, § 65; Cd. '81, § 860; L. '86, p. 76, § 1; 2 H. P. C., § 93.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2548-2551, supra.

The term "armed force," as used in this section, does not authorize the peace officers to command the services of the state militia: Chapin v. Ferry, 3 Wash. 386; and when the militia is ordered out by the gov-

ernor at sheriff's request, it does not become sheriff's posse comitatus: Id.

The service of a citizen as a member of the posse comitatus is not a compensated service, and no authority exists for paying them out of the county treasury: Id.

§ 2765. (7075.) Failure to Disperse.

All persons who shall have been commanded peaceably to disperse, who shall refuse so to disperse, or shall willfully obstruct or hinder such officer, who shall declare himself as such, from commanding them to disperse, shall on conviction be imprisoned in the county jail not more than one year, and be fined in any sum not exceeding two hundred dollars, or fined only. [L. '54, p. 87, § 66; Cd. '81, § 861; 2 H. P. C., § 94.]

As to repeal of this section, see § 2304, and note. Present law, see § 2551, supra. See notes to § 2064, language to be used in the charge.

§ 2766. (7076.) Disturbing Public Worship.

Every person who shall disturb any religious society, or any member thereof, when met or meeting together for public worship, or shall sell or give away any spirituous liquor at any booth, wagon, shed, or open place, or [at] any boat, canoe, or other water craft, or in any building temporarily erected for the purpose of selling therein such liquors, within one mile of any collection of a portion of the citizens of this state convened for the purpose of worship, or shall disturb any collection of people [convened] for any unlawful [lawful] purpose, such person shall, on conviction thereof, be imprisoned in the county jail not exceeding one month, and be fined in any sum not exceeding two hundred dollars, or fined only. [L. '54, p. 87, § 67; Cd. '81, § 862; 2 H. P. C., § 95.]

As to repeal of this section, see § 2304, and note. Present law, see § 2499, supra.

Cited in 11 Wash. 424.

The failure to charge the disturbance of a religious society as having been done willfully will not render the information insufficient, if other words of the same import are used: State v. Stuth, 11 Wash. 423.

This section is not void for uncertainty, the word "disturb" having a well-known legal significance; and the words "religious society" includes all religious societies or congregations which meet for public worship, without regard to their being incorporated: Id.

§ 2767. (7077.) Sunday Riots, Fighting, etc.—Jurisdiction.

If any person be found on the first day of the week, commonly called Sunday, engaged in any riot, fighting, or offering to fight, horse racing, or dancing, whereby any worshiping assembly or private family are disturbed, every person so offending shall on conviction be fined in the sum of not to exceed one hundred dollars, to be recovered before any justice of the peace in the county where such offense is committed, and shall be committed to the

jail of said county until the said fine, together with the costs of prosecution, shall be paid. [Cd. '81, § 865; 2 H. P. C., § 98.]

As to repeal of this section, see § 2304, and note. Present law, see § 2499, *supra*.

§ 2768. (7078.) Destruction of Buildings, etc., by Riotous Assemblage.

If any person or persons unlawfully or riotously assembled pull down, injure, or destroy, or begin to pull down, injure, or destroy, any dwelling-house or other building, or destroy, or attempt to injure or destroy, any boat or vessel, or perpetrate any premeditated injury on the person of another, not being a felony, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail not more than one year, and shall also be answerable to any person injured to the full amount of the damages by him sustained in an action at law. [Cd. '81, § 863; 2 H. P. C., § 96.]

As to repeal of this section, see § 2304, and note. Present law, see § 2553, *supra*.

§ 2769. (7079.) Affrays, Defined.

If two or more persons by agreement fight in any public place, the person so offending shall be deemed guilty of an affray, and upon conviction thereof shall be imprisoned in the county jail not more than six months, and be fined in any sum not exceeding three hundred dollars, or be fined only. [L. '54, p. 89, § 68; Cd. '81, § 866; 2 H. P. C., § 99.]

As to repeal of this section, see § 2304, and note.

This section seems covered by §§ 2556, 2557, *supra*, fighting and prize-fights.

§ 2770. (7080.) Horse Racing on Public Highways, etc.

Any persons who shall be guilty of racing horses or driving upon the public highway in a manner likely to endanger the persons or lives of others, or guilty of loud shouting, or the discharging of firearms, or any other demonstrations which are calculated or intended to frighten, intimidate, or in any manner disturb other persons, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days. [Cf. Cd. '81, § 864; L. '86, p. 77, § 1; 2 H. P. C., § 97.]

As to repeal of this section, see § 2304, and note. Present law, see § 2534, *supra*, covers this section, except "racing horses."

§ 2771. (7081.) Reckless Shooting, etc.

Every person who shall in a reckless, careless, or negligent manner discharge, in the vicinity of an inhabited dwelling-house, or in the streets of an incorporated city or unincorporated town, any firearm, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days, or both such fine and imprisonment. [L. '88, p. 100, § 1; 2 H. P. C., § 101.]

As to repeal of this section, see § 2304, and note. Compare § 2559, *supra*.

This section is not covered by the act of 1909. See note to § 2301, *supra*.

§ 2772. (7082.) Flourishing Dangerous Weapon, etc.

Every person who shall, in a manner likely to cause terror to the people passing, exhibit or flourish, in the streets of an incorporated city or unincor-

porated town, any dangerous weapon, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine in any sum not exceeding twenty-five dollars. Justices of the peace shall have exclusive original jurisdiction of all offenses arising under the last two preceding sections. [L. '88, p. 100, §§ 2, 3; 2 H. P. C., § 100.]

As to repeal of this section, see § 2304, and note.

This section is not covered by the act of 1909. See note to § 2301, *supra*.

§ 2773. (7083.) Exhibiting Dangerous Weapon in Threatening Manner.

Every person who shall, in a rude, angry, or threatening manner, in a crowd of two or more persons, exhibit any pistol, bowie-knife, or other dangerous weapon, shall, on conviction thereof, be imprisoned in the county jail not exceeding one year, and be fined in any sum not exceeding five hundred dollars. [L. '54, p. 80, § 30; Cd. '81, § 810; 2 H. P. C., § 37.]

As to repeal of this section, see § 2304, and note.

This section is not covered by the act of 1909. See note to § 2301, *supra*.

§ 2774. (7084.) Carrying Concealed Weapons.

If any person shall carry upon his person any concealed weapon, consisting of either a revolver, pistol, or other firearms, or any knife (other than an ordinary pocket knife), or any dirk or dagger, sling-shot, or metal knuckles, or any instrument by the use of which injury could be inflicted upon the person or property of any other person, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty dollars nor more than one hundred dollars, or imprisonment in the county jail not more than thirty days, or by both fine and imprisonment, in the discretion of the court: Provided, that this section shall not apply to police officers and other persons whose duty it is to execute process or warrants or make arrests. [Cf. Cd. '81, § 929; L. '86, p. 81, § 1; 2 H. P. C., § 166.]

As to repeal of this section, see § 2304, and note. Present law, see § 2517, *supra*, "furtively carry, or conceal."

§ 2775. (7085.) Armed Bodies of Men.

That it shall be unlawful for any person, corporation or association of persons, or agents of any person, or member, agent or officer of any corporation or association of persons, to organize, maintain or employ an armed body of men in this state for any purpose whatever; and all parties so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine of not less than one thousand dollars nor more than five thousand dollars, and in a like sum each day they shall continue to offend after having been once fined, and in addition to such fine such offender, if a person, may be imprisoned in the county jail not exceeding one year, at the discretion of the court. The fines shall be paid into the general fund of the county in which the offense was committed. And all arms, uniforms, accoutrements and any other property of a military character in possession of such person, member, agents, officer, corporation, or armed bodies of men shall be seized by the officer making the arrest under the provisions of this section, [and] be forfeited to the state of Washington. [L. '93, p. 449, § 1.]

As to repeal of this section, see § 2304, and note.

As to armed associations as military companies without consent of the governor, see § 2546, *supra*.

Cited in 46 Wash. 410.

This section does not violate Constitution, Article I, § 24, guaranteeing the right of an individual citizen to bear arms in defense of himself or the state: *State v. Gohl*, 46 Wash. 408.

One is guilty of violating this section, prohibiting the organizing, maintaining or "employing" of an armed body of men, where he caused them to assemble and took them in a launch for the purpose of in-

timidating the master of a schooner and thereby removing a part of the crew; it being sufficient if he "employed" the men in the sense of making use of them for a specific purpose, although he did not "hire" them: *Id.*

Upon a conflict in the testimony as to whether defendant employed men, whether they were armed, and as to their mission, the questions are for the jury: *Id.*

§ 2776. (7086.) **Blackmail.**

If any person, either verbally or by any written or printed communication, shall maliciously threaten any injury to the person or property of another, with intent thereby to extort money or any pecuniary advantage whatever, or to control the person so threatened to do any act against his will, he shall, upon conviction thereof be imprisoned in the county jail not more than one year nor less than one month, or be fined in any sum not exceeding five hundred dollars nor less than one hundred dollars. [Cd. '81, § 822; 2 H. P. C., § 38.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2610, 2613, *supra*.

Cited in 48 Wash. 106.

Under the common law, it was not an indictable offense to extort money by threatening to institute a criminal prosecution

against the party defrauded, since the threat is not of personal violence or such as to overcome a firm and prudent man: *State v. Nethercutt*, 48 Wash. 105.

§ 2777. (7087.) **Libel, Defined.**

A libel is the defamation of a person made public by any words, printing, writing, sign, picture, representation, or effigy tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends. Every person who makes, composes, or dictates a libel, or procures the same to be done, or who publishes or willfully circulates such libel, or in any way knowingly and willfully aids or assists in making, publishing, or circulating the same, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. [Cf. L. '69, p. 383, §§ 1, 2; L. '79, p. 144, §§ 1, 2; Cd. '81, §§ 1230, 1231; L. '91, p. 119, § 3; 2 H. P. C., § 17.]

As to repeal of this section, see § 2304, and note. Present law, see § 2424, *supra*.

See *supra*, § 292, pleadings in civil action for libel.

See *supra*, § 2065 and notes, sufficiency of indictment, etc.

See *supra*, § 2070, charge of libel, when sufficient.

See notes to § 2152, evidence in libel.

See *supra*, § 2157, truth of matter a defense.

See notes to § 2158, instructions, etc.

Cited in 5 Wash. 559; 15 Wash. 6; 38 Wash. 513; 43 Wash. 288; 46 Wash. 542.

All the provisions of this section construed together show that it was not the intention of the legislature to include spoken words in criminal libel: *State v. McArthur*, 5 Wash. 558.

It is doubtful, under the definition of the statute, whether the question of malice or

intention enters into the crime: *State v. Nichols*, 15 Wash. 1, 6.

Libel: See 1 Remington's Digest, pp. 1711-1714, §§ 1-15; *Kimble v. Kimble*, 14 Wash. 369; *Byrne v. Funk*, 38 Wash. 506; *Urban v. Helmick*, 15 Wash. 155; *Wright v. Daniel*, 40 Wash. 6; *Chambers v. Leiser*, 43 Wash. 285; *Abbott v. National Bank of Commerce*, 20 Wash. 552; *McClure v. Review Pub. Co.*, 38 Wash. 160; *Wood-*

house v. Powles, 43 Wash. 617; State v. Tugwell, 19 Wash. 238.

A newspaper article holding up an attorney to public ridicule for refusal to pay bills for printing and for charging excessive fees is libelous, and the burden of establishing the truth is on the defendant; and where the publication is admitted and no evidence in justification is offered as to the matters libelous per se, the jury should be instructed to award damages therefor: Reynolds v. Holland, 46 Wash. 537.

In an action by an attorney for libel in publishing that he charged an excessive fee

for the foreclosure of a mortgage when the work was done by defendant's attorney, evidence on the part of the plaintiff that he was attorney of record in the foreclosure suit and had not been released by the mortgagee from responsibility, is admissible: Id.

In such an action, evidence that the fee allowed in the decree was excessive, offered by the defendant to sustain the truth of the charge, is inadmissible, since the allowance was to the client and had no bearing on the issues involved: Id.

§ 2778. (7088.) Publication of Libel, What Constitutes.

The delivering, selling, reading, or otherwise communicating a libel, or causing the same to be delivered, sold, read, or otherwise communicated, to one or more persons, or to the party libeled, shall be deemed a publication thereof. [L. '69, p. 384, § 5; Cd. '81, § 1234; 2 H. P. C., § 18.]

As to repeal of this section, see § 2304, and note. Present law, see § 2426, supra. See notes to last section.

§ 2779. (7089.) Malicious Prosecution.

If any person shall maliciously, without probable cause, attempt to cause an indictment to be found [or information to be filed], or other prosecution for any crime or misdemeanor to be commenced, against any person, or if two or more persons shall conspire together for that purpose, the person so sought to be indicted or otherwise prosecuted being innocent, such person or persons so offending shall, on conviction thereof, be imprisoned in the county jail not exceeding six months, and be fined in any sum not exceeding one thousand dollars. [L. '54, p. 92, § 89; Cd. '81, § 899; 2 H. P. C., § 119.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2369, 2382, supra. To prohibit blacklisting, see § 6565, infra.

§ 2780. Criminal Anarchy, Defined.

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. [L. '03, p. 52, § 1.]

As to repeal of this section, see § 2304, and note.

§ 2781. Advocating, Teaching, or Spreading Doctrines—Penalty.

Any person who, by word of mouth or writing, advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head, or any of the executive officials of government, or by any unlawful means; or, prints, publishes, edicts [edits], issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or openly, willfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States

or of any state or of an [any] civilized nation having an organized government, or the committing of any other crime, with intent to teach, spread or advocate the doctrines of criminal anarchy; or organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrines, is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than \$5,000, or both. [L. '03, p. 52, § 2.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2562, 2563, 2565, *supra*.

§ 2782. Editor or Publisher Liable.

Every editor or proprietor of a book, newspaper or serial and every manager of a partnership or incorporated association by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution therefor, the defendant may show in his defense that the matter complained of was published without his knowledge by another who had no authority from him to make the publication and whose act was disavowed by him as soon as known. [L. '03, p. 52, § 3.]

As to repeal of this section, see § 2304, and note. Present law, see § 2564, *supra*.

§ 2783. Unlawful Assembly—Penalty.

Whenever two or more persons assemble for the purpose of advocating or teaching the doctrines of criminal anarchy, as defined in section 2780, such an assembly is unlawful, and every person voluntarily participating therein by his presence, aid or instigation, is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than \$5,000, or both. [L. '03, p. 53, § 4.]

As to repeal of this section, see § 2304, and note. Present law, §§ 2562, 2566, *supra*.

CHAPTER IV.

OFFENSES AGAINST PROPERTY.

§ 2784. (7094.) Arson, Defined.

Arson is the willful setting fire to any structure, as defined in this act, by any person, whether said structure be occupied or vacant, and whether the same be owned by the person or persons setting fire thereto or by any other person or persons, or by any corporation, or by the person or persons setting fire thereto and any other person or persons, or by the person or persons setting fire thereto and any corporation, and whether such structure be partially erected or fully completed. [Cf. L. '54, p. 82, § 40; Cd. '81, § 823; L. '86, p. 77; 2 H. P. C., § 40; L. '95, p. 173, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2572, 2573, *supra*.

See notes to § 2065, sufficiency of indictment, etc.

See notes to § 2152, evidence in arson.

See notes to § 2158, instructions, etc., on trial.

"Act" in this section refers to §§ 2784-2791.

Cited in 1 Wash. 347; 24 Wash. 256;
43 Wash. 269.

Distinctions between arson at common law
and under the statute pointed out: McClaine
v. Territory, 1 Wash. 346, 348.

This act does not violate Constitution,
Article 2, § 19, which provides that "no
bill shall embrace more than one subject":
State v. Hall, 24 Wash. 255.

§ 2785. (7095.) Structure, Defined.

The term "structure" in this act shall be held to mean and shall include in meaning any house, edifice, building, cabin, tent, vessel, boat, water craft or erection capable of affording or designed to afford or intended when completed to afford shelter for any human being, any barn, stable, outhouse, shed, mill, millhouse, dryhouse, hophouse, distillery, manufactory, shop, store, office, office building, bank building, or any building in which property is placed or stored, or which is used or intended to be used for such purpose, or which is intended to be used for the purpose of transacting any kind of business therein, any public building, courthouse, jail, city hall, guardhouse, college building, university building, seminary, poorhouse, market-house, pesthouse, public bridge, any infirmary, asylum, schoolhouse, engine-house, hospital, theater, hall, church, meeting-house, depot, station-house, railway car, street-car, roundhouse, railroad bridge, railroad trestle, any wharf, dock or landing, or any building or shed of whatever kind or description which is used or intended to be used for the shelter of any human being, animal or thing. [L. '95, p. 173, § 2.]

As to repeal of this section, see § 2304, and note.

"Act" in this section refers to §§ 2784-2791.

This section is not covered by the act of 1909, but falls with the repeal of the last previous section.

Cited in 43 Wash. 269.

§ 2786. (7096.) Penalty—Murder, When.

Every person convicted of arson shall be imprisoned in the penitentiary not exceeding ten years nor less than one year, or in the county jail not exceeding one year and be fined not exceeding one thousand dollars: Provided, that if any person or persons shall commit the crime of arson and thereby cause the death of any human being, the person or persons committing said crime shall be deemed guilty of murder in the first degree and shall be punished with death, if it be proved that such person or persons had reason to believe that said crime would probably produce death, otherwise such person or persons committing said crime of arson which shall cause the death of any human being shall be deemed guilty of murder in the second degree, and shall be imprisoned in the penitentiary for not exceeding thirty years. [L. '95, p. 171, § 3.]

As to repeal of this section, see § 2304, and note.

This section is covered by § 2392, supra.

As to pleading the facts under this section, the same rules apply as are stated in the notes to § 2784, supra.

§ 2787. (7097.) Accessories Deemed Principals.

When any crime of arson is committed, every person who shall have aided, counseled or advised the commission of said crime shall be deemed a principal, and shall upon conviction be punished as a principal in said crime. [L. '95, p. 174, § 4.]

As to repeal of this section, see § 2304, and note.

This section is covered by § 2260, supra.

See supra, § 2007 et seq., and notes, accessories.

§ 2788. (7098.) Married Woman Liable for Arson.

A married woman who shall commit the crime of arson, or who shall counsel, aid or abet in the commission of such crime may be convicted thereof

and punished therefor, though the property set fire to may belong partially or wholly to the husband. [Cf. L. '54, p. 83, § 43; Cd. '81, § 826; 2 H. P. C., § 44; L. '95, p. 174, § 5.]

As to repeal of this section, see § 2304, and note.

This section is not expressly covered by the act of 1909. See note to § 2301, *supra*.

§ 2789. (7099.) **Attempt to Commit Arson.**

Every person who attempts to commit the crime of arson and fails, or is prevented or intercepted in the perpetration thereof, shall be punished by imprisonment in the penitentiary for the term not exceeding two years, or by imprisonment in the county jail not exceeding one year, and by fine in any sum not exceeding five hundred dollars. [L. '95, p. 174, § 6.]

As to repeal of this section, see § 2304, and note.

See *infra*, § 2986, attempts to commit crime.

§ 2790. (7100.) **Attempt, Defined.**

Any willful preparation made by any person with a view to setting fire to any structure as defined in this act, shall be deemed to be an attempt to commit the crime of arson, and shall be punished as such. [L. '95, p. 174, § 7.]

As to repeal of this section, see § 2304, and note. Present law, see § 2577, *supra*.

"Act" refers to §§ 2784-2791.

§ 2791. (7101.) **Official Acts Excepted.**

No act done by any official in the discharge of his duty or by any person in pursuance of authority granted by any public authority shall be punishable under this act. [L. '95, p. 174, § 8.]

As to repeal of this section, see § 2304, and note.

"Act" in this section refers to §§ 2784-2791.

§ 2792. (7103.*) **Robbery, Defined.**

Every person who shall forcibly and feloniously take from the person of another, or from his immediate presence, any article of value, by violence or putting in fear, shall be deemed guilty of robbery and upon conviction thereof shall be punished by imprisonment in the penitentiary for any length of time not more than twenty years nor less than five years. [L. '03, p. 5, § 1. Cf. L. '54, p. 81, §§ 3, 4; L. '69, p. 204, § 36; Cd. '81, § 829; 2 H. P. C., § 45.]

As to repeal of this section, see § 2304, and note. Present law, see § 2418, *supra*.

See *supra*, § 2065, sufficiency of information, etc.

Assault with intent to commit robbery: See notes to § 2748, *supra*.

Cited in 19 Wash. 557; 22 Wash. 567; 24 Wash. 51; 35 Wash. 129, 130; 44 Wash. 301.

Robbery: See 2 Remington's Digest, pp. 2511, 2513, §§ 1, 12; State v. Dengel, 24 Wash. 49; State v. Morgan, 31 Wash. 226; State v. Johnson, 19 Wash. 410; State v. Fenton, 30 Wash. 325; State v. Ripley, 32 Wash. 182; State v. Hyde, 22 Wash. 551; State v. Smith, 26 Wash. 354; State v. Fair, 35 Wash. 127.

There is sufficient element of force and putting in fear to constitute the crime of robbery, where the prosecuting witness, while drunk, was forcibly conducted to a

saloon under the pretext that he was under arrest and must be searched, and that the defendants were officers, who were about to lock him up, and who thereupon forcibly took his money when no one else was present, under commands to keep silent: State v. Parsons, 44 Wash. 299.

There is not sufficient evidence to sustain a conviction for robbery, and it was error to deny a new trial, where it appears that the prosecuting witness, who was not present at the trial, the defendant, and others were intoxicated and engaged in a fight in an alley, and there was no evidence that he had been robbed other

than loose statements to the effect that he had stated to third persons that he had a twenty-dollar bill and some change which he lost in the alley: *State v. Jamieson*, 45 Wash. 314.

§ 2793. Larceny from the Person Defined—Penalty.

Every person who shall feloniously take or steal from the person of another, without violence or putting in fear, any article of value, shall be deemed guilty of larceny from the person and, upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine in any sum not exceeding one thousand dollars, or by both such fine and imprisonment. [L. '01, p. 34, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2605, *supra*.

§ 2794. (7104.) Burglary, Defined.

Every person who shall unlawfully enter in the night-time, or shall unlawfully break and enter in the daytime, any dwelling-house, or outhouse thereunto adjoining, and occupied therewith, or any office, shop, store, warehouse, malthouse, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat, water craft, or any building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit, within the body of any county, with intent to commit a misdemeanor or felony, shall be deemed guilty of burglary, and upon conviction thereof shall be imprisoned in the penitentiary for any period not more than fourteen years. [Cf. L. '54, p. 83, § 44; Cd. '81, § 827; L. '88, p. 14, § 1; 2 H. P. C., § 46.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2578, 2579, *supra*.

See next section and notes, presumption of unlawful intent.

See notes to § 2058, evidence, etc.

See notes to § 2065, sufficiency of indictment, etc.

Cited in 6 Wash. 108; 7 Wash. 241; 9 Wash. 220; 10 Wash. 239; 22 Wash. 261; 27 Wash. 531; 32 Wash. 130; 36 Wash. 128, 439; 42 Wash. 673.

Nature and elements of offense: See 1 Remington's Digest, p. 413, § 1; *State v. Boysen*, 30 Wash. 338; *State v. Petit*, 32 Wash. 129.

The difference between the statutory and common-law definitions of burglary, so far as intent is concerned, is that the former makes it burglary to enter or break a house with intent to commit a misdemeanor, as well as a felony: *Linbeck v. State*, 1 Wash. 336, 339.

This section defines the offense of burglary to be an unlawful entry in the night-time, or an unlawful breaking and entry in the daytime, with intent to commit a misdemeanor or felony: *State v. Hansen*, 10 Wash. 235, 239.

Burglary may be committed upon and in any of the places particularly specified, and in addition, upon and in any other building in which goods, merchandise, etc., are kept for use, sale or deposit: *State v. Sufferin*, 6 Wash. 107, 108; or the breaking or entry of an office, without also charging that such office was a place where goods, merchandise or valuable things were kept for sale or deposit: *Id.*

§ 2795. (7105.) Presumption as to Intent—Rebuttal.

Every person who shall be guilty of any such unlawful entry, or unlawful breaking and entry, as described in the last preceding section, shall be deemed to have made such entry, or breaking or entry, with intent to commit a misdemeanor or a felony, unless such entry, or breaking and entry, shall be explained by testimony satisfactory to the jury trying the case to have been made for some purpose without criminal intent. [L. '73, p. 190, § 49; Cd. '81, § 828; 2 H. P. C., § 47.]

As to repeal of this section, see § 2304, and note. Present law, see § 2580, *supra*.

Cited in 5 Wash. 351; 9 Wash. 220; 42 Wash. 673; 52 Wash. 318.

Under this section the burden of showing with what intent defendant entered the

house is cast upon him: *Linbeck v. State*, 1 Wash. 336.

The provisions of this section do not contravene any constitutional right of the accused: *State v. Anderson*, 5 Wash. 350.

This section only purports to change or modify the rules of evidence, and not those of pleadings: *Linbeck v. State*, supra, 336, 340.

It overrides the presumption of innocence, and may, under certain circumstances,

modify the provision requiring the court to charge that no presumption shall arise from defendant's silence: *Id.*

The provisions of this section cannot be interpreted as a proviso to § 2794, defining the crime of burglary; and, consequently, the amendment of § 2794, by enlarging its scope so as to include additional structures as subject to burglary, will not work a repeal of this section: *State v. Wilson*, 9 Wash. 218.

§ 2796. (7106.) Attempt to Commit Burglary, Possession of Tools, etc.

If any person shall be found at night around [armed] with any dangerous instrument or offensive weapon whatsoever, with intent to break or enter into any dwelling-house, building, room in a building, cabin, state-room, railway car or other covered inclosure where personal property shall be, and to commit any larceny, felony or misdemeanor therein, or with the intent to commit any larceny, felony or misdemeanor, or if any person shall at any time be found having in his possession any picklock, crow, key, bit, jack, jimmy, nippers, outsiders, pick, drill punch, betty or other implement or implements of burglary, with the intent aforesaid, and under such circumstances as shall not amount to an attempt to commit felony, every such offender shall be deemed guilty of a misdemeanor. [L. '93, p. 221, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2582, supra. See infra, § 2986, attempt to commit crime.

Cited in 34 Wash. 396, 397.

Possession of burglar's tools: See *State v. Garbe*, 34 Wash. 395.

§ 2797. (7107.) Presumption of Intent from Possession of Burglar's Tools.

The possession of any of the above-mentioned burglar's implements, tools, weapons or instruments by any person other than a mechanic, artificer or person in trade at and in his known or established shop or place of business, which is open to the public as such, shall be prima facie proof of the intent of such person to use the same for the felonious or unlawful purposes mentioned in the last preceding section, and shall impose upon such person the burden of proving a contrary intent. [L. '93, p. 221, § 2.]

As to repeal of this section see § 2304, and note. Present law, see § 2582, supra.

The mere possession of stolen property is not prima facie evidence of the breaking and entering, but a circumstance to be considered by the jury: *State v. Beeman*, 51 Wash. 557.

§ 2798. (7108.) Grand Larceny, Defined.

Every person who shall feloniously steal, take and carry, lead or drive away the personal goods or property of another, of the value of thirty dollars or more, shall be deemed guilty of grand larceny, and upon conviction thereof shall be imprisoned in the penitentiary not more than fourteen years nor less than one year. [L. '54, p. 83, § 45; Cd. '81, § 830; 2 H. P. C., § 48.]

As to repeal of this section, see § 2304, and note. Present law, § 2605, supra.

See supra, §§ 2013-2015, venue in larceny.

See notes to § 2065, sufficiency of indictment, etc.

See notes to § 2074, stolen money, etc., how pleaded.

See supra, § 2152, evidence, etc.

See notes to § 2158, instructions, etc.

Laws of 1886, p. 81, § 1, purporting to amend this section, is void, for want of proper title: See *In re Rafferty*, 1 Wash. 382.

§§ 2799-2801 OFFENSES AND PUNISHMENTS UNDER FORMER LAWS. [TITLE XV

This and the next section is superseded, so far as cutting and stealing timber is concerned, by § 2826, *infra*: Tacoma Mill Co. v. Perry, 32 Wash. 650.

Cited in 10 Wash. 88; 13 Wash. 590; 14 Wash. 311, 312; 31 Wash. 247; 32 Wash. 652; 38 Wash. 477.

A state court has jurisdiction to punish the crime of larceny committed by stealing the property of a railroad company which is in the hands of a receiver appointed by the United States court: State v. Coss, 12 Wash. 673.

The association of the word "feloniously" with the words "steal, take and carry, lead or drive away," defining grand larceny, makes each phrase synonymous with the others, and the use of the disjunctive "or" in an information charging that crime does not render the pleading bad: State v. Brookhouse, 10 Wash. 87.

§ 2799. (7109.*) **Petit Larceny, Defined.**

Every person who shall feloniously steal, take and carry away, lead or drive away, the personal goods or property of another, under the value of thirty dollars, shall be deemed guilty of petit larceny, and upon conviction thereof shall be punished by fine of not more than five hundred dollars, or by imprisonment in the county jail not more than one year, or by both fine and imprisonment, in the discretion of the court. [L. '05, p. 142, § 1. Cf. L. '54, p. 83, § 46; Cd. '81, § 831; 2 H. P. C., § 49.]

As to repeal of this section, see § 2304, and note. Present law, see § 2601, *supra*. See notes to last section.

With the exception of "value," the same principles govern this offense as that of grand larceny. L. '67, p. 98, § 2, 2 H. P. C., § 4980, Bal. Code, § 7110, defining larceny by a partner, was repealed by L. '73, p. 251, § 325: Bingham v. Keylor, 19 Wash. 555.

Cited in 13 Wash. 590; 32 Wash. 652.

§ 2800. (7111.) **Bonds, Notes, etc., Subjects of Larceny.**

Bonds, promissory notes, bills of exchange, or other bills, orders, drafts, checks, or certificates, or warrants for or concerning money, goods, or property due, or to become due, or to be delivered, and any deed or writing containing a conveyance of land, or any valuable contract in force, or receipt, release, or defeasance, writ, process, or public record, or any other instrument whatever, shall be considered personal goods, of which larceny may be committed. [L. '54, p. 83, § 47; Cd. '81, § 832; 2 H. P. C., § 50.]

As to repeal of this section, see § 2304, and note.

The subject matter of this section seems to be covered by § 2601, *supra*.

See *supra*, § 2074, larceny of moneys, etc., how pleaded.

Larceny of notes, etc., sufficient specifications in indictment or information for: See § 2074, *supra*.

§ 2801. **Larceny of Fixtures.**

Every person who shall sever from the freehold, steal, take and carry away any fixture or fixtures, attached to the real estate, or possessory claim of another, of the value of thirty dollars or more, shall be deemed guilty of grand larceny, and upon conviction thereof shall be punished by imprisonment in the penitentiary not more than fourteen years nor less than six months. Any person who shall sever from the freehold, steal, take and carry away, any fixture or fixtures attached to the real estate, or possessory claim of another, of a value of less than thirty dollars, shall be deemed guilty of petit larceny and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one month, or by a fine not to exceed one hundred dollars, or by both fine and imprisonment, in the discretion of the court. [L. '03, p. 12, § 1.]

As to repeal of this section, see § 2304, and note.

The subject matter of this section may be covered by §§ 2601, 2605, *supra*.

§ 2802. (7112.) Dogs Subject of Larceny.

All dogs in this state are hereby declared to be personal property, and shall be as much the subject of larceny as any other kind of personal property, and every person stealing and taking away such dogs shall be liable to prosecution and indictment as in other cases of larceny. [L. '71, p. 92, § 1; Cd. '81, § 837; 2 H. P. C., § 51.]

As to repeal of this section, see § 2304, and note. Compare § 2601, *supra*.

The subject matter of this section is probably covered by § 2303, dogs defined as personal property.

§ 2803. (7113.) Stealing Horses, Cattle, etc.

If any person shall steal a horse, mare, gelding, foal or filly, ass or mule, or any one or more head of neat cattle, or any one or more head of sheep, of any value, or if any person shall receive or buy any horse, mare, gelding, foal or filly, ass or mule, or any one or more head of neat cattle, or any one or more head of sheep, that shall have been stolen, with intent, by such receiving or buying, to defraud the owner, or if any person shall conceal any person guilty of stealing any of said property, knowing him to be the person who stole the same, or if any person shall conceal any horse, mare, or gelding, foal or filly, ass or mule, or any one or more head of neat cattle, or any one or more head of sheep, knowing the same to have been stolen, any person so offending shall be deemed guilty of an offense against the laws of the state of Washington, and upon conviction thereof shall be imprisoned in the penitentiary and kept at hard labor not more than ten nor less than one year; or, in the discretion of the court, the offender may be imprisoned in the county jail not exceeding one year, or fined not exceeding one hundred dollars, or both. [L. '63, p. 289, § 48; L. '79, p. 137, § 1; Cd. '81, § 833; 2 H. P. C., § 52.]

As to repeal of this section, see § 2304, and note. Present law, see § 2605, *supra*.

See notes to § 2065, sufficiency of indictment, etc.

See *supra*, § 2076, ownership of property, how pleaded.

See notes to § 2152, evidence in larceny.

Cited in 10 Wash. 89; 13 Wash. 584, 589; 14 Wash. 553; 18 Wash. 143; 31 Wash. 247; 36 Wash. 486; 38 Wash. 477; 42 Wash. 57; 46 Wash. 495.

An information under this section describing the property taken as so many "head of cattle" is defective: *State v. Brookhouse*, 10 Wash. 87.

The term "cattle" in law includes all of the domestic animals mentioned in this section, so that the information would have

been sustained by proof of the taking of twenty-five head of horses, as well as by showing that the "cattle" were that number of "steers": *Id.*

In an information charging the larceny of cattle under this section, providing that if any person shall steal certain animals (naming them), "of any value," he shall be deemed guilty, etc., it is not necessary that the value of the stolen cattle should be alleged: *State v. Young*, 13 Wash. 584.

§ 2804. (7114.) Possession of Range Stock, Presumption of Guilt.

In all prosecutions for larceny under the last preceding section, where the animal alleged to have been stolen was permitted by its owner to run on the range, proof of possession of the animal by the person accused of stealing the same shall be *prima facie* evidence that the accused acquired possession thereof recently, and shall have the effect of throwing on the accused person the burden of explaining such possession. [L. '95, p. 471, § 1.]

As to repeal of this section, see § 2304, and note.

The subject matter of this section seems not covered by the act of 1909, and may be in force, if the present laws are construed (under § 2300) as continuations of the last preceding section. See notes to §§ 2253 and 2301.

Cited in 14 Wash. 553; 33 Wash. 298; 42 Wash. 57.

Effect of possession of stolen property: See 2 Remington's Digest, p. 1707, § 39; State v. Wilson, 42 Wash. 56; State v. Eubank, 33 Wash. 293.

No constitutional rights of defendants in criminal prosecutions are violated by this section: State v. Kyle, 14 Wash. 550; cited in State v. Everett, 14 Wash. 574, 576.

§ 2805. (7115.) Obtaining Property Under False Pretense, Larceny.

Every person who shall falsely represent or personate another, and in such assumed character shall receive any money or other property whatever, intended to be delivered to the party so personated, with intent to convert the same to his own use, shall be deemed guilty of larceny, and shall, on conviction thereof, be imprisoned in the penitentiary not more than fourteen years nor less than one year, or imprisoned in the county jail any length of time not exceeding one year. [L. '54, p. 84, § 53; Cd. '81, § 834; 2 H. P. C., § 53.]

As to repeal of this section, see § 2304, and note. Present law, see § 2601, supra. See infra, § 2843, obtaining money under false pretenses.

Cited in 9 Wash. 249; 12 Wash. 419; 14 Wash. 665.

False personation: See 2 Remington's Digest, p. 1699, § 3; State v. Skilbrick, 25 Wash. 555.

It is larceny for any person to receive "any money or other property whatever"

by falsely representing or personating another, and it is a crime for a person by such means to receive any kind or description of property of value: State v. White, 12 Wash. 417; State v. Smith, 9 Wash. 248; cited in State v. Reiff, 14 Wash. 669.

§ 2806. (7116.) Buying or Receiving Stolen Property.

Every person who shall buy, receive, or aid in the concealment of stolen property, money, or goods, knowing the same to have been stolen, or who shall bring or aid in bringing into this state from any other state or territory of the United States, or from any foreign country, any such stolen property, money, or goods, knowing the same to have been stolen, shall, upon conviction thereof, be imprisoned in the penitentiary not more than four years nor less than one year, or be imprisoned in the county jail not more than two years nor less than one month, and shall be fined not exceeding five hundred dollars nor less than one hundred dollars. [Cf. L. '54, p. 84, § 49; Cd. '81, § 849; L. '90, p. 129, § 1; 2 H. P. C., § 68.]

As to repeal of this section, see § 2304, and note. Present law, see § 2601, supra.

See § 2154, supra, averments and proof necessary.

See notes to § 2158, instructions on presumption from receiving stolen property.

Receiving stolen property: See 2 Remington's Digest, p. 2482, §§ 1, 2; State v. Druxinman, 34 Wash. 257.

Possession of recently stolen property is a circumstance to be considered by the jury in connection with all the other evidence in the given case in determining the

guilt or innocence of the accused, and the presumption that may be drawn from such possession is one of fact merely, and is to be determined by the jury: State v. Walters, 7 Wash. 246; State v. Humason, 5 Wash. 499; State v. Payne, 6 Wash. 563.

§ 2807. (7118.) Conversion of Personal Property, Larceny.

Every person who shall borrow, hire, or in any manner obtain the use of the goods, chattels, or personal property of any nature, kind, or condition whatsoever, of another, for any specific purpose, or for any specific time, and who shall at any time after the said purpose has been complied with, or the said time has expired, give away, trade, barter, sell, convert, or secrete, with intent to convert to his own use, without the consent of the owner, or agent of said owner, any of the goods, chattels, or personal prop-

erty of any nature, kind, or condition whatsoever, of another, which shall have come into his or her possession by virtue of such borrowing or hiring, or so obtaining the possession thereof, as aforesaid, he or she shall, upon conviction thereof, be adjudged guilty of larceny, and shall be punished in the same manner prescribed by law for the larceny of property of the kind and value of the goods, chattels, or personal property so given away, traded, bartered, sold, converted, or secreted with intent so to convert to his or her own use. [L. '88, p. 121, § 1; 2 H. P. C., § 54.]

As to repeal of this section, see § 2304, and note. Present law, see § 2601, *supra*.

See notes to § 2065, sufficiency of information.

Cited in 5 Wash. 174, 175.

§ 2808. (7119.) Larceny by Embezzlement.

If any agent, clerk, officer, servant, or person to whom any money or other property shall be intrusted, with or without hire, shall fraudulently convert to his own use, or shall take and secrete the same with intent fraudulently to convert the same to his own use, or shall fail to account to the person so intrusting it to him, he shall be deemed guilty of larceny, and on conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year, or be imprisoned in the county jail for any length of time not exceeding one year. [L. '54, p. 85, § 55; Cd. '81, § 835; L. '91, p. 120, § 6; 2 H. P. C., § 55.]

As to repeal of this section, see § 2304, and note. Present law, see § 2601, *supra*.

See notes to § 2065, sufficiency of indictment, etc.

See notes to § 2152, evidence, venue, etc.

See notes to § 2158, instructions in embezzlement, etc.

See *infra*, §§ 2812, 2813, embezzlement of public funds, punishment.

Cited in 10 Wash. 95; 12 Wash. 255, 259; 17 Wash. 302; 26 Wash. 165; 30 Wash. 49; 31 Wash. 114; 32 Wash. 139; 36 Wash. 306.

Embezzlement by agents: See 1 Remington's Digest, p. 1017, § 3; *State v. Maines*, 26 Wash. 160; *State v. Lewis*, 31 Wash. 75; *State v. Whitworth*, 30 Wash. 47; *State v. Bogardus*, 36 Wash. 297.

The words "for hire" in this section qualify each of the classes of persons enumerated therein: *Terry v. State*, 1 Wash. 277.

The requirements of this section are, first, not only that the respondent was a person, but that he was an agent; second, that he received the property of his principal; third, that he received it in the course of his employment; fourth, that he fraudulently and feloniously converted it to his own use: *State v. Turner*, 10 Wash. 94, 96.

The fact that an agent is entitled to a commission on goods does not make him a joint owner: *Brandenstein v. Way*, 17 Wash. 293.

There seems to be no good reason why the legislature should not have in mind the treasurer of a county or of a municipality when it used the word "officer," as it appears in this section: *State v. Isen-*

see, 12 Wash. 255, 256; see *State v. Krug*, 12 Wash. 294.

When a public officer charged with the custody of public funds misappropriates and embezzles the same he may be prosecuted either under this section or § 2812, *infra*: *State v. Isensee*, *supra*.

There are no grades of this offense charged in this section, and value of property taken can only influence the court's discretion in penalty imposed: *State v. Weydeman*, 3 Wash. 399, 400.

If defendant is indicted under this section a verdict of not guilty of the offense charged, but guilty of the crime of petit larceny is equivalent to acquittal: *Id.*

One who is employed as the driver of a laundry wagon under a contract which charges him instead of the patrons with all the work brought in and permits the driver to make the collections, retaining for himself twenty-two per cent of the amount due for laundry work brought in, and making him personally responsible for failure to collect moneys from patrons whom he had trusted, stands in the relation of a debtor, and upon failure to turn in moneys collected, cannot be prosecuted for embezzlement as an agent for hire: *State v. Covert*, 14 Wash. 652. See, also, *State v. Hoshier*, 26 Wash. 643.

§ 2809. (7120.) Larceny by Agent of Insurance Company.

If any director, officer, agent or other person connected with or doing business for or with any insurance company shall fail to account for or

fraudulently convert or appropriate to his own use, or the use of any other person or persons, any money or other property belonging to such company, he or they shall be deemed guilty of larceny, and on conviction thereof shall be imprisoned in the penitentiary not more than five years, or be imprisoned in the county jail for any period of time less than one year. [L. '95, p. 269, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2601, *supra*.

§ 2810. (7121.) Bank Deposits, Larceny of, When.

Any president, director, manager, cashier or other officer of any banking institution who shall receive or assent to the reception of deposits after he shall have knowledge of the fact that such banking institution is insolvent or in failing circumstances, shall be guilty of felony and punished as hereinafter provided. [L. '93, p. 271, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2640, *supra*.

Cited in 35 Wash. 151.

v. Oleson, 35 Wash. 149; *State v. Dix*, 33

Receiving deposits after insolvency: See Wash. 405.

1 Remington's Digest, p. 338, § 10; State

§ 2811. (7122.) Penalty for Violating Last Section.

Any person violating the provisions of the last preceding section of this chapter, upon conviction thereof shall be punished by imprisonment in the penitentiary for a period of not less than two nor more than twenty years. [L. '93, p. 271, § 2.]

As to repeal of this section, see § 2304, and note. Present law, see § 2640, *supra*.

§ 2812. (7123.) Embezzlement of Public Funds a Felony.

If any state, county, township, city, town, village, or other officer elected or appointed under the constitution or laws of this state, court commissioner, or any officer of any court, or any clerk, agent, servant, or employee of any such officer, shall, in any manner not authorized by law, use any portion of the money intrusted to him for safekeeping, in order to make a profit out of the same, or shall use the same for any purpose not authorized by law, he shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the penitentiary not less than one nor more than ten years. [L. '90, p. 113, § 1; 2 H. P. C., § 57.]

As to repeal of this section, see § 2304, and note. See § 2334, *supra*, making use of public moneys a misdemeanor; and § 2601, making appropriation thereof larceny; and § 2569, misappropriation of public funds.

See notes to § 2665, sufficiency of indictment, etc.

See notes to § 2808, embezzlement.

See *infra*, § 9032, embezzlement by state treasurer.

Cited in 9 Wash. 479; 12 Wash. 258, 290, 293; 15 Wash. 415; 16 Wash. 144; 18 Wash. 645.

By public officers: See 1 Remington's Digest, p. 1018, §§ 4, 9; *State v. Boggs*, 16 Wash. 143; *State v. McCauley*, 17 Wash. 88; *State v. Downing*, 15 Wash. 413; *Bardsley v. Sternberg*, 18 Wash. 612; *State v. Isensee*, 12 Wash. 254.

This section makes it a felony for any officer to use any portion of the public

money intrusted to him in any manner or for any other purpose not authorized by law, which is the same as a prohibition against using it except as authorized by law: *Marx v. Parker*, 9 Wash. 473, 479.

This section applies to city officers chosen under a freeholders' charter, which cities of the first class are authorized by the constitution and legislature to frame for themselves: *State v. Krug*, 12 Wash. 288.

§ 2813. (7124.) Allegations and Proof Necessary.

In prosecutions for the offenses named in the next preceding section, it shall be sufficient to allege generally in the information or indictment, that

any such officer, court commissioner, clerk, agent, servant, or employee has made profit out of the public money in his possession or under his control, or has used the same for any purpose not authorized by law, to a certain value or amount, without specifying any further particulars in regard thereto, and on the trial evidence may be given of all the facts constituting the offense and defense thereto. [L. '90, p. 113, § 2; 2 H. P. C., § 58.]

As to repeal of this section, see § 2304, and note.

Query as to whether this section is covered by the act of 1909. See notes to §§ 2253 and 2301, *supra*.

Cited in 12 Wash. 297.

Sufficiency of indictment or information:
See 1 Remington's Digest, p. 1019, § 8.

The words "without specifying any further particulars in regard thereto," as used in this section, are not in violation of the fourteenth amendment to the Constitution

of the United States, and section 22, Article I, of the Constitution of Washington: State v. Krug, 12 Wash. 288, 297; State v. Isensee, 12 Wash. 254; State v. Krug, 12 Wash. 288; State v. McCauley, 17 Wash. 88; State v. Boggs, 16 Wash. 143.

§ 2814. (7125.) **Altering Marks, Brands, etc., on Animals Larceny.**

Every person who shall mark or brand, or alter or deface the mark or brand, of any horse, mare, colt, jack, jennet, mule, or any one or more head of neat cattle, or sheep, goat, hog, shoat, or pig, not his own property, but belonging to some other person, or cause the same to be done, with intent thereby to steal the same, or to prevent the identification thereof by the true owner, shall, on conviction thereof, be imprisoned in the penitentiary not more than five years nor less than one year, or be imprisoned in the county jail for any length of time not exceeding one year. [L. '54, p. 84, § 48; Cd. '81, § 839; 2 H. P. C., § 60.]

As to repeal of this section, see § 2304, and note. Present law, see § 2594, *supra*.
See *supra*, § 2076, allegation of ownership.

Cited in 42 Wash. 57; 46 Wash. 495.

§ 2816. (7128.) **Forgery, Defined.**

Every person who shall falsely make, or assist to make, deface, destroy, alter, forge, or counterfeit, or cause to be falsely made, defaced, destroyed, altered, forged, or counterfeited, any record, deed, will, codicil, bond, writing obligatory, promissory note for money or property, receipt for property, power of attorney, certificate of a justice of the peace or other public officer, auditor's warrant, treasury note, county order, acceptance or indorsement of any bill of exchange, promissory note, draft, or order, or assignment of any bond, writing obligatory, or promissory note for money or property, or any other instrument in writing, or any brand prescribed by law on tobacco, beef, bacon, or pork cask, lard keg or barrel, salt barrel, or hay bale, or any person who shall utter or publish as true any such instrument, knowing the same to be false, defaced, altered, forged, or counterfeited, with intent to defraud any person, body politic or corporate, shall be deemed guilty of forgery, and on conviction thereof shall be imprisoned in the penitentiary not more than fourteen years nor less than one year, and be fined in any sum not exceeding five thousand dollars. [L. '54, p. 85, § 57; Cd. '81, § 854; 2 H. P. C., § 63.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2583-2587, 2595, 2596, *supra*.

Repealed as to "wills" by next section.

See notes to § 2065, sufficiency of indictment, etc.

See notes to § 2152, evidence, etc.

See *infra*, § 2819, possession of counterfeiting tools with intent to use, etc.

§§ 2817-2820 OFFENSES AND PUNISHMENTS UNDER FORMER LAWS. [TITLE XV

Cited in 17 Wash. 313; 18 Wash. 54; 52; State v. Heaton, 17 Wash. 310; State v. Harding, 20 Wash. 556.
29 Wash. 378.

Forgery: See 1 Remington's Digest, p. 1263, §§ 1-3; State v. Barkuloo, 18 Wash.

§ 2817. (7129.) Secreting or Destroying Wills.

Any person who shall willfully secrete or destroy any last will and testament of a person then deceased, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment at hard labor in the penitentiary of this state for a term of not less than one year, nor more than five years, or by fine of not less than one thousand dollars, or more than five thousand dollars, or by both such fine and imprisonment. [L. '93, p. 50, § 4.]

This section repeals so much of the last section as relates to wills.

As to repeal of this section, see § 2304, and note.

The subject matter of this section is not covered by the act of 1909. See note to § 2301, supra.

§ 2818. (7130.) Forgery of Warehouse Receipts.

If any warehouseman, miller, storage, forwarding, or commission merchant, or his or their servants, agents, or clerks, shall willfully and fraudulently make or alter any receipt or other written evidence of the delivery into the warehouse, mill, store, or other building belonging to him, them, or either of them, or his or their employers, of any grain, flour, pork, beef, or wool, or other goods, wares, or merchandise, which shall not have been so received or delivered into such mill, warehouse, store, or other building previous to the making and altering such receipt, or other written evidence thereof, he shall, upon conviction thereof, be imprisoned in the penitentiary not more than two years, nor less than six months, or imprisoned in the county jail for any length of time not exceeding one year, and fined in any sum not exceeding one thousand dollars. [Cf. L. '54, p. 85, § 56; Cd. '81, § 836; L. '91, p. 120, § 7; 2 H. P. C., § 56.]

As to repeal of this section, see § 2304, and note. Present law, see § 2644, supra.

§ 2819. (7131.) Possession of Counterfeiting Tools with Intent to Use, etc.

Every person who shall cast, stamp, engrave, make, or mend, or shall knowingly have in his possession, any mold, pattern, die, puncheon, engine, press, or other tool or instrument adapted and designed for coining or making any counterfeit coin in the similitude of any gold or silver coin current by law or usage in this state, with intent to use the same, or cause or permit the same to be used or employed in coining or making any such false or counterfeit coin as aforesaid, shall, on conviction thereof, be imprisoned in the penitentiary not more than ten years or less than one year, and be fined in any sum not exceeding five thousand dollars, and all such tools and instruments intended for such purposes aforesaid shall be destroyed. [L. '54, p. 86, § 58; Cd. '81, § 855; 2 H. P. C., § 64.]

As to repeal of this section, see § 2304, and note. Present law, see § 2591, supra.

§ 2820. (7132.) Allegation of Intent to Defraud—Variance.

In any case where the intent to defraud is necessary to constitute the offense of forgery or any other offense that may be prosecuted, it shall be sufficient to allege in the indictment or information an intent to defraud, without naming therein the particular person or body corporate intended to

be defrauded; and on the trial of such indictment it shall be deemed sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, territory, county, city, town, or village, or any body corporate, or any public officer in his official capacity, or any copartnership, or member thereof, or any particular person; and persons of skill shall be competent witnesses to prove a forgery. [Cf. L. '54, p. 86, § 59; Cd. '81, § 856; L. '91, p. 121, § 9; 2 H. P. C., § 65.]

As to repeal of this section, see § 2304, and note. Present law, see § 2292, *supra*.
See § 2702, *supra*, counterfeiting uncoined gold, etc.

§ 2821. (7136.) **Forcible Entry and Detainer, Defined.**

Every person who shall violently take or keep possession of any house or close with menaces, force, and arms, and without the authority of law, shall be deemed guilty of forcible entry or forcible detainer, as the case may be, and upon conviction thereof shall be fined in any sum not exceeding one thousand dollars. [L. '54, p. 86, § 60; Cd. '81, § 858; 2 H. P. C., § 67.]

As to repeal of this section, see § 2304, and note. Present law, see § 2558, *supra*.
See *supra*, § 810 et seq., action for forcible entry and detainer.

§ 2822. (7137.) **Trespass upon Inclosed Lands.**

If any person, other than an officer on lawful business, shall go or trespass upon any inclosed lands or premises not his own, and shall fail, neglect, or refuse to depart therefrom immediately, and remain away until permitted to return, upon the verbal or printed or written notice of the owner or person in the lawful occupation of said lands, or premises, such trespasser shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not less than five nor more than fifty dollars, and shall be committed, in default of payment of the fine and costs imposed, to the jail of the county in which the offense is committed, one day for each two dollars of the said fine and costs: Provided, that any and all lands and premises inclosed by a lawful fence shall be deemed and considered inclosed lands within the meaning of this section: And provided further, that any and all precipices, embankments, streams, lakes, or ponds, or other natural obstructions which equally secure them from trespass of any domestic animals, or shall be made so by artificial means, constituting any part of such inclosure, shall, for all purposes of this section, be deemed lawful fences. [L. '90, p. 124, § 1; 2 H. P. C., § 70.]

As to repeal of this section, see § 2304, and note. Present law, see § 2665, *supra*.
Injury by trespassers, see § 2659, *supra*.
See *supra*, § 939 et seq., action for trespass.

A person, though the owner, has no right to forcibly invade the actual and peaceable occupancy of land by another, even if the latter holds the same without right. By so doing he is a trespasser, and such possessor has the right to defend himself and his possession, if unlawfully assailed by such owner: *White v. Territory*, 3 W. T. 397.

§ 2823. (7138.) **Trespass upon Uninclosed Lands.**

If any person, other than an officer on lawful business, shall trespass upon any uninclosed lands or premises not his own, by the erection of any house, tent, or by continuing to camp or live thereon, after receipt from the owner or person in the lawful occupation of said lands or premises of verbal, written, or printed notice to vacate such lands or premises, such trespasser shall be deemed guilty of a misdemeanor, and upon conviction

thereof shall be punished as provided in the next preceding section. [L. '90, p. 125, § 2; 2 H. P. C., § 71.]

As to repeal of this section, see § 2304, and note. Present law, see § 2665, *supra*, trespass after warning.

§ 2824. (7139.) Notice to Trespassers.

Printed or written notices having attached thereto, by authority, the name of the owner or person in lawful occupation of said lands or premises, and requiring all persons to forbear trespassing on said lands or premises, and to depart therefrom, posted in three conspicuous places on said lands or premises, shall be held and deemed to be sufficient prima facie evidence of notice, as mentioned in the last two preceding sections. [L. '90, p. 128, § 12; 2 H. P. C., § 72.]

As to repeal of this section, see § 2304, and note. Present law, see § 2665, *supra*, trespass after warning.

§ 2825. (7140.) Trespassing Hunters, Arrest, Jurisdiction.

Any owner or other legal occupant of any inclosed premises, used for meadow, pasture, cultivation, or other use, may post, at the usual place or places of entering upon the same, written or printed notices, forbidding persons to trespass upon said inclosed premises, for the purpose of hunting or pursuing game, without first obtaining the consent of the owner or legal occupant thereof; any person entering said lands for said purposes while said notices are so posted shall be deemed guilty of a misdemeanor, and for every such offense shall be punished by a fine of ten dollars, one-half of which shall be paid to the owner or legal occupant of such premises, and the other half into the school fund in the county in which the act of trespass is committed. For the carrying out of the provisions of this section, the owner or legal occupant of the premises may arrest the trespasser upon his premises, taken in the act, without a warrant, and take him before the nearest justice of the peace for trial, or may have a warrant issued as in other cases of misdemeanor; and any natural barrier, as a river, lake, or other obstruction to the passage of stock, shall, for the purposes of this article, constitute an inclosure. [Cf. L. '75, p. 116, § 5; L. '77, p. 331, § 2; Cd. '81, § 1204; L. '83, p. 56, §§ 1-4; L. '91, p. 121, § 10; 2 H. P. C., § 73.]

As to repeal of this section, see § 2304, and note. For present law, see § 2665, *supra*, trespass after warning, not relating particularly to hunters.

See *supra*, §§ 2230, 2189, and notes, disposition of fines.

Query: As to whether, § 12, L. '88, p. 99, relating to trespassing hunters on inclosed lands, is repealed by this section?

§ 2826. (7141.) Willfully Removing Trees, etc., from Another's Land.

If any person shall willfully cut down, destroy, or injure any standing or growing tree upon the lands of another, or shall willfully take or remove from any such lands any timber or wood previously cut or severed from the same, or shall willfully dig, take, quarry, or remove from any such lands any mineral, earth, or stone, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than fifty nor more than one thousand dollars. [L. '90, p. 126, § 5; 2 H. P. C., § 74.]

As to repeal of this section, see § 2304, and note. Present law, see § 2659, *supra*, partly covers this section. See note to § 2301.

Cited in 32 Wash. 652.

§ 2827. (7142.) Willfully Taking Fruit, etc., from Another's Land.

If any person shall willfully enter upon the garden, orchard, or other improved land of another, or in his possession, with intent to cut, take, carry away, destroy, or injure the trees, grain, grass, hay, fruit or vegetable products there growing and being, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one nor more than six months, or by fine not less than five nor more than fifty dollars. [L. '90, p. 125, § 3; 2 H. P. C., § 75.]

As to repeal of this section, see § 2304, and note. Present law, see § 2659, *supra*, partly covers this section. See note to § 2301.

§ 2828. (7144.) Injuring Trees on Streets or Highways.

Every person who shall cut down, girdle, destroy, or injure any tree, timber, or shrub on the street or highway in front of any person's house, village, town, or city lot, or on the commons or public grounds of any village, town, or city, or on the street or highway in front thereof, without lawful authority, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars, or by imprisonment in the county jail not more than twenty days, or by both such fine and imprisonment. [L. '91, p. 122, § 11; 2 H. P. C., § 77.]

As to repeal of this section, see § 2304, and note. Present law, see § 2659, *supra*, partly covers this section. See note to § 2301.

§ 2829. Injuring Trees and Shrubs in Public Places.

Whoever digs up, cuts down, girdles, defaces, or otherwise injures or mars any tree or shrub on any public highway, bicycle path, park or any public grounds used as a place of public resort, unless the same is deemed an obstruction by the road supervisor or person lawfully in charge of such highway, bicycle path, park or public grounds and removed under his or their direction, shall be deemed guilty of a misdemeanor, and be fined in any sum not less than five dollars nor more than one hundred dollars and the costs of prosecution. [L. '01, p. 301, § 1.]

As to repeal of this section, see § 2304, and note. Present laws, §§ 2656, 2659, partly cover this section. See note to § 2301.

§ 2830. (7145.) Malicious Injury to Freehold.

If any person shall maliciously or wantonly cut down, destroy, or injure any bush, shrub, fruit, or other tree not his own, standing or growing for fruit, ornament, or other useful purpose, or shall willfully break the glass in or deface any building not his own, or shall willfully break down or destroy any fence or hedge belonging to or inclosing land not his own, or shall willfully throw down, or open and leave down or open, any bars, gate, or fence, or hedge belonging to or inclosing land not his own, or shall maliciously or wantonly sever from the land of another any produce thereof, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than ten dollars nor more than five hundred dollars. [L. '90, p. 127, § 10; 2 H. P. C., § 78.]

As to repeal of this section, see § 2304, and note. Present law, § 2659, *supra*, partly covers this section. See note to § 2301.

See § 2703, *supra*, robbing sluice-boxes, etc.

§ 2831. (7146a.) Destruction, etc., of Monuments, etc., on Mining Claims Prohibited.

Any person who shall willfully and maliciously deface, remove, injure or destroy any location stake, side post, corner post, landmark or monument, or any other land boundary monument, the same having been erected or implanted for the purpose of designating the location, boundary or name of any mining claim, lode or vein of mineral, or for posting the name of the discoverer, locator or owner or date of discovery thereon; or any person who shall so deface, obliterate, remove or destroy any notice having been placed or posted upon any mining claim for the purpose of marking or identifying the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not exceeding one year: Provided, however, that the provisions of this act shall not apply to abandoned mining claims. [L. '97, p. 221, § 1.]

As to repeal of this section, see § 2304, and note. The subject matter of this section may be covered by § 2656. See note to § 2301.

§ 2832. (7147.) Malicious Injury to Railway Structure, etc.

Any person or persons who shall purposely and maliciously break down, destroy, or injure any fence, gate, signboard, milepost, car, or other useful structure upon the line of any railroad, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding two hundred dollars, or be imprisoned in the county jail not exceeding one year, or by both fine and imprisonment. [Cf. Cd. '81, § 848; L. '91, p. 122, § 12; 2 H. P. C., § 80.]

As to repeal of this section, see § 2304, and note. Present laws, §§ 2656, 2659, partly cover this section. See note to § 2301.

§ 2833. (7154.) Willful Injury to Bridges, etc.

Every person who shall willfully and maliciously cut, break, injure, or destroy any bridge, mill dam, canal, flume, aqueduct, reservoir, or other structure erected to create hydraulic power, or to conduct water for mining or agricultural purposes, or to conduct water for the purpose of floating or carrying therein logs, timber, earth, or sand, or any embankment necessary to the same, or either of them, or shall willfully or maliciously make, or cause to be made, any aperture in such dam, canal, flume, aqueduct, reservoir, embankment, or structure, with intent to injure or destroy the same, shall, on conviction thereof, be fined in any sum not more than one thousand dollars, or be imprisoned in the penitentiary at hard labor not more than two years, or both such fine and imprisonment. [Cf. L. '62, p. 30, § 1; Cd. '81, § 842; L. '91, p. 228, § 1; 2 H. P. C., § 85.]

As to repeal of this section, see § 2304, and note. Present laws, §§ 2656, 2658, supra, partly cover this section.

Cited in 44 Wash. 603.

§ 2834. (7155.) Malicious Injury to Vessels, Logs, etc.

If any person maliciously cut away, let loose, injure, or destroy any boom or raft of wood, logs, or lumber, or any boat or vessel fastened to any place, of which he is not the owner or legal possessor, he shall be punished by fine not exceeding five hundred dollars, and imprisonment in the county jail not more than one year, and shall also forfeit to the use of the person

so injured double the amount of damages by him thereby sustained, to be recovered in an action at law. [Cd. '81, § 843; 2 H. P. C., § 86.]

As to repeal of this section, see § 2304, and note. Compare § 2658.

This section seems only partly covered by the act of 1909. See note to § 2301, *supra*.

§ 2835. (7156.) Destruction of Dams, Dikes, etc.

It shall be unlawful to cut or damage, break or destroy, any dike or dam erected or maintained in this state for the protection of lands from overflow; and any person or persons so offending, upon conviction thereof, shall be fined any sum not exceeding three hundred dollars for each and every offense, which fine shall be paid over to the school fund of the county wherein the offense is committed. The person or persons so offending shall not, by the provisions of this section, nor by any judgment under this section, be exempted from any suit for damages brought by any person or persons injured by the cutting, breaking, damaging, or destroying of such dike or dam. [L. '91, p. 123, § 16; 2 H. P. C., § 88.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2656, 2658, *supra*. See note to § 2825, disposition of fines.

**§ 2336. (7160.) Unlawful to Tap or Interfere with Electric Wires, etc.—
Penalty.**

It shall be unlawful for any person or persons to tap, or make connection with, or take currents of electricity from, in any unauthorized manner whatsoever, any electric wire or cable, used by any person, town, city or electric company in this state for conducting electric currents over the same, or to tamper with any meter, or meters, of such person, town, city or company, or use their electricity, or diminish by any means or contrivance whatsoever, the free passage of any current or currents of electricity over any such wires or cables or through such meters, or to agree with or conspire with any other person or persons to do any of the aforementioned unlawful acts, and any person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten dollars, nor more than one hundred dollars, or by imprisonment in the county jail not more than ninety days or both such fine and imprisonment. [L. '97, p. 54, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2657, *supra*.

§ 2837. Unlawful to Injure or Remove Electric Wires.

It shall be unlawful for anyone within the state of Washington to willfully or wantonly and without the consent of the owner, take down, remove, injure, obstruct, displace or destroy any line erected or constructed for the transmission of electrical current, or any poles, wires, conduits, cables, insulators, or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith; or to sever any wire or cable thereof, or in any manner to interrupt the transmission of the electrical current over and along any such line; or to take down, remove, injure or destroy any house, shop, building or other structure or machinery connected with or necessary to the use of any line erected, or constructed for the transmission of electrical current. [L. '99, p. 180, § 1; L. '03, p. 198, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2657, *supra*.

§ 2838. Unlawful to Injure Electric Wire by Fires.

It shall be unlawful for any person within the state of Washington to willfully or wantonly set any fire that shall result in the destruction or injury of any line erected or constructed for the transmission of electrical current or any poles, conduits, wires, cables, insulators, or any support upon which wires or cables may be suspended, or any part of any such line, or appurtenances or apparatus connected therewith, or any house, shop, building or other structure or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electrical current, or to set any fire that shall in any manner interrupt the transmission of electrical current over and along any such line. [L. '99, p. 180, § 2; L. '03, p. 199, § 2.]

As to repeal of this section, see § 2304, and note. This section may be covered by § 2657, *supra*.

§ 2839. Penalty.

Any person or persons violating any of the provisions of sections 2837 and 2838, shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment in the discretion of the court. [L. '99, p. 181, § 3; L. '03, p. 199, § 3.]

As to repeal of this section, see § 2304, and note. See last previous sections and notes.

§ 2840. Unlawful to Injure Booms.

Any person who shall willfully and maliciously break, cut away, injure or destroy any boom lawfully established and being in any of the waters of this state, or make any cut or break in the same with intent to destroy the same, shall be deemed guilty of a felony, and on conviction thereof shall be punished by imprisonment in the state penitentiary for any term not exceeding five years. [L. '01, p. 22, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2658, *supra*.

§ 2841. Unlawful to Destroy Marks and Brands on Logs.

Every person who shall cut out, alter or destroy any mark or brand made or caused to have been made by the owner upon any log, spar, pile, boom stick, shingle bolt or other timber of value, lying or being in any of the waters of this state, or upon the beach or bank adjacent to such waters, without the consent of the owner thereof, shall, on conviction, be punished by a fine of not more than one hundred dollars, or by imprisonment in the county jail of not more than six months or by both such fine and imprisonment. [L. '01, p. 40, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2594, *supra*.

§ 2842. Malicious Injury or Destruction of Personal Property.

Any person who shall unlawfully or maliciously injure or destroy the personal property of another shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum not exceeding \$100, or shall be committed to the county jail for a period not exceeding thirty (30) days. [L. '03, p. 13, § 1.]

: As to repeal of this section, see § 2304, and note. Present law, see § 2667.

Injury to improvements of settlers on unsurveyed land: See § 2704, *supra*.

For the protection of property and records on public land: See §§ 2705-2707, *supra*.

Posting advertisements on public property: See § 2708, *supra*.

To prevent removal of mortgaged property: See § 2709, *supra*.
 Relating to sign-boards and mile-posts: See §§ 2716, 2717, *supra*.
 Poisoning honey bees: See § 3265, *infra*.
 Malicious injury to animals: See § 3289, *infra*.
 Interference with headgates or measuring-boxes: See § 6396, *infra*.

§ 2843. (7165.) Obtaining Money, etc., Under False Pretenses.

If any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretense, obtain from any person any money, transfer, note, bond, or receipt, or thing of value, such person shall, upon conviction thereof, be imprisoned in the penitentiary not more than five years nor less than one year, or imprisoned in the county jail for any length of time not exceeding one year. [L. '54, p. 85, § 54; Cd. '81, § 853; 2 H. P. C., § 234.]

As to repeal of this section, see § 2304, and note. Present law, see § 2601, *supra*.

See *supra*, § 2065, and notes, sufficiency of indictment, etc.

See *supra*, § 2074, and notes.

See notes to § 2152, evidence, etc.

See *supra*, § 2805, obtaining property under false pretenses.

False pretenses in selling mines, false assays, etc.: See §§ 2711-2714, *supra*.

Fraudulent sale of fruit or ornamental trees: See § 3123, *infra*.

Deception as to incorporation of bank: See § 3340, *infra*.

Cited in 11 Wash. 517; 14 Wash. 406, 665; 33 Wash. 329; 34 Wash. 600; 49 Wash. 32.

False pretenses: See 1 Remington's Digest, p. 1243, §§ 1-5; State v. Mendenhall, 24 Wash. 12; State v. Phelps, 41 Wash. 470; State v. Knowlton, 11 Wash. 512; State v. Riddell, 33 Wash. 324.

The statute punishing the obtaining of property "by color of any false token or writing, or any false pretense," does not restrict the false pretense to one in the nature of a "token or writing": State v. Reiff, 14 Wash. 664, following State v. White, 12 Wash. 417.

A lady's beaver shoulder cape is the subject of larceny by false pretense under this section, classifying as such subjects "any

money, transfer, note, bond, or receipt, or thing of value": State v. Reiff, *supra*.

An information charging the obtaining of money under false pretenses, by presenting wildcat scalps to a county auditor, when the accused had not killed the wildcats in said county or within a period of three months previous thereto, under this section, is not demurrable and the facts are not inapplicable to the crime charged by reason of Laws of 1905, page 122, making it a misdemeanor to offer scalps of wildcats that were killed out of the state or prior to the passage of the act; since the information does not show that the wildcats were killed out of the state or prior to the act: State v. King, 50 Wash. 31.

§ 2844. (7167.) Use of False Weights or Measures.

Every person who uses any weight or measure, knowing it to be false, by which use another is defrauded or otherwise injured, is guilty of a misdemeanor. A false weight or measure is one which does not conform to the standard established by the laws of the United States. [Cf. L. '86, p. 122, §§ 1-3; L. '91, p. 129, § 33; 2 H. P. C., § 236.]

As to repeal of this section, see § 2304, and note. Present law, see § 2637, *supra*.

§ 2845. (7168.) Failure to Give Full Weight.

In all sales of coal, hay, and other commodities usually sold by the ton or fractional part thereof, the seller must give to the purchaser full weight at the rate of two thousand pounds to the ton; and in all sales of articles which are sold in commerce or trade by avoirdupois weight, the seller must give to the purchaser full weight, at the rate of sixteen ounces to the pound. Any person violating this section is guilty of a misdemeanor. [L. '86, p. 122, § 2; 2 H. P. C., § 237.]

As to repeal of this section, see § 2304, and note. Present law, see § 2637, *supra*.

§ 2846. (7175.) Misrepresentation of Pedigree of Animals Kept for Breeding.

Any person who is the owner, agent, or keeper, or in any way interested in the ownership or the keeping, of any stallion, bull, ram, or boar, that may be kept for the use of the general public for pay, and who shall knowingly and willfully misrepresent the pedigree or blood of any such stallion, bull, ram, or boar, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars, and shall be liable for all damages that may be sustained by reason of such misrepresentation. [Cf. L. '88, p. 123, § 1; L. '91, p. 130, § 35; 2 H. P. C., § 243.]

As to repeal of this section, see § 2304, and note. Compare § 2593.

This and the next section hardly seem covered by the act of 1909. See note to § 2301, *supra*.

§ 2847. (7176.) Misrepresenting Pedigree of Animal in Making Sale.

It shall hereafter be unlawful for any person to make, or cause to be made, and furnish or deliver, or use any false or fraudulent pedigree of any horse, cow, sheep or other domestic animal for the purpose of enhancing the value of such animal. Any person who shall by false statement or misrepresentation concerning pedigree, sell to another person any domestic animal not of the breeding or pedigree as represented, shall be liable to the purchaser of such animal in a civil action for double the price received for such animal. [Cf. L. '88, p. 123, § 2; 2 H. P. C., § 244; L. '95, p. 351, § 1.]

As to repeal of this section, see § 2304, and note. Compare § 2593. See note to last section.

Cited in 43 Wash. 457.

§ 2848. Failure to Pay Hotel or Board Bill.

A person who obtains any food, lodging or accommodation at a hotel, boarding-house, restaurant, or lodging-house, without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at a hotel, boarding-house, or lodging-house by the use of a false pretense, or who after obtaining board, lodging or accommodations at a hotel, boarding-house, restaurant, or lodging-house, absconds or surreptitiously removes his baggage therefrom without paying for his food, lodging or accommodation, is guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than ten dollars nor more than fifty dollars, or imprisonment in the county jail not less than ten nor more than thirty days. [L. '99, p. 38, § 1; L. '03, p. 244, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2625, *supra*.

Cited in 52 Wash. 313.

This section does not violate Const., Art. I, § 17, prohibiting imprisonment for debt except in the case of absconding debt-

ors, since the imprisonment is for the fraud committed: In re Milecke, 52 Wash. 312.

§ 2849. Proof of Fraudulent Intent.

Proof that lodging, food or other accommodation was obtained by false pretense or by false or fictitious sham or pretense of any baggage or other property, or that the person refused or neglected to pay for such food, lodging or other accommodation on demand, or that he gave in payment for such food, lodging or other accommodation bank check or draft on which payment was refused, or that he absconded without paying or offering to

pay for such food, lodging or other accommodation, or that he surreptitiously removed or attempted to remove his baggage shall be prima facie proof of the fraudulent intent mentioned in section 2848. [L. '03, p. 244. § 2.]

This section would fall with the repeal of § 2848, unless § 2625 is construed as a continuation of the earlier law, under § 2300.

Cited in 52 Wash. 314, 317.

This section is not unconstitutional, as and order of proof: In re Milecke, 52 Wash. the legislature may prescribe the quantum 312.

§ 2850. Drawing Check or Draft, Without Funds, a Felony.

Any person who shall with intent to defraud, make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or depository, to meet said check, in full upon its presentation, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary for not more than five years or less than one year, or imprisonment in the county jail for any length of time not exceeding one year. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank for the payment of such check or draft. [L. '05, p. 78, § 1.]

As to repeal of this section, see § 2304, and note. Compare present law, § 2601, supra, defining larceny, which covers this section in part only. See note to § 2301.

CHAPTER V.

OFFENSES AGAINST PUBLIC JUSTICE AND OFFICIAL DUTY.

§ 2851. (7185.) Perjury, Defined.

Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury. [L. '54, p. 88, §§ 69, 70; Cd. '81, § 867; 2 H. P. C., § 102.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2351, 2353, supra. Compare § 6648.

See notes to § 2065.

See supra, § 1269, perjury, defined.

Cited in 21 Wash. 271; 43 Wash. 127.

Under our statute, conviction for perjury can only take place for making a false affidavit when it is sworn to for the purpose of being used in some action or proceeding

wherein by law it could be material, or by using or consenting to its use after being sworn to, in such action or proceeding: State v. Smith, 3 Wash. 14.

§ 2852. (7186.) Term "Oath" Includes Affirmation.

The term "oath," as used in the last section, includes an affirmation and every other mode authorized by law of attesting the truth of that which is stated. [Cd. '81, § 868; 2 H. P. C., § 103.]

As to repeal of this section, see § 2304, and note. Present law, see § 2354, supra.

§ 2853. (7187.) Irregularly Administered Oath No Defense.

It is no defense to a prosecution for perjury that the oath was administered or taken in any irregular manner. [Cd. '81, § 869; 2 H. P. C., § 104.]

As to repeal of this section, see § 2304, and note. Present law, see § 2355, supra.

§ 2854. (7188.) Incompetent Testimony No Defense.

It is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition, or certificate of which falsehood is alleged. It is sufficient that he did give such testimony or make such deposition or certificate. [Cd. '81, § 870; 2 H. P. C., § 105.]

As to repeal of this section, see § 2304, and note. Present law, see § 2355, supra.

§ 2855. (7189.) Ignorance No Defense, When.

It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him, or that it did not in fact affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding. [Cd. '81, § 871; 2 H. P. C., § 106.]

As to repeal of this section, see § 2304, and note. Present law, see § 2352, supra.

§ 2856. (7190.) Deposition or Certificate Complete, When.

The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true. [Cd. '81, § 872; 2 H. P. C., § 107.]

As to repeal of this section, see § 2304, and note. Present law, see § 2356, supra.

§ 2857. (7191.) False Statement, Defined.

An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false. [Cd. '81, § 873; 2 H. P. C., § 108.]

As to repeal of this section, see § 2304, and note. Present law, see § 2357, supra.

§ 2858. (7192.) Penalty for Perjury and Subornation of.

Every person convicted of the crime of perjury committed on the trial of or proceedings in a criminal action for a crime punishable with death or imprisonment for life shall be punished by imprisonment in the penitentiary not less than five nor more than twenty years; every person convicted of the crime of perjury committed in any proceeding in a court of justice, other than such criminal action, shall be punished by imprisonment in the penitentiary not less than three nor more than ten years; and every person convicted of the crime of perjury committed otherwise than in a proceeding before a court of justice, or convicted of the crime of subornation of perjury, however committed, shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [L. '69, p. 216, § 76; Cd. '81, § 874, 2 H. P. C., § 109.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2351, 2353, supra. See supra, § 2851, notes, definition of perjury.

§ 2859. (7193.) Oath of Office Excepted.

So much of an oath of office as relates to the future performance of official duties is not such an oath as is intended by sections 2851 and 2852. [Cd. '81, § 875; 2 H. P. C., § 110.]

As to repeal of this section, see § 2304, and note.

§ 2860. (7194.) Subornation of Perjury, Defined.

Every person who willfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner

as he would be if personally guilty of the perjury so procured. [L. '54, p. 89, §§ 71, 72; Cd. '81, § 876; 2 H. P. C., § 111.]

As to repeal of this section, see § 2304, and note. Present law, see § 2360, *supra*.

See *supra*, § 2851, notes, definition of perjury.

See *supra*, § 2072, sufficiency of indictment, etc., for.

§ 2861. (7195.) Attempt to Suborn Perjury.

If any person shall endeavor to procure or incite another to commit the crime of perjury, though no perjury be committed, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than three years. [L. '54, p. 89, §§ 71, 72; L. '69, p. 216, § 77; Cd. '81, § 877; 2 H. P. C., § 112.]

As to repeal of this section, see § 2304, and note. Present law, see § 2361, *supra*.

See *supra*, § 2851, and notes, definition of perjury.

See *infra*, § 2986, attempts to commit crime.

§ 2862. (7196.) Soliciting to be Placed on Jury List.

Any person who shall ask or request any sheriff, constable, or other person or persons whose duty it may be under the law to select or summon any jury or juror to be selected or put upon the jury, or shall procure or offer to procure for himself or for another person, or place upon any jury, or shall seek to have himself or another placed upon the list of jurors, that is now required by law to be made, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding three hundred dollars. [L. '88, p. 114, § 1; 2 H. P. C., § 113.]

As to repeal of this section, see § 2304, and note. Present law, see § 2328, *supra*.

§ 2863. (7197.) Misdemeanor to Select Soliciting Juror.

Any sheriff, constable, or other person whose duty it may be under the law to select or summon a jury who shall select, summon, or place upon any jury any person whom he has been asked or requested to select or summon shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding three hundred dollars. [L. '88, p. 114, § 2; 2 H. P. C., § 114.]

As to repeal of this section, see § 2304, and note. Present law, see § 2327, *supra*.

§ 2864. (7198.) Failure to Attend as Witness.

If any person who shall have been summoned as a witness on the part of the prosecution shall fail or refuse to attend at the time fixed for trial, without a reasonable excuse, the person so failing or neglecting shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail not less than twenty-five days nor more than three months, or by both such fine and imprisonment, in the discretion of the court. [L. '77, p. 99, § 9; Cd. '81, § 1261; 2 H. P. C., §§ 115, 147.]

As to repeal of this section, see § 2304, and note.

See *supra*, § 2148, general attendance of witnesses.

This section seems not covered by the act of 1909. See notes to §§ 2352, 2301, *supra*.

§ 2865. (7199.) Fraud in Drawing Jurors.

If any clerk of a superior court, or any other person, shall be guilty of any fraud, either by practicing on a jury-box previously to a draft, or in changing a juror, or any way in drawing of jurors, he shall, upon conviction

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thereof, be fined in any sum not exceeding five hundred dollars. [L. '54, p. 94, § 107; Cd. '81, § 922; 2 H. P. C., § 116.]

As to repeal of this section, see § 2304, and note. Present law, see § 2327, *supra*.

§ 2866. (7200.) Compounding or Concealing Crime.

If any person, having knowledge of the commission of any crime, shall take any money, gratuity, reward, or any engagement therefor, upon an agreement or understanding, express or implied, to compound or conceal such crime, or not to prosecute therefor [or not give evidence thereof], he shall, on conviction thereof, be imprisoned in the county jail for any length of time not exceeding one year, or be fined in any sum not exceeding one thousand dollars. [L. '54, p. 95, § 112; Cd. '81, § 934; 2 H. P. C., § 117.]

The words in brackets were incorporated in the Laws of 1854, but omitted from the Code of 1881.

As to repeal of this section, see § 2304, and note. Present law, see § 2367, *supra*.

See *supra*, §§ 2126, 2127, 2129, compromising crime.

§ 2867. (7201.) Judicial Officer Receiving Bribe.

If any judge, justice of the peace, juror, commissioner, auditor, referee, arbitrator, or person summoned as a juror, shall accept, receive, or agree for in any way any bribe, present, or reward to him offered for the purpose of obtaining or influencing his opinion, judgment, verdict, sentence, report, or award, in any matter or cause depending or to be tried before him alone, or before him with others, he shall, on conviction thereof, be imprisoned in the penitentiary not more than seven years nor less than one year, or be imprisoned in the county jail not more than one year nor less than one month, and be fined in any sum not exceeding one thousand dollars. [L. '54, p. 89, § 73; Cd. '81, § 878; 2 H. P. C., § 172.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2320, 2321, 2322, *supra*.

§ 2368. (7202.) Executive or Legislative Officer Receiving Bribe.

If any executive, judicial, or ministerial officer, or member of the legislature, shall accept or receive [or agree to accept or receive] in any way any bribe, present, or reward to him offered, for the purpose of inducing or influencing such officer to appoint any person to office, to give any vote or to execute any of the powers in him vested, or perform any duty of him required with partiality or favor, or otherwise than is required by law, or in consideration that such officer has appointed any person to any office, or voted, or exercised any power in him vested, or performed any duty of him required with partiality or favor, or otherwise contrary to law, he shall, on conviction thereof, be imprisoned in the penitentiary not more than ten years nor less than one year, or in the county jail not more than one year nor less than three months, and be fined in any sum not exceeding five thousand dollars. [L. '54, p. 89, § 74; Cd. '81, § 879; 2 H. P. C., § 173.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2320, 2321, 2325, *supra*.

An offer to bribe an officer to move for reconsideration of a resolution passed by the state board of education adopting a uniform system of school books is subject to indictment under this section: *State v. Womack*, 4 Wash. 19.

§ 2869. (7203.) Bribing or Attempting to Bribe Public Officer.

Every person who shall bribe or attempt to bribe or offer any present, bribe, or reward to any judge, justice of the peace, juror, commissioner,

referee, auditor, arbitrator, or person summoned as a juror, or to any executive, judicial, or ministerial officer, or member of the legislature, for the purpose of influencing him in the exercise of any of the powers in him vested for the performance of any duty of him required, shall, on conviction thereof, be imprisoned in the county jail any length of time not exceeding one year, and fined in any sum not exceeding two thousand dollars, or fined only. [L. '54, p. 89, § 75; Cd. '81, § 880; L. '91, p. 125, § 23; 2 H. P. C., § 174.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2320, 2321, *supra*. See notes to § 2065, requisites of indictment.

Cited in 4 Wash. 22, 25.

Our statute has not attempted to define bribery; it merely asserts that certain acts constitute bribery, fixing the penalty there-

for, and has not abrogated the common-law crime of bribery: *State v. Womack*, 4 Wash. 19, 25. See, also, *Armstrong v. Van De Vanter*, 21 Wash. 682.

§ 2870. (7204.) **Assisting Prisoner to Escape.**

Every person who shall convey into any penitentiary, jail, or house of correction, or house of reformation, any disguise, or any instrument, tool, weapon, or other thing adapted to or useful in aiding any prisoner there lawfully committed or detained to make escape, or shall, by any means whatever, aid or assist any such prisoner in his endeavor to escape therefrom, whether such escape be attempted or effected, or not; and every person who shall aid or assist any prisoner in escaping, or in attempting to escape from any officer or person who shall have the lawful custody of such prisoner, or who shall forcibly rescue any prisoner from lawful custody of such persons, shall, on conviction thereof, be imprisoned in the penitentiary not more than four years nor less than one year, or imprisoned in the county jail any length of time not exceeding one year, and be fined in any sum not exceeding five hundred dollars. [L. '54, p. 89, § 76; Cd. '81, § 881; 2 H. P. C., § 175.]

As to repeal of this section, see § 2304, and note. Present law, see § 2343, *supra*.

§ 2871. (7205.) **Officer Suffering Prisoner to Escape.**

If any jailer or other officer shall voluntarily suffer any prisoner in his custody, charged with or convicted of any criminal offense, to escape, he shall suffer, unless the prisoner so escaping be charged with or convicted of any capital offense, the like punishment and penalties as the prisoner so suffered to escape was sentenced to, or would be liable to suffer upon conviction for the crime or offense wherewith he stood charged; and if the prisoner was charged with or convicted of a capital offense, he shall be imprisoned in the penitentiary not more than twenty years nor less than five years. [L. '54, p. 90, § 77; Cd. '81, § 882; 2 H. P. C., § 176.]

As to repeal of this section, see § 2304, and note. Present law, see § 2344, *supra*.

§ 2872. (7206.) **Refusal to Receive or Negligently Allowing Escape.**

If any jailer or other officer shall, through negligence, suffer any prisoner in his custody, upon conviction or upon any criminal charge, to escape, or shall willfully refuse to receive into his custody any prisoner lawfully committed thereto, on any criminal charge or conviction, or on any lawful process whatever, he shall, on conviction thereof, be imprisoned in the county jail not more than two years, and be fined not more than five hundred nor less than one hundred dollars, or fined only. [L. '54, p. 90, § 78; Cd. '81, § 883; 2 H. P. C., § 177.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2344, 2345, 2364, *supra*.

§ 2873. (7207.) Jail Breaking.

If any person confined in any county jail upon any conviction for a criminal offense break such jail and escape therefrom, he shall be imprisoned in such prison not exceeding one year, to commence from and after the expiration of the former sentence, and fined not exceeding three hundred dollars. [Cd. '81, § 884; 2 H. P. C., § 178.]

As to repeal of this section, see § 2304, and note. Present law, see § 2342, *supra*.

§ 2874. (7208.) Resisting Officer.

If any person knowingly and willfully resist or oppose any officer of this state, or any other person authorized by law, in serving or attempting to execute any legal writ, rule, order, or process whatsoever, or shall knowingly and willfully resist any such officer in the discharge of his duties without such writ, rule, order, or process, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars nor less than fifty dollars, or by both fine and imprisonment, at the discretion of the court. [L. '54, p. 90, § 79; Cd. '81, § 885; 2 H. P. C., § 179.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2331, 2366, *supra*.

See notes to § 2065, requisites of indictment.

See notes to § 2152, variance.

Cited in 50 Wash. 230.

See *State v. Brown*, 6 Wash. 609.

An information for resisting an officer in serving or attempting to execute any legal writ, or process as defined by this section is defective where it simply charges unlawfully resisting an officer in the levying of an execution issued by a justice of the peace on a certain judgment; but the same must aver that the process was a "legal" process in the language of the statute, or set out its terms

so as to show the essentials of a legal process: *State v. Knapf*, 50 Wash. 229.

In a prosecution for resisting an officer in the levying of an execution which was fair on its face, it is error to exclude evidence of an infirmity in the judgment and that the officer had notice thereof; since an officer is not protected by a writ fair on its face unless he acted in good faith, and would be a trespasser if he had notice of the invalidity of the writ: *Id*.

§ 2875. (7209.) Refusal to Assist Officer.

If any person, being lawfully required by any sheriff, deputy sheriff, coroner, constable, or other officer, willfully neglect or refuse to assist him in the execution of his office in any criminal case, or in any case of escape or rescue, he shall be punished by imprisonment in the county jail not more than six months, or by fine not more than one hundred dollars. [L. '54, p. 90, § 79; Cd. '81, § 886; 2 H. P. C., § 180.]

As to repeal of this section, see § 2304, and note. Present law, see § 2365, *supra*.

See *supra*, § 2764, and notes, dispersion of unlawful assembly.

§ 2876. (7210.) Corrupt Refusal of Officer to Execute Process.

If any officer authorized to serve process shall willfully and corruptly refuse to execute any lawful process to him directed, and requiring him to apprehend or confine any person charged with or convicted of any offense, or shall willfully and corruptly omit or delay to execute such process, whereby such person shall escape and go at large, he shall, on conviction thereof, be imprisoned in the county jail not more than one year, or be fined not exceeding three hundred nor less than fifty dollars. [L. '54, p. 90, § 86; Cd. '81, § 887; 2 H. P. C., § 181.]

As to repeal of this section, see § 2304, and note. Present law, see § 2365, *supra*.

§ 2877. (7211.) Willful Inhumanity to Prisoners.

If any sheriff, jailer, or other officer shall be guilty of willful inhumanity or oppression to any prisoner under his care or custody, he shall, on conviction thereof, be imprisoned in the county jail not more than one year nor less than one day, and be fined in any sum not exceeding one thousand dollars. [L. '54, p. 90, § 81; Cd. '81, § 888; 2 H. P. C., § 182.]

As to repeal of this section, see § 2304, and note.

This section is not covered by the act of 1909. See note to § 2301, *supra*.

§ 2878. (7212.) Official Nonfeasance and Misfeasance.

If any officer shall willfully fail to perform any duty within the time and in the manner prescribed by law, or shall do any act which he shall be specially prohibited from doing by law, he shall, on conviction thereof, be fined in any sum not exceeding one thousand dollars, to which may be added imprisonment in the county jail for any length of time not exceeding six months. [L. '54, p. 90, § 82; Cd. '81, § 889; 2 H. P. C., § 183.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2569, 2570, *supra*.

§ 2879. (7213.) Failure to Pay Over Public Moneys, etc.

If any officer or person required by law to collect, disburse, receive, or keep any public money shall willfully neglect or refuse to pay over such money at the time prescribed by law, or shall willfully refuse to pay any warrant lawfully drawn, or shall pay over a less valuable kind of money than that collected or received by him, or scrip or county or state orders in lieu of money so collected or received by him, in any sum whatever, he shall, on conviction thereof, be imprisoned in the county jail not exceeding one year nor less than one month, or be fined in any sum not exceeding five thousand dollars, or both. [L. '54, p. 91, § 83; L. '73, p. 202, § 92; Cd. '81, § 890; 2 H. P. C., § 184.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2569, 2570, *supra*.

See *infra*, § 4081, penalty for failure to pay over by county officer.

§ 2880. (7214.) Auditor Issuing Illegal Warrant.

If any auditor shall knowingly issue any warrant not authorized by law, he shall, on conviction thereof, be imprisoned in the county jail not exceeding one year, and be fined in any sum not exceeding one thousand dollars, or be fined only. [L. '54, p. 91, § 84; Cd. '81, § 891; 2 H. P. C., § 185.]

As to repeal of this section, see § 2304, and note. This section is not covered by the act of 1909, except by § 2570. See note to § 2301.

§ 2881. (7215.) Officer Purchasing or Discounting Warrant.

If any auditor, treasurer, sheriff, assessor, or county commissioner shall purchase, exchange, or receive in payment, during his term of office, any state or county order or demand for less than the amount of such order or demand, he shall, on conviction thereof, be fined in any sum not exceeding one thousand dollars. [L. '54, p. 94, § 105; Cd. '81, § 920; 2 H. P. C., § 155.]

As to repeal of this section, see § 2304, and note. This section is not covered by the act of 1909. See note to § 2301.

§ 2882. (7216.) Usurpation of Official Authority, Defined.

Every person who shall officiate in any place of authority without being legally authorized shall be deemed guilty of usurpation, and upon conviction

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tion thereof be fined in any sum not exceeding one thousand dollars. [L. '54, p. 91, § 85; Cd. '81, § 892; 2 H. P. C., § 186.]

As to repeal of this section, see § 2304, and note. Present law, see § 2336, supra.

§ 2883. (7217.) Performing Official Duties Without Having Qualified.

If any person elected or appointed to an office, or his deputy, shall perform any of the duties of such office, without having taken an oath as prescribed by law, or before having given and filed the bond required of him, and in the manner prescribed by law, he shall, upon conviction thereof, be fined in any sum not exceeding one thousand dollars. [L. '54, p. 91, § 86; Cd. '81, § 893; 2 H. P. C., § 187.]

As to repeal of this section, see § 2304, and note. Present law, see § 2336, supra.

§ 2884. (7218.) Corruptly Exacting Illegal Fees.

If any officer, whose fees are stated by law, shall corruptly exact or extort any greater fees for any services than by law are stated and allowed, or shall levy, demand, receive, or take under color of his office any bond, bill, or note, or other assurance or promise whatever, securing the payment of a greater sum of money for any service than he is by law authorized to demand or receive, he shall, on conviction thereof, be imprisoned in the county jail not exceeding one year, and be fined in any sum not exceeding one thousand dollars. [L. '54, p. 91, § 87; Cd. '81, § 894; 2 H. P. C., § 188.]

As to repeal of this section, see § 2304, and note. Present law, see § 2612, supra.

See infra, § 4080, penalty for taking illegal fees by officer.

See infra, § 4087, penalty for accepting fees from soldier, etc.

Cited in 50 Wash. 226.

§ 2885. (7219.) Certain Officers to Complain of Violations of Law.

It shall be the duty of all county school superintendents and school directors to make complaint in all cases which shall come to their knowledge of a criminal violation of the laws relating to schools and education. It shall be the duty of road supervisors to make complaint in all cases which shall come to their knowledge of a criminal violation of the laws relating to roads and highways. It shall be the duty of all constables and sheriffs to make complaint of all violations of the criminal law which shall come to their knowledge within their respective jurisdictions. [Cd. '81, § 895; 2 H. P. C., § 189.]

As to repeal of this section, see § 2304, and note. This section is not covered by the act of 1909. See note to § 2301.

Cited in 38 Wash. 107.

§ 2886. (7220.) Penalty for Violation of Last Section.

Any officer who shall willfully and knowingly violate or refuse to perform the duty imposed by the next preceding section of this code shall be guilty of a misdemeanor, and on conviction thereof be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than one month nor more than six months, or by fine and imprisonment, in the discretion of the court having jurisdiction thereof. [Cd. '81, § 896; 2 H. P. C., § 190.]

As to repeal of this section, see § 2304, and note. See note to last section.

§ 2887. (7221.) Conviction Under Last Section Vacates Office.

A conviction of any officer, under the foregoing section, shall operate as a vacation of the office of the officer so convicted, and the office so vacated shall be filled in accordance with law. [Cd. '81, § 897; 2 H. P. C., 191.]

As to repeal of this section, see § 2304, and note. See note to last section.

§ 2888. Tampering with a Witness.

If any person shall willfully and corruptly hinder, prevent, or endeavor to hinder, or prevent, any person from appearing before any court of justice as a witness, or from giving evidence, in any action or proceeding, with intent thereby to obstruct the course of justice, he shall be deemed guilty of the misdemeanor of tampering with a witness, and, upon conviction thereof, shall be punished by imprisonment in the county jail for any period not exceeding one year, or by fine not exceeding one thousand dollars, or both, in the discretion of the court. [L. '01, p. 16, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2363, *supra*.

CHAPTER VI.

OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

§ 2889. (7226.) Sodomy, Defined.

Every person who shall commit the infamous and detestable crime against nature, either with mankind or with any beast, shall be deemed guilty of sodomy, and upon conviction thereof shall be punished by imprisonment at hard labor in the state penitentiary for not less than ten nor more than fourteen years. [L. '93, p. 470, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2456, *supra*.

See notes to § 2152, *supra*.

See *supra*, § 2748, assault with intent to commit crime against nature.

Cited in 48 Wash. 698.

§ 2890. (7227.) Degree of Sexual Penetration Necessary.

Any sexual penetration however slight is sufficient to complete the crime against nature. [L. '93, p. 470, § 2.]

As to repeal of this section, see § 2304, and note.

§ 2891. (7228.) Incest, Defined.

Incest is the sexual commerce of persons related within the degrees wherein marriage is prohibited. [L. '95, p. 371, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2455, *supra*.

Cited in 12 Wash. 547; 34 Wash. 223.

Wash. 221; State v. Nugent, 20 Wash. 522; State v. McGilvery, 20 Wash. 240; Incest: See 2 Remington's Digest, p. 1454, §§ 1-8; State v. Glindemann, 34 State v. Wood, 33 Wash. 290.

§ 2892. (7229.) Who Deemed Guilty of Incest.

Persons being within the degrees of consanguinity or affinity, within which marriages are prohibited by law, who intermarry with each other, or who commit fornication or adultery with each other, or who carnally know each other, shall be deemed guilty of the crime of incest, and upon con-

viction thereof shall be punished by imprisonment in the state prison for any term not exceeding twenty years. [L. '95, p. 371, § 2.]

As to repeal of this section, see § 2304, and note. Present law, see § 2455, *supra*.

See notes to preceding section.

Cited in 20 Wash. 250, 523; 34 Wash. 223.

§ 2893. (7230.) Adultery, Defined.

Adultery is the sexual intercourse between a married person and one who is not such married person's husband or wife. [Cf. Cd. '81, § 944; 2 H. P. C., § 193; L. '95, p. 372, § 3.]

As to repeal of this section, see § 2304, and note. Present law, see § 2457, *supra*.

Cited in 39 Wash. 223; 48 Wash. 78, 79.

Solicitation to commit adultery is not indictable as an attempt to commit the crime: *State v. Butler*, 8 Wash. 194.

The repeal of § 192, 2 Hill's Penal Code, by the Laws of 1895, page 371, without any saving clause as to prior offenses or pending cases, operated as a bar to the pros-

ecution of parties charged with adultery committed prior to the passage of the act: *State v. Oliver*, 12 Wash. 547.

Under this section, an unmarried man living in a state of adultery with a married woman is guilty of the offense, the statute applying to both parties: *State v. Keith*, 48 Wash. 77. See *State v. Nelson*, 39 Wash. 221.

§ 2894. (7231.) Living in a State of Adultery.

Every person who lives in a state of adultery, upon conviction thereof, shall be punished by imprisonment in the state prison not exceeding five years. [L. '95, p. 372, § 4.]

As to repeal of this section, see § 2304, and note.

This section is not covered by the act of 1909. See note to § 2301.

Cited in 39 Wash. 223; 48 Wash. 697.

§ 2895. (7232.) Proof of Marriage.

A recorded certificate of marriage, or a certified copy thereof, there being no decree of divorce, proves the marriage of a person for the purposes of this act. [L. '95, p. 372, § 5.]

"Act" in this section refers to §§ 2891-2897.

This section was not repealed by the law of 1909, and is duplicated at § 2153, *supra*.

Cited in 39 Wash. 226.

§ 2896. (7233.) Bigamy, Defined.

Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy. [L. '95, p. 372, § 6.]

As to repeal of this section, see § 2304, and note. Present law, see § 2453, *supra*.

This section covers part of § 2898, *infra*.

§ 2897. (7234.) Exceptions to Last Section.

The last section does not extend,—

1. To any person by reason of any former marriage whose husband or wife by such marriage has been absent for five successive years, without being known to such person within that time to be living; nor,

2. To any person by reason of any former marriage which has been pronounced void, annulled or dissolved by the judgment of a competent court. [L. '95, p. 372, § 7.]

As to repeal of this section, see § 2304, and note. Present law, see § 2453, *supra*.

Compare § 195 of 2 Hill's P. C., which appears to be repealed.

§ 2898. (7235.) Punishment for Bigamy.

Any person guilty of bigamy shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year. [L. '54, p. 96, § 116; Cd. '81, § 945; 2 H. P. C., § 194.]

As to repeal of this section, see § 2304, and note. Present law, see § 2453, *supra*.
See *supra*, § 2896, bigamy defined, which repeals omitted portions of this section.

§ 2899. (7236.) Knowingly Marrying Husband or Wife of Another.

Every unmarried person who knowingly marries the husband or wife of another, when such husband or wife is guilty of bigamy thereby, shall be punished by imprisonment in the penitentiary not exceeding three years, or by fine not more than three hundred dollars, or imprisonment in the county jail not exceeding one year. [Cd. '81, § 947; 2 H. P. C., § 196.]

As to repeal of this section, see § 2304, and note. Present law, see § 2454, *supra*.

§ 2900. (7237.) Prohibiting Solicitation of Divorce Business—Penalty.

Whoever advertises, prints, publishes, distributes or circulates, or causes to be advertised, printed, published, distributed or circulated, any circular, pamphlet, card, hand bill, advertisement, printed paper, book, newspaper, or notice of any kind, offering to procure or obtain, or to aid in procuring or obtaining, any divorce, or the severance, dissolution or nullity of any marriage, or offering to engage or appear or act as attorney, counsel, or referee in any suit for alimony or divorce, or the severance, dissolution or nullity of any marriage, either in this state or elsewhere, shall be guilty of a misdemeanor. This section shall not apply to the printing or publishing of any notice or advertisement required or authorized by any law of this state. Any person convicted of the violation of the provisions of this section shall be punished by fine of not less than one hundred dollars, nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months. [L. '97, pp. 7, 8, §§ 1, 2.]

As to repeal of this section, see § 2304, and note. Present law, see § 2463, *supra*.

§ 2901. (7238.) Unlawful Cohabitation—Indecent Exposure.

If any man or woman, not being married to each other, lewdly and viciously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open or gross lewdness, or designedly make any open and indecent or obscene exposure of his or her person, or of the person of another, every such person shall be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding two hundred dollars. [L. '54, p. 95, § 117; Cd. '81, § 948; 2 H. P. C., § 198.]

As to repeal of this section, see § 2304, and note. Present law, see § 2458, *supra*.

Cited in 39 Wash. 223; 48 Wash. 78, 697.

§ 2902. Conniving at Prostitution of Wife—Penalty.

Every man who by force, intimidation, threats, persuasion, promises, or any other means, places or leaves, or procures any other person or persons, to place or leave, his wife in a house of prostitution, or connives at, or consents or permits, the placing or leaving of his wife in a house of prostitution, or allows or permits her to remain therein, is guilty of a felony, and shall be punished, upon conviction thereof, by imprisonment in the penitentiary for not less than one year or more than ten years; and in all prosecutions

under this section the wife shall be a competent witness against her husband. [L. '03, p. 230, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2440, *supra*.

§ 2903. Accepting Earnings of Prostitute, Soliciting Sexual Intercourse, etc.

Any male person [who lives with, or] who lives off of, in whole or in part, or accepts any of the earnings of a prostitute, or connives in or solicits or attempts to solicit any male person or persons to have sexual intercourse, or cohabit with a prostitute, or who shall invite, direct or solicit any person to go to a house of ill-fame for any immoral purpose; or any person who shall entice, decoy, place, take or receive any female child or person under the age of eighteen years, into any house of ill-fame or disorderly house, or any house, for the purpose of prostitution; or any person who, having in his or her custody or control such child, shall dispose of it to be so received or to be received in or for any obscene, indecent or immoral purpose, exhibition or practice, shall be deemed guilty of a felony and upon conviction thereof shall be imprisoned in the penitentiary not less than one year nor more than five years, and fined in any sum not less than one thousand dollars nor more than five thousand dollars. [L. '03, p. 230, § 2.]

As to repeal of this section, see § 2304, and note. Present law, see § 2440, *supra*.

Void as to the bracketed words "who lives with," for defect in the title: *State v. Poole*, 42 Wash. 192.

§ 2904. (7239.) Keeping House of Ill-fame.

Every person who shall keep a house of ill-fame in this state, resorted to for the purposes of prostitution and lewdness, or who shall reside in such house for the purposes aforesaid, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in a common jail for a term not exceeding six months, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment, at the discretion of the court. [L. '60, p. 296, § 1; Cd. '81, § 1210; 2 H. P. C., § 199.]

As to repeal of this section, see § 2304, and note.

The subject matter of this and the next three sections is not covered by the act of 1909. See note to § 2301.

See *infra*, § 8319, houses of ill-fame declared nuisances.

See *supra*, § 2500, public nuisances defined.

See *infra*, § 2925, leasing premises for prostitution, etc.

Cited in 22 Wash. 676.

§ 2905. (7240.) Lessee as Keeper, Effect on Lease.

Whenever the lessee of any house shall be convicted of the offense of keeping such house of ill-fame as aforesaid, the lease or contract for letting such house shall, at the option of the lessor, become void, and such lessor shall thereupon have the like remedy to recover the possession of such house as is provided against a tenant holding over after the termination of his lease. [L. '60, p. 296, § 2; Cd. '81, § 1211; 2 H. P. C., § 200.]

As to repeal of this section, see § 2304, and note. See note to last section.

See *infra*, § 2925, letting premises for house of ill-fame, misdemeanor.

Doubted, whether the title to the act of 1909 is broad enough to authorize a repeal of civil remedies.

§ 2906. (7241.) Keeper may be Required to Give Bonds, When.

Every justice of the peace may, on the complaint of any citizen of the county, require sureties of the peace and good behavior from any person

who shall be guilty of keeping or maintaining houses reputed to be houses of bawdry and ill-fame; and every person being so ordered to find sureties of the peace and good behavior, who shall neglect or refuse to comply with such order, may, by said justice, be committed to the common jail in the county where the offense was committed for a term not exceeding thirty days; and the bond required, as aforesaid, shall be filed with the county auditor of the county where the offense was committed, and from said order the accused shall have the right to appeal to the superior court in the county within which the offense was committed. [L. '60, p. 296, § 3; Cd. '81, § 1212; 2 H. P. C., § 201.]

As to repeal of this section, see § 2304, and note. See note to § 2904.

§ 2907. (7242.) Keeper to Pay Costs, When.

When any person, prosecuted under the next preceding section, shall be required to procure sureties of the peace and good behavior, such person shall pay costs of prosecution; and on failure so to do, shall be imprisoned in the county jail, at the discretion of the court having cognizance thereof, until such costs be paid and satisfied. [L. '60, p. 296, § 4; Cd. '81, § 1213; 2 H. P. C., § 202.]

As to repeal of this section, see § 2304, and note. See note to § 2904.

§ 2908. (7243.) Prize-fighting, etc.

Any person who, within this state, engages in, instigates, aids, or encourages, or does any act to further, a contention or fight, with or without weapons, between two or more persons, or a fight commonly called a sparring match, in which the combatants are provided with gloves, or who sends or publishes a challenge or acceptance to a challenge for such a contention, prize-fight, sparring match, with or without gloves, or carries or delivers such a challenge or acceptance, or trains or assists any person or persons in training or preparing for such contention, prize-fight, or sparring match, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a term of not less than thirty days nor more than one year, and by a fine of not less than fifty dollars nor more than one thousand dollars: Provided, that nothing in this section shall be so construed as to interfere with members of private clubs sparring or fencing for exercise among themselves. [Cf. L. '86, p. 82, § 1; L. '90, p. 109, § 1; 2 H. P. C., § 203.]

As to repeal of this section, see § 2304, and note. Present law, see § 2556, *supra*.
See *supra*, § 2769, agreement to fight, an affray.

§ 2909. (7244.) Betting or Holding Stakes on Prize-fight, etc.

Any person who bets, stakes, or wagers money or other property upon the result of such a fight, encounter, or contention, or holds or undertakes to hold money or other property so staked or wagered, to be delivered to or for the benefit of the winner thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a term not less than thirty days nor more than one year, or by a fine of not less than fifty dollars nor more than one thousand dollars, or by both fine and imprisonment, at the discretion of the court. [L. '90, p. 109, § 2; 2 H. P. C., § 204.]

As to repeal of this section, see § 2304, and note. Present law, see § 2556, *supra*.

§ 2910. (7245.) Duty of Officers as to Prize-fighting, etc.

It shall be the duty of every peace officer in this state to see that sections 2908 and 2909 are faithfully enforced, and when any such officer has reason to believe these sections are being violated, or are about to be violated, it shall be his duty forthwith to arrest any person or persons violating the provisions thereof, with or without warrant, and take him or them before the nearest committing magistrate of the county, to be dealt with according to law, and such peace officer may pursue and arrest any person or persons whom he has reason to believe have violated or are attempting to violate any of the provisions thereof, into any county in the state, and take such offenders into the county from whence they were pursued, before the proper magistrate. It shall be the duty of every judge on charging the grand jury to read these sections, and charge such grand jury to diligently inquire into any and all violations of the provisions of the same. [L. '86, p. 83, § 3; 2 H. P. C., § 207.]

As to repeal of this section, see § 2304, and note. Compare §§ 2556, 2557, *supra*.

The subject matter of this section is not covered by the act of 1909. See note to § 2301.

§ 2911. (7246.) Demoralizing Literature, etc.—Circulating.

If any person shall import, print, publish, sell, lend, give away, distribute, or show, or have in his possession with intent to sell or give away, or to show or advertise, or otherwise offer for loan, gift, sale, or distribution, any obscene or indecent book, magazine, pamphlet, newspaper, story paper, writing paper, picture, engraving, drawing, or photograph, or if any person shall design, copy, draw, photograph, print, utter, publish, or otherwise prepare any of the articles mentioned in this section, or shall write or print, or cause to be written or printed, a notice of any kind, giving information, or shall give information stating when, where, and how, or of whom or by what means, any of the articles mentioned in this section could be purchased or obtained, or if any person sells, lends, gives away, or shows, or has in his possession with intent to sell or give away, or to show or advertise, or otherwise offers for loan, gift, sale, or distribution, to any minor child, any book, pamphlet, magazine, newspaper, or other printed paper devoted to the publication, or principally made up of, criminal news, police reports, or accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust, or crime, or if any person exhibits upon any street or highway, or in any other place within view, or which may be within the view, of any minor child, any book, magazine, pamphlet, newspaper, writing paper, picture, engraving, drawing, photograph, or other article coming within the description of the articles mentioned in this section, or any of them, or if any person, in any manner, hires, uses, or employs any minor child to sell or give away, or in any manner to distribute, or who, having the care, custody, or control of any minor child, permits such child to sell, give away, or in any other manner to distribute any book, magazine, pamphlet, newspaper, story paper, writing paper, picture, engraving, drawing, photograph, or other article or thing coming within the description of articles and matter mentioned in this section, or any of them, upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding three years, or by a fine not exceeding two thousand dollars: Provided, however, that if such obscene or indecent matter is circulated in any school or institution of learning, or in any charitable or reformatory institution, or in any jail or penitentiary,

supported in whole or in part by public money or moneys raised by taxation, then the minimum of imprisonment shall not be less than thirty days, and in all such cases imprisonment shall follow conviction. [Cf. L. '54, p. 96, § 118; Cd. '81, § 850; L. '86, p. 122, § 1; L. '91, p. 126, § 24; 2 H. P. C., § 205.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2459-2462, *supra*. See *supra*, § 2075, information sufficient if facts stated generally. Cited in 15 Wash. 445.

See *State v. Ulsemer*, 24 Wash. 657.

§ 2912. (7247.) Question of Obscenity or Indecency for Jury.

The jury in all prosecutions under the next preceding section shall be the sole and exclusive judges as to whether or not the matter circulated is obscene or indecent. [L. '86, p. 123, § 2; 2 H. P. C., § 206.]

As to repeal of this section, see § 2304, and note.

The subject matter of this section is not covered by the act of 1909. See note to §§ 2253 and 2301.

Cited in 24 Wash. 659.

§ 2913. (7248.) Violation of Sepulcher.

If any person, not being lawfully authorized, shall willfully dig up, disinter, remove, or convey away any human body, or the remains thereof, or shall knowingly aid in such disinterment, removal, or conveying away, every such offender, and every person accessory thereto, either before or after the fact, shall, upon conviction thereof, be imprisoned in the county jail not exceeding one year, and be fined not exceeding one thousand dollars, or fined only. [L. '54, p. 96, § 119; Cd. '81, § 951; 2 H. P. C., § 208.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2489, 2491, *supra*. See *infra*, §§ 8408, 8409, possession of dead bodies for purpose of dissection.

§ 2914. (7249.) Willful Injury to Cemetery.

Every person who shall willfully disfigure, injure, or remove any tombstone, monument, fence, tree, or shrubbery around or within any cemetery, or shall use such cemetery for another purpose than a burying ground, he shall, upon conviction thereof, be imprisoned in the county jail not exceeding six months, and be fined in any sum not exceeding five hundred dollars, or shall be fined only. [L. '54, p. 97, § 120; Cd. '81, § 952; 2 H. P. C., § 209.]

As to repeal of this section, see § 2304, and note. Present law, see § 2656, *supra*.

See Laws of 1857, p. 28, § 4, although omitted in Code of 1881, believed to cover same matter as this section.

§ 2915. (7250.) Places of Amusement to be Closed on Sunday.

Any person who shall keep open any playhouse or theater, race-ground, cock-pit, or play at any game of chance for gain, or engage in any noisy amusements, or keep open any drinking or billiard saloon, or sell or dispose of any intoxicating liquors as a beverage, on the first day of the week, commonly called Sunday, shall, upon conviction thereof, be punished by a fine not less than thirty dollars nor more than two hundred and fifty dollars. All fines collected for violation of this section shall be paid into the common school fund. [Cf. Cd. '81, § 1266; L. '91, p. 127, § 25; 2 H. P. C., § 210.]

As to repeal of this section, see § 2304, and note. Present law, see § 2494, *supra*.

See *supra*, § 2766, disturbing public worship.

See *supra*, § 2767, Sunday riots, fighting, etc.

See note to § 2825, disposition of fines.

§§ 2916-2918 OFFENSES AND PUNISHMENTS UNDER FORMER LAWS. [TITLE XV

Cited in 21 Wash. 350; 47 Wash. 538; 49 Wash. 461-463, 466.

An information charging the keeping open of a saloon is good without alleging the sale of liquors, the opening of the saloon being a distinct offense: *State v. Binnard*, 21 Wash. 349.

This section was intended to prevent the opening of theaters for the purpose of giving plays or performances, and not to opening for the purpose of religious or other quiet, legitimate, and orderly exercises; and hence is not unconstitutional as an abridgment of the rights of individuals: *State v. Herald*, 47 Wash. 538.

This section is not unconstitutional as unreasonable, arbitrary or unnecessary for the protection of public health, safety or morals, or objectionable as class legislation, but is valid as an appropriate exercise of the police power: *In re Donnellan*, 49 Wash. 460.

The title to this act, "An act defining certain crimes and declaring their punishment and amending the code of 1881 and certain statutes on the same subject," is sufficiently broad to include the re-enactment of a section of the code of 1881 providing a punishment for keeping open a theater on Sunday: *Id.*

§ 2916. (7251.) **Business Houses to be Closed on Sunday.**

It shall be unlawful for any person or persons of this state to open on Sunday for the purpose of trade or sale of goods, wares, and merchandise, any shop, store, or building, or place of business whatever: Provided, that this section shall apply to hotels only in so far as the sale of intoxicating liquors is concerned, and shall not apply to drug-stores, livery-stables, or undertakers. Any person or persons violating this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars. [Cf. Cd. '81, §§ 2067, 2068; L. '91, p. 127, § 26; 2 H. P. C., § 211.]

As to repeal of this section, see § 2304, and note. Present law, see § 2494, *supra*.

Cited in 7 Wash. 323; 21 Wash. 350, 351, 352; 28 Wash. 629; 49 Wash. 462, 463.

The statute does not purport to prohibit the transaction of all business, or to render ordinary business transactions void: *Main v. Johnson*, 7 Wash. 321, 323.

The provision of this section does not relate to the opening of barber-shops on Sunday, as the statute applies only to places

where goods are offered for sale: *State v. Krech*, 10 Wash. 166. [Overruled.] *State v. Nichols*, 28 Wash. 628.

As to performance of contracts: See *Nelson v. Pyramid Harbor P. Co.*, 4 Wash. 689; *Go Fun v. Fidalgo Island Can. Co.*, 37 Wash. 238.

Sunday law: See *State v. Binnard*, 21 Wash. 349.

§ 2917. **Barbering on Sunday—Penalty.**

That it shall be unlawful for any person, persons or corporation to carry on the business of barbering on Sunday. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of ten dollars or imprisonment in the county jail for five days for the first offense, and by a fine of not less than twenty-five dollars nor more than fifty dollars, or imprisonment in the county jail for not less than ten days nor more than twenty-five days for the second and each subsequent offense. [L. '03, p. 68, §§ 1, 2.]

As to repeal of this section, see § 2304, and note. Present law, see § 2494, *supra*.

This act is constitutional: *State v. Bergfeldt*, 41 Wash. 234.

§ 2918. (7252.) **Officers to Prosecute Violators of Sunday Laws.**

It shall be the duty of any and all public officers of this state, knowing of any violation of this chapter, to make complaint, under oath, to the nearest justice of the peace of the county in which the offense was committed. Any public officer who shall refuse or willfully neglect to inform against and prosecute offenders against section 2916, *supra*, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, and the

court before which such officer shall be tried shall declare the office or appointment held by such officer vacant for the remainder of his term. [Cf. Cd. '81, §§ 2069, 2070; L. '91, p. 127, § 27; 2 H. P. C., § 212.]

As to repeal of this section, see § 2304, and note.

The subject matter of this section is not covered by the act of 1909. See note to § 2301, *supra*.

"Chapter" refers to chapter 148 of the Code of 1881 [§ 2916, *supra*].

Cited in 39 Wash. 69.

§ 2919. (7253.) Unlawful for Children to Enter Saloons.

It shall be unlawful for any person or persons conducting, owning or maintaining any building, rooms, tents or places where spirituous, vinous, malt or other intoxicating liquors are sold or offered for sale, to permit any child or children, boy or girl, under the age of eighteen years, to enter the same to deliver any papers, messages, or for any other purpose whatsoever. [L. '95, p. 336, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2445, *supra*.

Prohibiting the sale of intoxicating liquors within prescribed limits of state educational institutions: See §§ 4742-4745, *infra*.

§ 2920. (7254.) Unlawful for Children to Enter Houses of Prostitution.

It shall be unlawful for any child or children, boy or girl, under the age of eighteen years, to enter into or become an inmate of any house or houses of prostitution, or room or rooms where the same is conducted, either as messengers, servants, or for any other purpose whatever, whether the same be under license or otherwise. [L. '95, p. 337, § 2.]

As to repeal of this section, see § 2304, and note. Present law, see § 2445, *supra*.

§ 2921. (7255.) Unlawful for Children to Enter Gambling-houses.

It shall be unlawful for any child or children, boy or girl, under the age of eighteen years, to enter in, as messenger or otherwise, any gambling-house or houses, room or rooms, where any games of chance are played, either for money or for any other consideration whatever. [L. '95, p. 337, § 3.]

As to repeal of this section, see § 2304, and note. Present law, see § 2445, *supra*.

§ 2922. (7256.) Liability of Owner or Operator of Such Houses.

Any person or persons owning, operating or maintaining any of the places enumerated in the three preceding sections of this chapter, permitting or allowing in any way whatever any child or children, boy or girl, under eighteen years of age, to enter the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty dollars, nor more than two hundred and fifty dollars or by imprisonment in the county jail not exceeding ninety days, or by both such fine and imprisonment. [L. '95, p. 337, § 4.]

As to repeal of this section, see § 2304, and note.

This section hardly seems covered by the act of 1909. See note to § 2301.

Compare § 2445, *supra*, which may be construed as a continuation of the three preceding sections, under § 2300.

Owner to display sign: See § 6284, *infra*.

Unlawful to employ female in saloon, etc.: See § 6285, *infra*.

§ 2923. (7259.) Sale of Lottery Tickets.

Every person who shall sell any lottery tickets, or shares in any lottery, for the division of property to be determined by chance, or shall make or

draw any lottery or scheme for a division of property not authorized by law, on conviction thereof shall be fined in any sum not exceeding five hundred dollars: Provided, that nothing herein contained shall apply to any lottery for charitable purposes. [L. '54, p. 93, § 98; Cd. '81, § 913; 2 H. P. C., § 139.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2464-2468, supra. Cited in 19 Wash. 40.

§ 2924. (7260.) Gambling.

Each and every person who shall deal, [play], or carry on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor, employee, whether for hire or not, any game of faro, monte, roulette, rouge-et-noir, lansquenet, rondo, vingt-un (or twenty-one), poker, draw poker, brag, bluff, thaw, tan, or any banking or other game played with cards, dice, or any other device, whether the same be played for money, checks, credits, or any other representative of value, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and shall be imprisoned in the county jail until such fine and costs are paid: Provided, that such persons so convicted shall be imprisoned one day for every two dollars of such fine and costs: And provided further, that such imprisonment shall not exceed one year: And still further provided, that anyone who shall carry on any chuck-a-luck, bunko, strap, sling, panel-house, or other swindling game shall be deemed guilty of a felony, and upon conviction shall be imprisoned in the penitentiary not exceeding five years for such offense. [Cf. L. '54, p. 93, § 99; L. '79, § 1; Cd. '81, § 1253; 2 H. P. C., § 140.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2469, 2470, supra. The word "play" was contained in the act of 1879.

See note to § 2065, supra, sufficiency of indictment, etc.

See notes to § 2152, evidence, etc.

See notes to § 2158, instructions, etc.

See § 2931, infra, conducting gambling resort.

Cited in 9 Wash. 17; 32 Wash. 472, 474; 49 Wash. 300.

The gravamen of this offense is the conducting of the game as owner, and it is unnecessary to name in the charge the names of the persons who participated in the game: *State v. Wilson*, 9 Wash. 16, 19; *Foster v. Territory*, 1 Wash. 411.

This act was treated as impliedly repealed by § 2931, infra, covering most of this section, in *In re Dietrick*, 32 Wash. 471; but that point was clearly obiter as to the offense of "dealing" or "playing"

covered by this section; and this section has since been treated as still in force, in part: See cases, infra.

This section is not limited to the conducting of public games, but includes games secretly carried on from which the public is excluded: *State v. Preston*, 49 Wash. 298.

Under this section, "each and every person" is prohibited from gaming and it is not necessary to allege the capacity in which the game was conducted: *Id.*

§ 2925. (7261.) Leasing Premises for Gaming or Prostitution.

Every person who shall let or rent any room or building for a gaming-house or house of ill-fame, or for rent or hire shall permit to be dealt or carried on upon his premises any game prohibited by the last preceding section, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars. [Cf. L. '73, p. 206, § 111; Cd. '81, §§ 915, 1256; L. '91, p. 124, § 20; 2 H. P. C., § 141.]

As to repeal of this section, see § 2304, and note. As to gambling, compare § 2474.

The subject matter of this act, as far as prostitution is concerned, is not covered by the act of 1909. See note to § 2301.

See supra, § 2904 et seq., keeping houses of ill-fame.

Recovery of money lost at gaming: See § 5315, *infra*.

Lease for gaming premises, how terminated: See § 5316, *infra*.

Cited in 22 Wash. 676.

§ 2926. (7264.) Unlawful to Permit Gaming on One's Premises.

Any person who shall suffer or permit any of the acts or things forbidden by or made punishable by this title, to be done or carried on in any house, room, or shop, or other building whatsoever, or any boat, booth, garden, or other place of which he is the owner, or in the possession of which he is entitled, under sections 2924 and 2925, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and be imprisoned in the county jail until such fine is paid. [Cf. L. '54, p. 93, § 100; L. '79, p. 98, § 6; Cd. '81, § 1258; 2 H. P. C., § 144.]

As to repeal of this section, see § 2304, and note. Present law, see § 2474, *supra*.

"This title" includes §§ 1253-1262, both inclusive, of the Code of 1881, as amended by §§ 20, 21, of the act of March 2, 1891, which sections are the same as §§ 2924-2929.

As § 2924 and this section are sufficiently explicit to enable the court, with reasonable certainty, to determine what the legislature intended and as they describe the offense of dealing *faro*, or per-

mitting the same to be done on one's premises, with sufficient certainty, they cannot be held void for uncertainty and ambiguity: *Foster v. Territory*, 1 Wash. 411.

§ 2927. (7265.) Duty of Officers to Inform and Prosecute.

It shall be the duty of each prosecuting attorney, sheriff, constable, city or town marshal, or public officer, to inform against and diligently prosecute any and all persons whom they shall have reasonable cause to believe guilty of a violation of the provisions of this title. [L. '79, p. 98, § 7; Cd. '81, § 1259; 2 H. P. C., § 145.]

As to repeal of this section, see § 2304, and note.

This and the next four sections are not covered by the act of 1909. See note to § 2301, *supra*.

See *infra*, § 3967.

See note to § 2926.

See *supra*, §§ 2885-2887, duty of officers and penalty for neglect.

§ 2928. (7266.) Penalty for Failure to Inform and Prosecute.

Any officer named in the preceding section, who shall refuse or willfully neglect to inform against and prosecute offenders against this act, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than fifty nor more than five hundred dollars, and the court before which such officer shall be tried shall declare the office, or appointment held by such officer, vacant for the balance of his term. [L. '79, p. 98, § 8; Cd. '81, § 1260; 2 H. P. C., § 146.]

As to repeal of this section, see § 2304, and note. See note to § 2927.

Note, etc., for gambling debt void—Exception, see § 5317, *infra*.

See note to § 2926.

See *supra*, § 2887, vacation of office for failure to enforce certain laws.

§ 2929. (7268.) Innocent Games for Pastime Permitted.

No person shall be deemed guilty of gambling who shall play at any game of chance or skill for amusement or pastime only, and not for gain to himself or another. [Cf. L. '79, p. 99, § 11; Cd. '81, § 1262; 2 H. P. C., § 149.]

As to repeal of this section, see § 2304, and note. See note to § 2927.

Cited in 49 Wash. 301.

§ 2930. (7269.) Penalty for Gambling with Indian—Duty of Officers.

Every white man, negro, half-breed Indian, kanaka, or Chinaman who shall play at any game of cards or any game of chance with any Indian, for fun, pleasure, luck, money, or anything of value whatever, or for anything whatever, and every white man, negro, half-breed Indian, kanaka, or Chinaman who shall run horses on a wager of any kind, or for pastime, with an Indian, shall be subject, on conviction thereof, for each and every offense, to a fine of not less than fifty dollars and not exceeding five hundred dollars, or to imprisonment not exceeding six months, or to both such fine and imprisonment; and it is hereby made the duty of any prosecuting attorney having knowledge of the violation of this section to prosecute the offender, and of every sheriff or constable having such knowledge to report the same to a justice of the peace in the county in which such offense was committed, or to the prosecuting attorney or grand jury for such county. [Cf. L. '77, p. 198, § 1; Cd. '81, § 914; L. '91, p. 125, § 22; 2 H. P. C., § 150.]

As to repeal of this section, see § 2304, and note. See note to § 2927.
See supra, § 2924, gambling.

§ 2931. Maintaining of Gambling Resorts.

Any person who shall conduct, carry on, open, or cause to be opened, either as owner, proprietor, employee, or assistant, or in any manner whatever, whether for hire or not, any game of faro, monte, roulette, rouge et noir, lansquenette, rondo, vingt-un (or twenty-one), poker, draw-poker, brag, bluff, thaw, tan, or any banking or other game played with cards, dice or any other device, or any slot machine, or other gambling device, whether the same be played or operated for money, checks, credits, or any other representative or thing of value, in any house, room, shop, or other building whatsoever, boat, booth, garden or other place, where persons resort for the purpose of playing, dealing or operating any such game, machine or device, shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for the period of not less than one nor more than three years. [L. '03, p. 63, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2469, supra.
See § 2924, supra, gambling.

This act is a complete law in itself and § 2924, supra, in conflict therewith: In re by implication repeals the provisions of Dietrick, 32 Wash. 471.

§ 2932. Maintaining Slot-machines.

Any person or persons who shall conduct, maintain, exhibit in a public place or operate either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents any nickel-in-the-slot machine or other device of like character, wherein there enters an element of chance, whether the same be played or operated for money, checks, credits, or any other representative of value, or for any property or thing of value whatever, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars, nor more than one hundred dollars, and in default of the payment of the fine imposed shall be imprisoned in the county jail one day for each two dollars thereof. [L. '01, p. 311, § 1; L. '03, p. 64, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2472, supra.

§ 2933. Possession Prima Facie Evidence.

For the purposes of trial and conviction under this act the possession of any such machine or device or keeping the same in any place accessible to the public shall be prima facie evidence against the person in possession thereof of guilt under this act. [L. '01, p. 311, § 2.]

"Act" in this and following section refers to §§ 2932-2934.

This and the next section are not expressly repealed and would not fall with the repeal of § 2932, if the present law is construed as a continuation (under § 2300), and these sections may be still in force.

§ 2934. Disposition of Fines.

Any fine imposed under this act shall be paid into the county treasury of the county wherein such conviction was secured, for the benefit of the school fund. [L. '01, p. 312, § 3.]

See note to last section.

§ 2935. Unlawful Enticement.

Any person who shall entice a female under the age of eighteen years from the custody of her parents, guardian, or other person having lawful control of her, for any unlawful purpose, shall upon conviction thereof be fined in any sum not exceeding one thousand dollars or imprisoned in the county jail not exceeding one year, or be fined and imprisoned. [L. '07, p. 46, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2439, *supra*.
See *supra*, § 2410, kidnapping.

CHAPTER VII.**OFFENSES AGAINST PUBLIC HEALTH, SAFETY AND CONVENIENCE.****§ 2936. (7275.) Selling Diseased or Unwholesome Provisions.**

Every person who shall knowingly sell any kind of diseased, corrupted, or unwholesome provisions, whether for meat or drink, without making the same fully known to the buyer, shall, on conviction thereof, be imprisoned in the county jail not more than one year, and be fined not exceeding one thousand dollars, or fined only. [L. '54, p. 97, § 122; Cd. '81, § 953; 2 H. P. C., § 213.]

As to repeal of this section, see § 2304, and note.

Combination of poisonous substances with bread, etc.: See § 5449, *infra*.

§ 2937. (7276.) Selling Active Poisons Without Label.

Every apothecary, druggist, or other person who shall sell and deliver any arsenic, corrosive sublimate, prussic acid, strychnine, or other active poison, without having the word "poison," and the true name thereof in English, written or printed upon a label attached to the vial, box, or parcel containing the same, shall, on conviction thereof, be imprisoned in the county jail not more than six months, and be fined in any sum not exceeding one hundred dollars, or fined only. [L. '54, p. 97, § 123; Cd. '81, § 954; 2 H. P. C., § 214.]

As to repeal of this section, see § 2304, and note. Present law, see § 2508, *supra*.

See *infra*, § 8445 et seq., who may compound drugs.

See *infra*, § 8458, penalty for adulteration of.

§§ 2938-2943 OFFENSES AND PUNISHMENTS UNDER FORMER LAWS. [TITLE XV

§ 2938. (7277.) Sale of Poisonous Drugs to Indians or Infants.

It shall be unlawful for any druggist or other person to sell, give, or in any manner furnish to any Indian, minor, intoxicated person, or person of unsound mind, any poisonous drug or compound destructive of human or animal life. [L. '75, p. 105, § 1; Cd. '81, § 935; 2 H. P. C., § 151.]

As to repeal of this section, see § 2304, and note. Present law, see § 2508, *supra*.

§ 2939. (7278.) Register of Persons Purchasing Poisonous Drugs.

Every druggist shall keep a book in which he shall register the name of any person purchasing or receiving from him any such poisonous drug or compound, unless the same shall be furnished upon the prescription of a competent physician, together with the name of such drug or compound, and the time when it was furnished. [L. '75, p. 105, § 2; Cd. '81, § 936; 2 H. P. C., § 152.]

As to repeal of this section, see § 2304, and note. Present law, see § 2508, *supra*.
See *infra*, § 8459, druggist to keep record of sales.

§ 2940. (7279.) Putting Out Poison Without Notice.

Every person who shall place any poison outside of his own building or out-buildings, for the destruction of noxious animals, or for any purpose whatever, shall give notice to all persons or families residing within one mile of the place where such poison is used, by posting notices in three of the most public places within one mile of where said poison is to be put out; but this notice shall not apply to such use of poison within the limits of an incorporate town. [L. '75, p. 106, § 3; Cd. '81, § 937; 2 H. P. C., § 153.]

As to repeal of this section, see § 2304, and note.

This section is not covered by the act of 1909. See note to § 2301.

§ 2941. (7280.) Penalties for Violating Last Three Sections.

Every person violating any of the provisions of the last three preceding sections shall be fined in any sum not exceeding five hundred dollars, and may be imprisoned until the fine and costs are paid. [L. '75, p. 106, § 4; Cd. '81, § 938; 2 H. P. C., § 154.]

As to repeal of this section, see § 2304, and note. Present law, see § 2508, *supra*.

§ 2942. (7281.) Prescription by Intoxicated Physician, etc.

If any physician or other person, while in a state of intoxication, shall prescribe any poison, drug, or other medicine to another person, to his injury, he shall, on conviction thereof, be imprisoned in the county jail for any length of time not exceeding one year, and fined not exceeding five hundred dollars, or fined only. [L. '54, p. 97, § 124; Cd. '81, § 955; 2 H. P. C., § 216.]

As to repeal of this section, see § 2304, and note. Present law, see § 2402, *supra*, confined to manslaughter. See note to § 2301, *supra*.

§ 2943. (7282.) Sale of Morphine Regulated.

It shall not be lawful for any druggist or other dealer in drugs or medicines to sell or offer for sale any sulphate or other preparations of morphine in any bottle, vial, envelope, or other package, unless the same shall be wrapped in a scarlet paper or envelope, and all bottles or vials used for the above purposes shall have in addition to said scarlet wrapper a scarlet

label lettered in white letters, plainly naming the contents of said bottle. [L. '86, p. 158, § 1; 1 H. C., § 3069.]

As to repeal of this section, see § 2304, and note. Present law, see § 2509, *supra*.
See *infra*, § 8457 et seq., sales of drugs by pharmacists.

§ 2944. (7283.) Penalty for Violating Last Section.

Anyone violating the provisions of the above section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than ten nor more than fifty dollars, at the discretion of the court, for each and every violation of the preceding section. [L. '86, p. 159, § 2; 1 H. C., § 3070.]

As to repeal of this section, see § 2304, and note. Present law, see § 2509, *supra*.
Cited in 41 Wash. 3.

§ 2945. (7284.) Resorts for Opium Smoking.

Any person or persons who shall hereafter keep a house, cellar, or any other place in which such person or persons, or any other person or persons, smoke or inhale opium, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be fined in any sum not exceeding one thousand dollars, or imprisonment not more than one year, or both, in the discretion of the court. [Cd. '81, § 2072; 2 H. P. C., § 216.]

As to repeal of this section, see § 2304, and note. Present law, see § 2670, *supra*.

§ 2946. (7285.) Opium Smoking.

Any person or persons who shall smoke or inhale opium, or who shall visit such house, cellar, or other place for the purpose of smoking or inhaling opium, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for the first offense, be fined in any sum not exceeding one hundred dollars, or imprisonment not to exceed one month, or both, in the discretion of the court; and for any subsequent offense, such person or persons so offending shall be imprisoned not to exceed three months: Provided always, that all opium, pipes, or other apparatus used for smoking or inhaling opium, that may be taken by any officer, the judge or justice of the peace trying the cause shall as additional penalty order the same to be destroyed by the officer so taking the same, immediately after the trial. [Cf. Cd. '81, § 2073; L. '83, p. 30, § 1; 2 H. P. C., § 217.]

As to repeal of this section, see § 2304, and note.

Compare § 2670, present law as to keeping opium joints.

This and the next section as to smoking opium are not covered by the act of 1909. See § 2301, *supra*.

Cited in 1 Wash. 175.

The provision of the statute against opium smoking is not unconstitutional on the ground that it involves a deprivation of liberty and property without due process of law: *Ah Lim v. Territory*, 1 Wash. 156.

§ 2947. (7286.) Evidence in Opium Smoking Cases.

It shall not be necessary, in order to prove the guilt of any person or persons keeping such house or other place for smoking or inhaling opium, that anyone should be found smoking or inhaling therein; but the finding of the pipes, opium, or other appliances used for the purpose of smoking or inhaling opium therein, shall be deemed sufficient evidence of the violation of the last two sections. Nor shall it be deemed necessary, in order to prove the guilt, or to convict any person or persons of smoking or inhaling opium,

that they shall be found in the act of smoking or inhaling; but evidence that such person or persons were found in such house or other place, in possession of opium pipes or under the influence of opium, shall be deemed sufficient evidence for conviction. [Cd. '81, § 2074; 2 H. P. C., § 218.]

As to repeal of this section, see § 2304, and note. See note to last section.
Health of female employees to be protected: See § 6566, *infra*.

§ 2948. (7288.) Sale of Adulterated Dairy Products.

No person or persons shall sell or exchange, or expose for sale or exchange, any unclean, unwholesome, or adulterated milk, nor any article of food manufactured therefrom, or of cream from the same. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars (\$50) nor more than two hundred dollars (\$200), or by not less than one month nor more than three months' imprisonment in the county jail, or by both such fine and imprisonment. [L. '90, p. 103, §§ 1, 3; 2 H. P. C., § 220.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2512-2515.
Prohibiting the sale of adulterated milk: See § 5451, *infra*.

§ 2949. (7293.) Obstructing Public Highways, etc.

Every person who shall in any manner obstruct any public highway, turnpike, plank road, or bridge, or injure any material used in the construction of such road or bridge, shall, on conviction thereof, be fined in any sum not exceeding five hundred dollars. [L. '54, p. 94, § 102; Cd. '81, § 917; 2 H. P. C., § 221.]

As to repeal of this section, see § 2304, and note.
This and the next section not covered by the act of 1909. See note to § 2301.
Cited in 34 Wash. 596.
See *State v. Horlacher*, 16 Wash. 325.

§ 2950. (7294.) Obstructing Highway by Driving Stock.

Any person or persons who shall, by driving stock along or near public highways, and cause such highway to be obstructed with stones, earth, or other debris, and shall permit such obstruction to remain for more than twenty-four hours, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding two hundred dollars. [Cf. L. '88, p. 106, § 1; L. '91, p. 128, § 28; 2 H. P. C., § 222.]

As to repeal of this section, see § 2304, and note. See note to last section.

§ 2951. (7295.) Injury to Improved Roads, Bridges, Telegraphs, etc.

If any person shall willfully break down, injure, or remove or destroy any free or toll bridge, railway, plank road, macadamized road, or any gate upon any such road, or any lock or embankment of any canal, or any telegraph post or wire, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than six months nor more than two years, or by fine not less than fifty nor more than one thousand dollars. [Cf. L. '90, p. 126, § 8; L. '91, p. 128, § 29; 2 H. P. C., § 223.]

As to repeal of this section, see § 2304, and note. Present law, see § 2656, *supra*.
See *infra*, § 2980, willful injury to telegraph apparatus.

§ 2952. (7296.) Failure of Road Supervisor to Perform Duty.

If any supervisor of roads fail to keep the highways and bridges in his road district in as good repair as the available labor or other means of such

district will enable him to do, or fail to discharge any other duty required of him by law, he shall, on conviction thereof, be fined in any sum not exceeding two hundred dollars, and upon prosecution for neglecting to keep a highway in good repair, it shall be sufficient to prove that such highway is commonly reputed as such. [L. '54, p. 94, § 106; Cd. '81, § 921; 2 H. P. C., § 232.]

As to repeal of this section, see § 2304, and note.

This section is not covered by the act of 1909. See note to § 2301.

Unlawful use of traction engine on highways: See § 2719, *supra*.

See *infra*, § 5580, duty of road supervisors.

Fast driving on bridge: See § 2718, *supra*.

§ 2953. (7298.) Willful Injury to Guide-boards, Monuments, etc.

If any person shall willfully break down, injure, remove, or destroy any monument erected or used for the purpose of designating the boundary of any town, tract, or parcel of land, or any tree marked for that purpose, or shall willfully break down, injure, remove or destroy any mile-stone, board, or post, or any guide or finger-board, erected or placed upon any road or highway, or shall willfully alter or deface the inscription upon any such stone, post, or board, or shall willfully extinguish any lamp, or break, injure, destroy, or remove any lamp, lamp-post, sign or sign-post, or any railing or posts erected upon any street, highway, sidewalk, court, or passage, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than ten dollars nor more than five hundred dollars. [Cf. L. '54, p. 86, § 62; Cd. '81, § 927; L. '90, p. 127, § 11; 2 H. P. C., § 228.]

As to repeal of this section, see § 2304, and note. Present law, see § 2656, *supra*.

§ 2954. (7299.) Willful Injury to Public Property.

Any person who shall willfully or maliciously cut, carve, otherwise deface, or injure any guide-board, bridge, building, column, monument, or structure, grounds or trees, belonging to the public, or any incorporated charitable, religious, or scientific institution, shall, on conviction thereof, be fined in any sum not greater than five hundred dollars nor less than ten dollars. [Cf. Cd. '81, § 845; L. '91, p. 128, § 31; 2 H. P. C., § 229.]

As to repeal of this section, see § 2304, and note. Present law, see § 2656, *supra*.

§ 2955. (7300.) Malicious Injury to Property of United States.

Any malicious, willful, reckless, or voluntary injury to or mutilation of the grounds, buildings, or other property of the United States within this state shall subject the offender or offenders to a fine not greater than five hundred dollars, nor less than twenty dollars, to which may be added, for an aggravated offense, imprisonment not exceeding six months in the county jail or work house, to be prosecuted before any court of competent jurisdiction. [Cf. L. '90, p. 126, § 7; L. '91, p. 129, § 32; 2 H. P. C., § 230.]

As to repeal of this section, see § 2304, and note. Present law, see § 2656, *supra*.

§ 2956. (7301.) Obstructing Public Ditches or Drains.

If any person place any obstruction in any of the public ditches or drains made for the purpose of draining any of the swamp-lands in this state, he shall, upon conviction, be compelled to remove such obstructions, and be fined not less than five dollars nor more than one hundred dollars, or be

imprisoned in the county jail not more than thirty days, at the discretion of the court. [Cd. '81, § 846; 2 H. P. C., § 231.]

As to repeal of this section, see § 2304, and note. Present law, see § 2656, *supra*.

§ 2957. (7305.) Mooring Vessel or Boom of Logs to Bridge.

Every person who shall moor or chain any steamer, sloop, scow, or other vessel, or raft, or boom of logs to the piling, piers, abutments, or other supports of any bridge within this state, shall, on conviction thereof, be fined in any sum not exceeding three hundred dollars nor less than fifty dollars. [L. '77, p. 205, § 3; Cd. '81, § 928; 2 H. P. C., § 224.]

As to repeal of this section, see § 2304, and note. Present law, see § 2656, *supra*.

§ 2958. (7306.) Mooring Vessel to Buoys or Beacons.

Any person or persons who shall moor any vessel or vessels, of any kind or name whatever, or any boat, skiff, barge, scow, raft, or part of raft to any buoy or beacon placed in the navigable waters of this state, or in any bay, river, or arm of the sea bordering upon this state by authority of the United States lighthouse board, or shall in any manner hang on with any vessel, boat, skiff, barge, scow, raft, or part of a raft to any such buoy or beacon, or shall willfully remove, damage, or destroy any such buoy or beacon, or shall cut down, remove, damage, or destroy any beacon or beacons erected on land in this state by the authority of the said United States lighthouse board, shall, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof before any court of competent jurisdiction shall be punished by a fine not less than one hundred nor more than two hundred dollars, or by imprisonment in the county jail not less than one or more than six months, or by both such fine and imprisonment, in the discretion of the court. One-half of all fines under this section shall be paid by the court to the informer, and the other half shall be paid into the common school fund of the county in which the offense shall be committed. [L. '75, p. 119, §§ 1, 2; Cd. '81, §§ 1208, 1209; 2 H. P. C., § 225.]

As to repeal of this section, see § 2304, and note. Present law, see § 2656, *supra*.

See § 2655, injury to United States lighthouse.

Obstructing navigation: See § 8293, *infra*.

Discharging ballast in navigable waters: See § 8294, *infra*.

§ 2959. Failing to Label Packages of Gasoline or Benzine.

Every apothecary, druggist, merchant or other person who shall sell and deliver any gasoline or benzine without having the word "explosive" and the true name thereof in English, written or printed upon a label attached to the vial, box, can or parcel containing the same shall, on conviction thereof, be imprisoned in the county jail not more than six months, and be fined in any sum, not exceeding one hundred dollars, or be fined or imprisoned only. [L. '05, p. 202, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2506, *supra*.

CHAPTER VIII.

OFFENSES AGAINST PUBLIC TRADE, POLICY AND POLICE ECONOMY.

§ 2960. (7310.) Public Nuisance.

Every person who shall erect, contrive, cause, continue, maintain, suffer or permit any public nuisance to the injury of any part of the citizens of this state shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars. After any person shall have been convicted of erecting, contriving, causing, continuing, maintaining, suffering or permitting any public nuisance, the court may make it a part of the judgment that such nuisance be removed by the proper officer. [Cf. L. '54, p. 92, § 88; Cd. '81, § 898; 2 H. P. C., § 118; L. '95, p. 21, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2500, *supra*.
See *infra*, § 8307 et seq., public nuisances, etc.

Cited in 8 Wash. 581, 583.

In nuisances the law contemplates that property, either in a business or in a building, shall not be destroyed unless the person who is financially interested therein is before the court; and while an employee is culpable in continuing an obnoxious trade or business, its abatement on an information against him could not be otherwise than oppressive: *State v. Paggett*, 8 Wash. 579, 584.

Upon the prosecution of an employee of a powder company for maintaining a public nuisance, judgment upon his conviction ordering that the nuisance be abated is erroneous: *Id.*

Until 1875 there seems to have been no statutory definition of nuisances, the courts being left to the common law for the ascertainment of what constituted public nuisances, the act then passed being § 1235, Code 1881: *Id.*, 582.

§ 2961. (7311.) Carrying on Business Without License.

Every person who shall, by himself or agent, transact any business, or do any act, without a license therefor, where such license is required by any law in this state, shall, on conviction thereof, be fined in any sum not exceeding five hundred dollars, and in all such cases, where the principal is prosecuted, his agent may be compelled to testify; and when the agent is prosecuted the principal may be compelled to testify. [L. '54, p. 92, § 90; Cd. '81, § 900; 2 H. P. C., § 132.]

As to repeal of this section, see § 2304, and note.
Present law, see § 2673, omitting reference to agents.

§ 2962. (7312.) Sale of Liquors Without License.

Any person who shall sell or dispose of any spirituous, malt, or other intoxicating liquors without having first obtained a license from the proper authorities shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not to exceed six months, or by both fine and imprisonment, for each offense. [L. '88, p. 125, § 4; 2 H. P. C., § 133.]

As to repeal of this section, see § 2304, and note. See note to last section.
This section is not covered by the act of 1909. See note to § 2301.
See notes to § 2065, sufficiency of indictment, etc.

Cited in 9 Wash. 680; 11 Wash. 418.

The offense mentioned in this section is not cut off by the general incorporation act chartering cities. It could not be done by implication. It is an offense to sell intoxicating liquors without a license, whether in

town or country, and the state has not yielded its right to prosecute that offense by the indefinite terms of the incorporation act of 1890: *State v. Hoepner*, 9 Wash. 682.

§ 2963. (7313.) Sale of Liquors to Minors.

Every person who shall knowingly sell or give to a minor intoxicating or spirituous liquors, without the written permission of the parent or guard-

ian of such minor, shall, on conviction thereof, be fined in any sum not exceeding five hundred dollars, or be imprisoned in the county jail for a term not exceeding three months, or both. [L. '77, p. 205, § 5; Cd. '81, § 939; 2 H. P. C., § 134.]

As to repeal of this section, see § 2304, and note. Present law, see § 2445, *supra*.

§ 2964. (7314.) Unlawful to Allow Minor to Play Cards, When.

If any person shall allow any minor to play at cards in his house, without the written permission of the parent or guardian, he shall be liable to the same penalties as for furnishing to such minor spirituous liquors. [Cf. L. '63, p. 305, § 130; Cd. '81, § 941; L. '91, p. 124, § 19; 2 H. P. C., § 135.]

As to repeal of this section, see § 2304, and note.

This and the next two sections are not covered by the act of 1909. See note to § 2301.

§ 2965. (7315.) Minor Misrepresenting His Age to Procure Liquor.

Any minor over the age of eighteen years and under the age of twenty-one years, who shall represent to any person dealing in spirituous, malt, or fermented liquors that he is of lawful age, and by means of such misrepresentation procure from such dealer spirituous, malt, or fermented liquors, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars nor less than twenty-five dollars, or imprisonment in the county jail any length of time not exceeding three months. [L. '77, p. 328, § 1; Cd. '81, § 940; 2 H. P. C., § 136.]

As to repeal of this section, see § 2304, and note. See note to last section.

§ 2966. (7316.) Sale of Liquor to Indians.

Any tavern-keeper, grocery-keeper, brewer, distillers, or person or persons, Indian or Indians, who shall sell, barter, give, or in [any] manner dispose of any wines, spirituous liquors, ale, beer, porter, cider, or any other intoxicating beverage, to any Indian or Indians within this state, every such person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof by any court having competent jurisdiction to try the same, shall forfeit and pay to the use of the county in which the offense may have been committed a fine of not less than twenty-five dollars and not more than one hundred dollars for each and every offense; and in all prosecutions under this section, Indians shall be competent as witnesses. [Cf. L. '67, p. 95, § 1; L. '69, p. 228, § 133; Cd. '81, § 942; 2 H. P. C., § 137.]

As to repeal of this section, see § 2304, and note. See note to § 2964.

This section was included by mistake. See note to § 6288, *infra*.

§ 2967. (7317.) Sale of Tobacco to Minors Under Sixteen Years of Age.

Every person who shall sell, give, furnish, or cause to be furnished to any person under the age of sixteen years any cigarette, cigar, or tobacco in any form, without the written consent of the parents or guardian of the person of such minor, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten dollars nor more than fifty dollars. [L. '83, p. 68, § 2; 2 H. P. C., § 138.]

As to repeal of this section, see § 2304, and note. Present law, see § 2445, *supra*.

For other laws relating to the sale of cigarettes, see §§ 2697-2701, *supra*.

§ 2968. Cigarettes, Manufacturing, Keeping, Selling, etc.

That it shall be unlawful for any person, by himself, clerk, servant, employee or agent, directly or indirectly, upon any pretense or by any de-

vice, to manufacture, sell, exchange, barter, dispose of or give away, or keep for sale, any cigarettes, cigarette paper or cigarette wrappers, or any paper made or prepared for the purpose of being filled with tobacco for smoking; and any person, for violation of the same, shall be guilty of a misdemeanor, and upon conviction shall, for the first offense, pay a fine of not less than ten dollars (\$10) nor more than fifty dollars (\$50) and cost of prosecution, and stand committed to the county jail until such costs are paid; and for the second and each subsequent offense, shall pay, upon conviction thereof, a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500), and the cost of prosecution, or be imprisoned in the county jail not to exceed six months: Provided, that the provisions hereof shall not apply to the sales of jobbers doing an interstate business with customers outside the state. [L. '07, p. 293, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2536, *supra*. Compare, also, §§ 2697-2701.

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§ 2969. (7322.) Importing or Selling Diseased Animals.

If any person knowingly import or bring within this state any horse, mule, or ass affected by the disease known as nasal gleet, glanders, or button farcy, or suffer the same to run at large upon any common, highway, or uninclosed land, or use or tie the same in any public place, or off his own premises, or sell, trade, or offer for sale or trade any such horse, mule or ass, knowing the same to be so diseased, he shall be deemed guilty of a misdemeanor, and shall on conviction be punished by a fine of not less than fifty dollars nor more than five hundred dollars; and if any horse, mule, or ass, reasonably supposed to be diseased with nasal gleet, glanders, or button farcy, be found running at large without any known owner, it shall be lawful for the finder thereof to take such horse, mule, or ass so found, before some justice of the peace, who shall forthwith cause the same to be examined by some veterinary surgeon, or other person skilled in such diseases, and if, on examination, it is ascertained to be so diseased, it shall be lawful for such justice of the peace to order such diseased animal to be immediately destroyed and buried; and the necessary expense accruing under the provisions of this section shall be defrayed out of the county treasury. [L. '69, p. 360, §§ 1-4; Cd. '81, § 933; 2 H. P. C., § 163.]

As to repeal of this section, see § 2304, and note. Present law, see § 2541, *supra*.

§ 2970. (7323.*) Barratry, Defined—Penalty—Disbarment.

If any person shall willfully instigate, maintain, excite, prosecute or encourage the bringing of any suit or suits at law or in equity, in which such person has no interest, in any court of this state, with intends [intent] to distress or harass the defendant therein, or shall willfully bring or prosecute any false suit or suits of his own, at law or in equity, with intent to distress the defendant therein, or if any attorney or counselor at law shall seek or obtain employment to prosecute or defend in any suit or case at law or in equity by means of personal solicitation of such employment or by procuring another to solicit such employment for him or shall by himself or another seek or obtain such employment by giving to the person from whom such employment is sought, money or any other thing of value, or shall directly or indirectly pay the debts or liabilities of the person from whom such employment is sought, or loan or promise to give, loan or other-

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wise grant money or other valuable thing to the person from whom such employment is sought, before such employment, shall be deemed guilty of barratry, and shall upon conviction be punished by a fine in any sum not exceeding five hundred dollars, and may in addition thereto be imprisoned in the county jail not exceeding three months. The term "attorney at law" shall include counselor at law, and any attorney at law violating any of the provisions of this section shall, in addition to the penalty hereinbefore provided, forfeit his right to practice in this state, and shall have his license revoked and be disbarred in the manner provided by law for dishonorable conduct or malpractice, whether he has been convicted for violating this section or not. [L. '03, p. 68, § 1. Cf. L. '54, p. 92, § 91; Cd. '81, § 901; 2 H. P. C., § 167.]

As to repeal of this section, see § 2304, and note. Present law, see § 2370, *supra*.

§ 2971. (7324.) Sale of Toy Pistols to Children.

It shall be unlawful for any person or persons to sell or offer for sale any toy pistols within this state, and every person who shall sell, give, furnish, or cause to be furnished, to any person under the age of sixteen years, any pistol, toy pistol, or other pocket weapon in which explosives may be used, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than five nor more than twenty-five dollars. [L. '83, p. 67, § 1; 2 H. P. C., § 168.]

As to repeal of this section, see § 2304, and note. Present law, see § 2445, *supra*.

§ 2972. (7334.) Willful Interference with Telegraphic Communications, etc.

Whoever shall willfully and maliciously cut, break, tap, or make any connection with, or read, or copy, by the use of telegraph or telephone instruments or otherwise, in any unauthorized manner, any message, either social or business, sporting, commercial or other news reports, from any telegraph or telephone line, wire, or cable, so unlawfully cut or tapped, in this state, or make unauthorized use of the same, or who shall willfully and maliciously prevent, obstruct or delay by any means or contrivance whatsoever, the sending, conveyance or delivery, in this state, of any authorized communication, sporting, commercial or other news reports, by or through any telegraph or telephone line, cable or wire under the control of any telegraph or telephone company doing business in this state, or who shall willfully and maliciously aid, agree with, employ or conspire with any other person or persons to do any of the aforementioned unlawful acts, shall be deemed guilty of felony, and shall be punished by a fine of not less than five hundred dollars nor more than three thousand dollars, or by imprisonment in the penitentiary for a period of not less than one nor more than five years; or by both fine and imprisonment within the limits hereinbefore specified, at the discretion of the court. Prosecutions under this section shall be by information or indictment in any court having criminal jurisdiction. [L. '93, p. 141, §§ 1, 2.]

As to repeal of this section, see § 2304, and note. Present law, see § 2656, *supra*.

§ 2973. (7335.) Divulging or Altering Telegram.

If any officer, agent, operator, clerk, or employee of a telegraph company, or any other person, shall willfully divulge to any other person than the party from whom the same was received, or to whom the same is ad-

ressed, or his agent or attorney, any message received or sent, or intended to be sent over any telegraph line, or the contents, substance, purport, effect, or meaning of such message, or any part thereof, or shall willfully alter any such message by adding thereto or omitting therefrom any word or words, figure or figures, so as to materially change the sense, purport, or meaning of such message, to the injury of the person sending or desiring to send the same, or to whom the same was directed, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment in the discretion of the court: Provided, that when numerals or words of number occur in any message, the operator or clerk, sending or receiving, may express the same in words or figures, or in both words and figures, and such fact shall not be deemed an alteration of the message, nor in any manner affecting its genuineness, force, or validity. [Cd. '81, § 2342; 2 H. P. C., § 292.]

As to repeal of this section, see § 2304, and note. Present law, see §§ 2657, 2662, *supra*. See *infra*, § 9321, damages recoverable.

§ 2974. (7336.) **Sending False or Forged Telegrams.**

If any agent, operator, or employee in any telegraph office, or any other person, shall knowingly or willfully send by telegraph to any person or persons any false or forged message, purporting to be from such telegraph office, or from any other person, or shall willfully deliver, or cause to be delivered, to any person any such message, falsely purporting to have been received by telegraph; or if any person or persons shall furnish or conspire to furnish, or cause to be furnished, to any such agent, operator, or employee, to be so sent by telegraph, or to be so delivered, any such message, knowing the same to be false or forged, with the intent to deceive, injure, or defraud any individual, partnership, or corporation, or the public,—the person or persons so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed one thousand dollars, or imprisonment not to exceed one year or by such fine and imprisonment, in the discretion of the court. [Cd. '81, § 2343; 2 H. P. C., § 293.]

As to repeal of this section, see § 2304, and note.
See note to last section.

§ 2975. (7337.) **Agent of Company not to Use Information.**

If any agent, operator, or employee in any telegraph office shall in any way use or appropriate any information derived by him from any private message or messages passing through his hands and addressed to any other person or persons, or in any other manner acquired by him by reason of his trust as such agent, operator, or employee, or shall trade or speculate upon any such information so obtained, or in any manner turn, or attempt to turn, the same to his own account, profit, or advantage, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court; and shall also be liable in treble damages to the party aggrieved, for all loss or injury sustained by reason of such wrongful act. [Cd. '81, § 2344; 2 H. P. C., § 294.]

As to repeal of this section, see § 2304, and note.
This section may not be covered by the act of 1909. See note to § 2301.

§ 2976. (7338.) Refusing to Send or Deliver Message.

If any agent, operator, or employee in any telegraph office shall unreasonably and willfully refuse or neglect to send any message received at such office for transmission, or shall unreasonably and willfully postpone the same out of its order, or shall unreasonably and willfully refuse or neglect to deliver any message received by telegraph, the person so offending shall be deemed guilty of a misdemeanor, and may be punished by fine not to exceed five hundred dollars, or imprisonment not to exceed six months, or by both such fine and imprisonment, in the discretion of the court: Provided, that nothing herein contained shall be so construed to require any message to be received, transmitted, or delivered unless the charges thereon shall have been paid or tendered, nor to require the sending, receiving, or delivery of any message counseling, aiding, abetting, or encouraging treason against the government of the United States, or other resistance to lawful authority, or any message calculated to further any fraudulent plan or purpose, or to instigate or encourage the perpetration of any unlawful act, or to facilitate the escape of any criminal or person accused of crime. [Cd. '81, § 2345; 2 H. P. C., § 295; Or., § 2005.]

As to repeal of this section, see § 2304, and note. Present law, see § 2662, *supra*.

§ 2977. (7339.) Wrongfully Obtaining Message Intended for Another.

If any person not connected with any telegraph office shall, without the authority or consent of the person or persons to whom the same may be directed, willfully and unlawfully open any sealed envelope inclosing a telegraphic message and addressed to any other person or persons, with the purpose of learning the contents of such message, or shall fraudulently represent any other person or persons, and thereby procure to be delivered to himself any telegraphic message addressed to such other person or persons, with the intent to use, destroy, or detain the same from the person or persons entitled to receive such message, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court; and shall, moreover, be liable in treble damages to the party injured, for all loss and damages sustained by reason of such wrongful act. [Cd. '81, § 2346; 2 H. P. C., § 296.]

As to repeal of this section, see § 2304, and note. Present law, see § 2662, *supra*.

In the Code of 1881, this section has the words "delivered by himself" instead of "delivered to himself." The original act, approved January 24, 1866, is the same as here printed.

§ 2978. (7340.) Unlawful Taking of Information from Wire.

If any person, not connected with any telegraph company, shall, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently read or attempt to read any message, or to learn the contents thereof, whilst the same is being sent over any telegraph line, or shall willfully or fraudulently or clandestinely learn, or attempt to learn, the contents or meaning of any message while the same is in any telegraph office, or is being received thereat, or sent therefrom, or shall use or attempt to use, or communicate to others, any information so obtained by any person, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed one thousand dollars, or imprison-

ment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court. [Cd. '81, § 2347; 2 H. P. C., § 297.]

As to repeal of this section, see § 2304, and note. Present law, see § 2656, *supra*.
See *infra*, § 9321, damages recoverable.

§ 2979. (7341.) Bribing Operator to Disclose Private Message.

If any person shall, by the payment or promise of any bribe, inducement, or reward, procure or attempt to procure any telegraph agent, operator, or employee to disclose any private message, or the contents, purport, substance, or meaning thereof, or shall offer to any such agent, operator, or employee any bribe, compensation, or reward, for the disclosure of any private information received by him, by reason of his trust as such agent, operator, or employee, or shall use or attempt to use any such information so obtained, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court. [Cd. '81, § 2348; 2 H. P. C., § 298.]

As to repeal of this section, see § 2304, and note. Present law, see § 2662, *supra*.
See note to last section.

§ 2980. (7342.) Malicious Injury to Telegraph Apparatus, etc.

If any person shall willfully or maliciously cut, break, or throw down any telegraph poles, or any tree, or other material used in any line of telegraph, or shall willfully and maliciously break, displace, or injure any insulator in use in any telegraph line, or shall willfully or maliciously cut, break, or remove from its insulator any wire used as a telegraph line, or shall, by the attachment of a ground wire, or by any other contrivance, willfully destroy the insulation of such telegraph line, or interrupt the transmission of the electric current through the same, or shall in any other manner willfully injure, molest, or destroy any property or materials appertaining to any telegraph line, or shall willfully interfere with the use of any telegraph line, or obstruct or postpone the transmission of any message over the same, or procure or advise any such injury, interference, or obstruction, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed five hundred dollars, or imprisonment not to exceed six months, or by both such fine and imprisonment, in the discretion of the court; and shall, moreover, be liable to the telegraph company whose property is injured, in a sum equal to one hundred times the amount of actual damages sustained there. [Cd. '81, § 2349; 2 H. P. C., § 299.]

As to repeal of this section, see § 2304, and note. Present law, see § 2656, *supra*.
See *supra*, § 2951, injury to telegraph line.

§ 2981. (7343.) Unlawful Use of Mark, Device, etc.

The president or secretary of any telegraph company doing business in this state may file in the office of the secretary of state a copy of any printed blank or envelope, picture, or device used, or intended so to be, by said company, with his certificate that the same is commonly used, or is intended so to be, in the business of said company, as a distinguishing mark, notice, or index of said business, and thereupon such blank, envelope, picture, or device shall become the property of said company, and it shall not be lawful for any person, unless by the employment or permission of

said company, to print, publish, distribute, or use, or cause to be printed, published, distributed, or used, either of them, or any copy, counterfeit, similitude, or imitation thereof. Any person willfully offending against the provisions of this section may be punished by fine not to exceed five hundred dollars, or imprisonment not to exceed six months. [L. '66, p. 76, § 19; Cd. '81, § 2360; 2 H. P. C., § 300.]

As to repeal of this section, see § 2304, and note.

This section may not be covered by the act of 1909. See note to § 2301.

§ 2982. (7404.) Proceedings to Prevent Cock-fights, etc.

When a complaint is made to a court or magistrate authorized to issue warrants in criminal causes, that complainant has good reason to believe that preparations are making for an exhibition of the fighting of fowls, birds, dogs or other animals at or in any place, building or tenement, or that such an exhibition is in progress, such court or magistrate, if satisfied that there is good cause for such belief, shall issue a search-warrant authorizing any sheriff, deputy sheriff, constable or police officer to search such place, building or tenement, at any hour of the day or night, and take possession of all such fowls, birds, dogs or other animals there found, and to arrest all persons there present at any such exhibition, or knowingly present when preparations are making for such an exhibition. [L. '93, p. 42, § 5.]

As to repeal of this section, see § 2304, and note.

This and the next section seem to relate to procedure and are not covered by the act of 1909. See note to §§ 2352 and 2301.

See supra, § 2238, search-warrant to seize gaming apparatus.

Forfeiture of fighting animals: See § 3284 et seq.

Prevention of cruelty to animals: See infra, § 3266 et seq.

§ 2983. (7405.) Time of Trial, Penalty.

All persons arrested under the provisions of the preceding section shall be kept in jail or other convenient place not more than twenty-four hours, exclusive of Sundays and legal holidays, at or before the expiration of which time they shall be brought before a trial justice, of a police or municipal court and tried, unless such trial be continued for cause, and if found guilty, punished by a fine not exceeding fifty dollars, or by imprisonment in the county jail not exceeding one month. [L. '93, p. 42, § 6.]

As to repeal of this section, see § 2304, and note. See note to last section.

CHAPTER IX.

OFFENSES NOT SPECIALLY PROVIDED FOR.

§ 2984. (7435.) Punishment of Misdemeanors Where No Penalty Prescribed.

Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. [Cd. '81, § 785; 2 H. P. C., § 301.]

As to repeal of this section, see § 2304, and note. Present law, see § 2265, supra.

See supra, § 2725, misdemeanor defined.

Cited in 19 Wash. 41; 25 Wash. 623;
47 Wash. 331.

The invalidity of a provision for a
penalty for acts made misdemeanors does

not affect the balance of the act, as the
misdemeanors are punishable under the
general statute, this section and § 2725,
supra: State v. Ames, 47 Wash. 328.

§ 2985. (7436.) Conviction for Attempt to Commit Crime.

Any person may be convicted of an attempt to commit a crime, although it appear on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury, and direct such person to be tried for such crime. [Cd. '81, § 1160; 2 H. P. C., § 302.]

As to repeal of this section, see § 2304, and note. Present law, see § 2264, supra.

Sufficiency of information charging crime
of attempt to commit incest: See State v.
McGilvery, 20 Wash. 240.

A party charged with a consummated
offense may be convicted of an attempt to
commit the offense: See State v. Romans,
21 Wash. 284.

§ 2986. (7437.) Attempts to Commit Crime, How Punished.

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, when no provision is made by law for the punishment of such attempt, as follows:—

1. If the offense so attempted is punishable by imprisonment in the penitentiary for five years or more, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the penitentiary or in the county jail, as the case may be, for a term not exceeding one-half of the longest term of imprisonment prescribed upon a conviction of the offense so attempted;

2. If the offense so attempted is punishable by imprisonment in the penitentiary for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year;

3. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted;

4. If the offense so attempted is punishable by imprisonment and a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half the longest term of imprisonment, and one-half the largest fine which may be imposed upon a conviction of the offense so attempted. [Cd. '81, § 1161; 2 H. P. C., § 303.]

As to repeal of this section, see § 2304, and note. Present law, see § 2264, supra.

Cited in 21 Wash. 285; 33 Wash. 329;
34 Wash. 397; 8 Wash. 198; 10 Wash.
278, 279.

Solicitation to commit adultery is not in-
dictable as an attempt to commit crime:
State v. Butler, 8 Wash. 194.

An attempt to secure money from a
bank by false pretenses as to ownership of
certificate of deposit is punishable under
this section: See State v. Riddell, 33 Wash.
324.

Sodomy, attempt to commit: See State
v. Romans, 21 Wash. 284.

§ 2987. (7438.) Restrictions upon Last Two Sections.

The last two sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punish-

ment prescribed by law for the crime committed. [Cd. '81, § 1162; 2 H. P. C., § 304.]

As to repeal of this section, see § 2304, and note.

See supra, §§ 2789, 2790, attempt to commit arson.

See supra, §§ 2796, 2797, attempts to commit burglary, etc.

See supra, § 2861, attempts to suborn perjury.

§ 2988. (7439.) Attempt to Commit Murder.

Every person who shall attempt to commit the crime of murder by drowning or strangling another person, or by any means not constituting an assault with intent to commit murder, shall on conviction thereof be imprisoned in the penitentiary not more than ten years nor less than one year. [L. '54, p. 80, § 31; Cd. '81, § 811; 2 H. P. C., § 305.]

As to repeal of this section, see § 2304, and note. Present law as to attempts generally, see § 2264, supra. See note to § 2301.

By § 46 of the act of March 2, 1891, provision is made saving prosecutions for crimes against statutes superseded by that act.

§ 2989. (7440.*) Wearing Grand Army or War Badge—Unlawful When—Jurisdiction.

Any person who shall willfully wear the badge or button of the Grand Army of the Republic, or Spanish-American War veterans, or who shall use or wear the same within this state, unless he shall be entitled to use or wear the same under the rules and regulations of the department of Washington and Alaska Grand Army of the Republic, or Spanish-American War veterans, or who shall willfully wear any emblem, badge, button, token or insignia of any secret, beneficiary or fraternal society or order organized or existing under the laws of this state, or shall use or wear the same to obtain or attempt to obtain aid or assistance within this state, unless such person shall be a member in good standing in said society or order and entitled to use or wear the same, shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for a term not to exceed thirty days in the county jail or a fine not exceeding twenty dollars, or by both such fine and imprisonment: Provided, that this section shall not apply to the sisters, daughters, wives or mothers of any member of such secret, beneficiary or fraternal society or order, or wives and daughters of the order of the Grand Army of the Republic or Spanish-American War veterans. [L. '90, p. 477, § 172; 2 H. P. C., § 246; L. '07, p. 395, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2626, supra.

§ 2990. Advertising with the American Flag.

That the national flag or the coat of arms of the United States or any imitation or representation thereof, shall not be attached to or imprinted or represented upon any goods, wares, or merchandise, or any advertisement of the same; and no goods, wares, or merchandise, or any advertisement of the same, shall be attached to the national flag or the coat of arms of the United States, and no such advertisement shall be imprinted thereon. Any violation of this act shall be punishable, on conviction in any court of competent jurisdiction in the state of Washington, by a fine of not more than five hundred dollars. [L. '01, p. 321, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2675, supra.

§ 2991. Acceptance of Gifts by Agents, Employees or Officers.

That any agent, employee or factor of any firm, person, association or corporation, or any agent, employee or officer of any corporation or municipality, who shall receive or accept any gift, bonus, gratuity, commission or thing of value from any person, firm, association or corporation with whom he shall contract for, or from whom he shall purchase any chattels, goods, wares, merchandise or material for his principal, employer, corporation or municipality, shall be deemed guilty of a misdemeanor. [L. '05, p. 299, § 1.]

As to repeal of this section, see § 2304, and note. Present law, see § 2679, supra.

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| 1019* | 7741 | 1130 | 7542 | 1207 | 8052 | 1348 | 4888 | 1433 | 4949 |
| 1025 | 7742 | 1131 | 7543 | 1208 | 8053 | 1349 | 4794 | 1434 | 4950 |
| 1026 | 7743 | 1132 | 7544 | 1214 | 8054 | 1350 | 4795 | 1435 | 4951 |
| 1027 | 7744 | 1133 | 7545 | 1215 | 8055 | 1351 | 4796 | 1436 | 4952 |
| 1028 | 7745 | 1134 | 7546 | 1216 | 8056 | 1353 | 4797 | 1437 | 4953 |
| 1029 | 7746 | 1135 | 7547 | 1217 | 8057 | 1354* | 4798 | 1438 | 4954 |
| 1030 | 7747 | 1136 | 7548 | 1222 | 8058 | 1355 | 4799 | 1439 | 4955 |
| 1036 | 7748 | 1139 | 7894 | 1223 | 8059 | 1356 | 4800 | 1440 | 4956 |
| 1038 | 7749 | 1140* | 7895 | 1224 | 8060 | 1357 | 4801 | 1441 | 4957 |
| 1039 | 7750 | 1141 | 7896 | 1237 | 5535 | 1358 | 4802 | 1445* | 4757 |
| 1047 | 7451 | 1142* | 7897 | 1238 | 5536 | 1359 | 4803 | 1446 | 4758 |
| 1048 | 7452 | 1143 | 7898 | 1239 | 5537 | 1360 | 4889 | 1447 | 4759 |
| 1049 | 7453 | 1144 | 7899 | 1240 | 5538 | 1361 | 4890 | 1448 | 4760 |
| 1050 | 7454 | 1145 | 7900 | 1241 | 5539 | 1362* | 4891 | 1449 | 4761 |
| 1054 | 7460 | 1146 | 7901 | 1242 | 5540 | 1363 | 4892 | 1450* | 4762 |
| 1055 | 7461 | 1147 | 7902 | 1260 | 7831 | 1364* | 4893 | 1451* | 4763 |
| 1056 | 7462 | 1148 | 7903 | 1261 | 7832 | 1365 | 4894 | 1452 | 4764 |
| 1057 | 7463 | 1149 | 7904 | 1262 | 7833 | 1366 | 4895 | 1453* | 4765 |
| 1058 | 7464 | 1150* | 7906 | 1263* | 7834 | 1367 | 4896 | 1454* | 4766 |
| 1059 | 7465 | 1152 | 7907 | 1264 | 7835 | 1368* | 4897 | 1455* | 4767 |
| 1060 | 7466 | 1153 | 7908 | 1265 | 7836 | 1369 | 4898 | 1456* | 4768 |
| 1061 | 7467 | 1154 | 7909 | 1266 | 7837 | 1370 | 4899 | 1457 | 4769 |
| 1062 | 7468 | 1155 | 7910 | 1267 | 7844 | 1371 | 4900 | 1458 | 4770 |
| 1063 | 7469 | 1156 | 7911 | 1268 | 7845 | 1372 | 4901 | 1459 | 4771 |
| 1064 | 7470 | 1157 | 7912 | 1269 | 7846 | 1373* | 4902 | 1460* | 4772 |
| 1065 | 7471 | 1158 | 7913 | 1270 | 7847 | 1374 | 4903 | 1461* | 4773 |
| 1066 | 7472 | 1159 | 7914 | 1271 | 7848 | 1375 | 4904 | 1462 | 4774 |
| 1067 | 7473 | 1160 | 7915 | 1272 | 7849 | 1376 | 4905 | 1463 | 4775 |
| 1068 | 7474 | 1161 | 7916 | 1273 | 7850 | 1377 | 4906 | 1464 | 4776 |
| 1069 | 7475 | 1162 | 7917 | 1274 | 7851 | 1378 | 4907 | 1465 | 4844 |
| 1070 | 7476 | 1163 | 7918 | 1275 | 7852 | 1379 | 4908 | 1466 | 4845 |
| 1071 | 7477 | 1164 | 7919 | 1276 | 7853 | 1380 | 4909 | 1467 | 4846 |
| 1076* | 8005 | 1165 | 7920 | 1280 | 7874 | 1381 | 4910 | 1468 | 4847 |
| 1077* | 8006 | 1166 | 7921 | 1281 | 7875 | 1385 | 4911 | 1469 | 4848 |
| 1080 | 8011 | 1167 | 7922 | 1282 | 7876 | 1386 | 4912 | 1470 | 4849 |
| 1081 | 8012 | 1168 | 7923 | 1283 | 7877 | 1387 | 4913 | 1471 | 4850 |
| 1082 | 8013 | 1169 | 7924 | 1284 | 7878 | 1388 | 4914 | 1472 | 4851 |
| 1083 | 8014 | 1170 | 7925 | 1285 | 7879 | 1389 | 4915 | 1473 | 4852 |
| 1090 | 7939 | 1171 | 7926 | 1286 | 7880 | 1390 | 4916 | 1474 | 4853 |
| 1091* | 7940 | 1172 | 7927 | 1292 | 7767 | 1391* | 4917 | 1475 | 4854 |
| 1092* | 7941 | 1173 | 7928 | 1293 | 7824 | 1392 | 4918 | 1476 | 4855 |
| 1093 | 7942 | 1174 | 7929 | 1294 | 7825 | 1393* | 4919 | 1477 | 4856 |
| 1094 | 7943 | 1175 | 7930 | 1295 | 7826 | 1394* | 4920 | 1478 | 4857 |
| 1095 | 7944 | 1176 | 7931 | 1296 | 7827 | 1395 | 4921 | 1479 | 4858 |
| 1096 | 7945 | 1177 | 7932 | 1297 | 7828 | 1396 | 4922 | 1480 | 4859 |
| 1097 | 7946 | 1178 | 7933 | 1298 | 7829 | 1400 | 4924 | 1481 | 4860 |
| 1098 | 7947 | 1179 | 7934 | 1299 | 1260½ | 1401 | 4925 | 1482 | 4861 |
| 1099 | 7948 | 1180 | 7935 | 1300 | 7055 | 1402 | 4926 | 1483 | 4862 |
| 1100 | 7949 | 1181 | 7936 | 1320* | 4752 | 1403 | 4927 | 1484 | 4863 |
| 1101 | 7950 | 1185 | 8032 | 1321 | 4753 | 1404 | 4928 | 1485 | 4864 |

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| 1486 | 4865 | 1580 | 4048 | 1656 | 9092 | 1740a* | 9236 | 1841 | 5026 |
| 1487 | 4866 | 1581 | 4049 | 1657* | 9093 | 1740b | 9237 | 1842 | 5027 |
| 1488 | 4867 | 1582* | 4050 | 1658 | 9097 | 1741 | 9238 | 1843 | 5028 |
| 1489 | 4868 | 1583 | 4051 | 1659* | 9098 | 1742 | 9239 | 1845 | 5085 |
| 1495 | 4869 | 1584 | 4052 | 1660 | 9101 | 1743 | 9240 | 1846 | 5086 |
| 1496 | 4870 | 1585 | 4053 | 1661 | 9118 | 1744 | 9241 | 1847 | 5087 |
| 1497 | 4871 | 1586 | 4054 | 1662 | 9119 | 1745 | 9242 | 1848 | 5088 |
| 1498 | 4872 | 1587 | 4055 | 1663 | 9120 | 1746 | 9243 | 1849 | 5089 |
| 1499 | 4873 | 1588 | 4056 | 1664 | 9117 | 1747 | 9244 | 1850 | 5090 |
| 1500 | 4874 | 1589 | 4057 | 1665 | 9121 | 1748 | 9245 | 1851 | 5091 |
| 1501 | 4875 | 1590 | 4058 | 1666 | 9122 | 1749* | 9252 | 1852 | 5092 |
| 1502 | 4876 | 1591 | 4059 | 1667 | 9123 | 1750 | 9253 | 1853 | 5093 |
| 1503 | 4877 | 1592 | 4060 | 1668 | 9124 | 1751* | 9254 | 1858 | 5094 |
| 1504 | 4878 | 1593 | 4061 | 1669 | 9125 | 1751a* | 9257 | 1859 | 5095 |
| 1505 | 4879 | 1594 | 4064 | 1670 | 9126 | 1752 | 9258 | 1860 | 5096 |
| 1506 | 4880 | 1595 | 4065 | 1671 | 9127 | 1755* | 9259 | 1861 | 5097 |
| 1507 | 4881 | 1596 | 4066 | 1672 | 9128 | 1756* | 9260 | 1862 | 5098 |
| 1508 | 4882 | 1597* | 4068 | 1673 | 9129 | 1757* | 9261 | 1863 | 5099 |
| 1509 | 4883 | 1598 | 4073 | 1674 | 9131 | 1760* | 9262 | 1864 | 5100 |
| 1510 | 4884 | 1599 | 4074 | 1675 | 9132 | 1761 | 9263 | 1865 | 5101 |
| 1511 | 4885 | 1600 | 4075 | 1676 | 9133 | 1762 | 9264 | 1870 | 5102 |
| 1512 | 4886 | 1601 | 4076 | 1677* | 9134 | 1764* | 9265 | 1871 | 5103 |
| 1513 | 4887 | 1602 | 4077 | 1678 | 9135 | 1765 | 9266 | 1872 | 5104 |
| 1517 | 8324 | 1603 | 4078 | 1679 | 9136 | 1767 | 9267 | 1873 | 5105 |
| 1518 | 8325 | 1604 | 4079 | 1680 | 9137 | 1769* | 9268 | 1874 | 5106 |
| 1519 | 8326 | 1605 | 4080 | 1681 | 9138 | 1772* | 9269 | 1875 | 5107 |
| 1520 | 8327 | 1606 | 4081 | 1682 | 9139 | 1773 | 9277 | 1880* | 5108 |
| 1521 | 8328 | 1607 | 4082 | 1683 | 9140 | 1778 | 9280 | 1881* | 5109 |
| 1522 | 8329 | 1608 | 4083 | 1696 | 9169 | 1779 | 9281 | 1882* | 5110 |
| 1523 | 8330 | 1609* | 497 | 1697 | 9170 | 1780 | 9282 | 1883* | 5111 |
| 1524 | 8331 | | 4084 | 1698 | 9112 | 1781 | 9283 | 1890 | 5112 |
| 1525 | 8332 | 1609a | 498 | 1699* | 9113 | 1782* | 9284 | 1891 | 5113 |
| 1526 | 8333 | 1610* | 497 | 1703 | 9102 | 1783 | 9285 | 1892* | 5114 |
| 1527* | 8334 | 1611 | 4067 | 1704 | 9102½ | 1784 | 9286 | 1893 | 5115 |
| 1528 | 8335 | 1612 | 500 | 1704a | 9103 | 1785 | 9287 | 1894 | 5116 |
| 1529 | 8336 | 1613 | 501 | 1705 | 9104 | 1786 | 9288 | 1895 | 5117 |
| 1530 | 8337 | 1614 | 502 | 1706 | 9105 | 1787 | 9289 | 1898 | 5118 |
| 1531 | 8338 | 1615 | 4086 | 1707 | 9106 | 1790 | 5129 | 1899 | 5119 |
| 1532 | 8339 | 1615a | 503 | 1708 | 9107 | 1791 | 5130 | 1900 | 5120 |
| 1533 | 8340 | 1616 | 4087 | 1709 | 9108 | 1792 | 5131 | 1901 | 5121 |
| 1547 | 8343 | 1617 | 4088 | 1710 | 9109 | 1793 | 5132 | 1902 | 5122 |
| 1548 | 8344 | 1618 | 4089 | 1711 | 9110 | 1794 | 5133 | 1903 | 5123 |
| 1549 | 8345 | 1619 | 504 | 1712 | 9111 | 1795 | 5134 | 1904 | 5124 |
| 1550 | 8975 | 1620 | 505 | 1713 | 9130 | 1796 | 5135 | 1905 | 5125 |
| 1551 | 8976 | 1621 | 506 | 1714* | 9200 | 1797 | 5136 | 1906 | 5126 |
| 1552 | 8977 | 1622 | 507 | 1715 | 9203 | 1798 | 5137 | 1907 | 5127 |
| 1553 | 8978 | 1623 | 4090 | 1716* | 9204 | 1799 | 5138 | 1908 | 5128 |
| 1554 | 8979 | 1624 | 508 | 1717* | 9205 | 1800 | 5139 | 1910 | 5035 |
| 1555 | 8980 | 1625 | 509 | 1718 | 9212 | 1801 | 5140 | 1911 | 5036 |
| 1556 | 8981 | | 4085 | 1719* | 9213 | 1810* | 9290 | 1912 | 5037 |
| 1557 | 8982 | 1627 | 2225 | 1720* | 9214 | 1811 | 9291 | 1913 | 5038 |
| 1558 | 8983 | 1628 | 2226 | 1721 | 9215 | 1812 | 9292 | 2068* | 7338 |
| 1559 | 8984 | 1629 | 2227 | 1722 | 9216 | 1813 | 9293 | 2069 | 7339 |
| 1563* | 4031 | 1630 | 2228 | 1723 | 9217 | 1814* | 9294 | 2075 | 7340 |
| 1564 | 4032 | 1631 | 2229 | 1724* | 9219 | 1815* | 9295 | 2076 | 7341 |
| 1565* | 4033 | 1632 | 2230 | 1725 | 9220 | 1816 | 9296 | 2077 | 7342 |
| 1566* | 4034 | 1633 | 3864 | 1726 | 9221 | 1817 | 9297 | 2078 | 7343 |
| 1567* | 4035 | 1635* | 1864 | 1727* | 9223 | 1818 | 9298 | 2085 | 6705 |
| 1568* | 4036 | 1636 | 1865 | 1728* | 9224 | 1819 | 9299 | 2110 | 6853 |
| 1569* | 4037 | 1637 | 1866 | 1729 | 9225 | 1825 | 5015 | 2111 | 6854 |
| 1570 | 4038 | 1641 | 6535 | 1730 | 9226 | 1826 | 5016 | 2112 | 6855 |
| 1571 | 4039 | 1642 | 6542 | 1731 | 9227 | 1827 | 5017 | 2113 | 6856 |
| 1572 | 4040 | 1643 | 6543 | 1732* | 9228 | 1828 | 5018 | 2114 | 6857 |
| 1573 | 4041 | 1644 | 6544 | 1733* | 9229 | 1830 | 5019 | 2115 | 6858 |
| 1574 | 4042 | 1645 | 6545 | 1734 | 9230 | 1831 | 5020 | 2116 | 6859 |
| 1575 | 4043 | 1646 | 6546 | 1736 | 9231 | 1832 | 5021 | 2117* | 6860 |
| 1576 | 4044 | 1647 | 6547 | 1737 | 9232 | 1833 | 5022 | 2118 | 6636 |
| 1577 | 4045 | 1648 | 6548 | 1738 | 9233 | 1834 | 5023 | 2119 | 6637 |
| 1578 | 4046 | 1649 | 6549 | 1739* | 9234 | 1835 | 5024 | 2120 | 6638 |
| 1579 | 4047 | 1655 | 9091 | 1740* | 9235 | 1840 | 5025 | 2121 | 6639 |

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|-----------|--------|-----------|--------|-----------|--------|-----------|--------|-----------|--------|
| 2122 | 6640 | 2195 | 6614 | 2323* | 4544 | 2424* | 4662 | 2526* | 4351 |
| 2123 | 6623 | 2196* | 6615 | 2324* | 4545 | 2425* | 4663 | 2527* | 4352 |
| 2124 | 6624 | 2197 | 6823 | 2325* | 4546 | 2426* | 4673 | 2528* | 4353 |
| 2125 | 6625 | 2198* | 6612 | 2326* | 4547 | 2427* | 4674 | 2529* | 4354 |
| 2126 | 6626 | 2199 | 6613 | 2327* | 4548 | 2428* | 4675 | 2530* | 4355 |
| 2130* | 6605 | 2203 | 6780 | 2328* | 4549 | 2429* | 4676 | 2531* | 4356 |
| 2131 | 6607 | 2204 | 6781 | 2329* | 4550 | 2430* | 4678 | 2532* | 4357 |
| 2132 | 6608 | 2212 | 6782 | 2330* | 4558 | 2431* | 4679 | 2533* | 4358 |
| 2133 | 6641 | 2213* | 6783 | 2331* | 4489 | 2432* | 4680 | 2543* | 4360 |
| 2134* | 6642 | 2214 | 6784 | 2332* | 4490 | 2433* | 4681 | 2544* | 4361 |
| 2135* | 6643 | 2215 | 6785 | 2333* | 4491 | 2434* | 4682 | 2545* | 4362 |
| 2136 | 6644 | 2216* | 6786 | 2334* | 4406 | 2435* | 4702 | 2546* | 4363 |
| 2137 | 6645 | 2217* | 6787 | 2335* | 4407 | 2436* | 4683 | 2547* | 4364 |
| 2138 | 6646 | 2218* | 6788 | 2336* | 4408 | 2437* | 4684 | 2548* | 4365 |
| 2139 | 6647 | 2235 | 6799 | 2337 | 4409 | 2439* | 4685 | 2549* | 4366 |
| 2140 | 6648 | 2236 | 6800 | 2338* | 4410 | 2442* | 4664 | 2550* | 4367 |
| 2141* | 6661 | 2237 | 6801 | 2339* | 4411 | 2443* | 4665 | 2551* | 4372 |
| 2142* | 6667 | 2238 | 6802 | 2340* | 4412 | 2445* | 4686 | 2552* | 4373 |
| 2143* | 6671 | 2239 | 6803 | 2341* | 4714 | 2446* | 4687 | 2553* | 4374 |
| 2144* | 6672 | 2240 | 6804 | 2342* | 4424 | 2447* | 4688 | 2554* | 4375 |
| 2145* | 6674 | 2241 | 6805 | 2352* | 4498 | 2448* | 4689 | 2555* | 4376 |
| 2146* | 6675 | 2242 | 6806 | 2353* | 4499 | 2449* | 4690 | 2556* | 4377 |
| 2147 | 6676 | 2243 | 6807 | 2354* | 4500 | 2450* | 4691 | 2557* | 4378 |
| 2148 | 6677 | 2244 | 6695 | 2355* | 4501 | 2451* | 4692 | 2558* | 4379 |
| 2149* | 6681 | 2252 | 6827 | 2356* | 4502 | 2452* | 4693 | 2563* | 4389 |
| 2150 | 6682 | 2253* | 6696 | 2362* | 4509 | 2453* | 4694 | 2580* | 4388 |
| 2151 | 6683 | 2272* | 4302 | 2366* | 4508 | 2454* | 4695 | 2585* | 4390 |
| 2152 | 6684 | 2273* | 4415 | 2367* | 4512 | 2455* | 4696 | 2586* | 4392 |
| 2153* | 6685 | 2274* | 4422 | 2368* | 4513 | 2456* | 4697 | 2587* | 4393 |
| 2154 | 6686 | 2275* | 4427 | 2369* | 4575 | 2458* | 4699 | 2588* | 4394 |
| 2155* | 6687 | 2276* | 4433 | 2372* | 4580 | 2459* | 4705 | 2589* | 4395 |
| 2156 | 6688 | 2277* | 4471½ | 2373* | 4581 | 2460* | 4700 | 2590* | 4395½ |
| 2157 | 6678 | 2278* | 4425 | 2374* | 4583 | 2461* | 4701 | 2631* | 8906 |
| 2158* | 6679 | 2279 | 4426 | 2379* | 4598 | 2462* | 4413 | 2632* | 8908 |
| 2159 | 6689 | 2284* | 4445 | 2380* | 4599 | 2463* | 4721 | 2633* | 8907 |
| 2160* | 6690 | 2285* | 4446 | 2381* | 4600 | 2464 | 4703 | 2634 | 8912 |
| 2161* | 6691 | 2286* | 4447 | 2382* | 4601 | 2465 | 4704 | 2635 | 8913 |
| 2162 | 6635 | 2287* | 4448 | 2383* | 4606 | 2466* | 4482 | 2636 | 8925 |
| 2163 | 6649 | 2288* | 4449 | 2385* | 4429 | 2467* | 4738 | 2637 | 8926 |
| 2164 | 6831 | 2290* | 4303 | 2386* | 4430 | 2470* | 4316 | 2640* | 8914 |
| 2165 | 6832 | 2291* | 4305 | 2387* | 4607 | 2471* | 4317 | 2641* | 8915 |
| 2166 | 6693 | 2292* | 4306 | 2388* | 4608 | 2472* | 4318 | 2642 | 8916 |
| 2167 | 6694 | 2293* | 4307 | 2389* | 4609 | 2473* | 4319 | 2643* | 8917 |
| 2168* | 6824 | 2294* | 4308 | 2390* | 4610 | 2474 | 4320 | 2644* | 8918 |
| 2169 | 6744 | 2295* | 4309 | 2391* | 4613 | 2475* | 4321 | 2645* | 8929 |
| 2170* | 6745 | 2296* | 4312 | 2392* | 4615 | 2476* | 4322 | 2646* | 8919 |
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| 2172 | 6747 | 2298* | 4313 | 2394* | 4617 | 2478* | 4324 | 2652 | 5937 |
| 2173 | 6748 | 2300* | 4314 | | 4618 | 2479 | 4325 | 2653 | 5938 |
| 2174 | 6749 | 2301* | 4472 | 2395* | 4619 | 2482 | 4329 | 2654 | 5939 |
| 2175 | 6750 | 2302* | 4473 | 2396* | 4620 | 2483 | 4330 | 2655 | 5944 |
| 2176 | 6754 | 2303* | 4474 | 2397* | 4621 | 2484 | 6654 | 2656 | 5945 |
| 2177 | 6755 | 2304* | 4475 | 2398* | 4622 | 2488 | 4742 | 2657 | 5946 |
| 2178* | 6761 | 2305* | 4476 | 2399* | 4623 | 2489 | 4743 | 2658 | 5947 |
| 2179* | 6762 | 2306* | 4477 | 2400* | 4625 | 2501 | 5063 | 2659 | 5948 |
| 2180* | 6764 | 2307* | 4706 | 2401* | 4624 | 2502 | 5064 | 2660 | 5953 |
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| 2184 | 6775 | 2311* | 4481 | 2404* | 4628 | 2514* | 4335 | 2663 | 5956 |
| 2185 | 6777 | 2312* | 4483 | 2405* | 4629 | 2515* | 4336 | 2664 | 5957 |
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| 2188 | 6610 | 2315* | 4486 | 2413* | 4642 | 2518* | 4339 | 2667 | 5960 |
| 2189 | 6611 | 2316* | 4487 | 2417* | 4640 | 2519* | 4340 | 2668 | 5961 |
| 2190 | 6631 | 2317* | 4488 | 2418* | 4654 | 2520* | 4341 | 2669 | 5971 |
| 2191 | 6632 | 2318* | 4706— | 2419* | 4657 | 2521* | 4342 | 2670 | 5972 |
| | 6778 | | 4713 | 2420* | 4658 | 2522* | 4343 | 2671 | 5973 |
| 2192* | 6633 | 2320* | 4541 | 2421* | 4659 | 2523* | 4348 | 2672 | 5964 |
| 2193 | 6634 | 2321* | 4542 | 2422* | 4660 | 2524* | 4349 | 2673 | 5965 |
| 2194* | 6629 | 2322* | 4543 | 2423* | 4661 | 2525* | 4350 | 2674 | 5966 |

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| 2676 | 5968 | 2783 | 8490 | 2857* | 5445b | 2996 | 5521 | 3090 | 8313 |
| 2677 | 5969 | 2784 | 8491 | 2858* | 5448k | 2997 | 5522 | 3091 | 8314 |
| 2678 | 5962 | 2785 | 8492 | 2859* | 5444a | 2998 | 5523 | 3092 | 8315 |
| 2680 | 5963 | 2786 | 8493 | 2860* | 5444b | 2999 | 5524 | 3093 | 8316 |
| 2683 | 5970 | 2787 | 8494 | 2861* | 5444c | 3000 | 5525 | 3094 | 8317 |
| 2692 | 8946 | 2788 | 8495 | 2862* | 5444d | 3001 | 5526 | 3095 | 8318 |
| 2693 | 8947 | 2789 | 8496 | 2863* | 5448m | 3002 | 5527 | 3096 | 8319 |
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| 2696* | 8951 | 2792 | 8499 | 2911 | 5308 | 3005 | 5530 | 3099 | 8322 |
| 2705 | 8596 | 2793 | 8500 | 2912 | 5309 | 3006 | 5531 | 3100 | 8323 |
| 2706 | 8597 | 2794 | 8501 | 2913 | 5310 | 3007 | 5532 | 3103 | 7070 |
| 2710 | 8598 | 2795 | 8502 | 2914 | 5311 | 3008 | 5533 | 3104 | 7071 |
| 2711* | 8599 | 2796 | 8503 | 2927 | 6257 | 3009 | 5534 | 3105 | 7072 |
| 2713 | 8600 | 2797 | 8504 | 2928 | 6258 | 3015* | 8397½ | 3106 | 7073 |
| 2714 | 8600½ | 2798 | 8505 | 2929 | 6259 | 3017* | 8399 | 3107 | 7074 |
| 2715 | 8601 | 2799 | 8506 | 2930 | 6260 | 3021 | 8412 | 3108 | 7075 |
| 2716 | 8602 | 2800 | 8507 | 2931 | 6261 | 3022 | 8413 | 3109 | 7076 |
| 2717 | 8603 | 2805* | 6068 | 2932 | 6262 | 3023 | 8414 | 3110 | 7077 |
| 2719 | 8604 | 2806 | 6067 | 2933 | 6263 | 3024 | 8415 | 3111 | 7078 |
| 2721* | 1980 | 2807 | 6077 | 2934 | 6264 | 3025* | 8416 | 3112 | 7079 |
| 2722* | 1981 | 2808* | 6078 | 2935 | 6267 | 3026 | 8417 | 3115 | 7080 |
| 2723 | 1982 | 2809 | 6079 | 2936 | 6268 | 3027* | 8418 | 3116 | 7081 |
| 2724 | 1983 | 2810 | 6080 | 2937 | 6275 | 3028 | 8420 | 3117 | 7082 |
| 2725 | 1984 | 2811 | 6081 | 2938 | 6276 | 3029* | 8421 | 3118 | 7083 |
| 2726 | 1985 | 2812* | 6082 | 2940 | 7022 | 3030 | 8422 | 3119 | 7085 |
| 2727* | 1986 | 2813 | 6083 | 2944 | 7023 | 3031 | 8423 | 3120 | 7086 |
| 2733 | 8508 | 2814 | 6084 | 2945* | 6289 | 3032* | 8424 | 3121 | 7087 |
| 2734 | 8509 | 2815 | 6085 | 2946 | 6290 | 3033 | 8425 | 3122 | 7088 |
| 2735 | 8510 | 2816 | 6086 | 2947 | 6291 | 3034 | 8444 | 3123 | 7089 |
| 2736 | 8511 | 2817 | 6087 | 2953 | 2697 | 3050* | 3202 | 3124 | 7090 |
| 2737 | 8512 | 2818 | 6095 | 2954 | 2698 | 3051* | 3203 | 3128 | 7091 |
| 2738 | 8513 | 2819 | 6097 | 2955 | 2699 | 3052 | 3205 | 3129 | 7092 |
| 2739 | 8514 | 2820 | 6098 | 2956 | 5404 | 3053 | 3206 | 3130 | 7093 |
| 2740 | 8515 | 2821 | 6099 | 2957* | 5406 | 3054* | 3208 | 3131 | 7094 |
| 2744 | 8516 | 2822 | 6102 | 2958* | 5416 | 3055 | 7127 | 3132 | 7095 |
| 2745 | 8517 | 2823 | 6103 | 2959 | 5417 | 3056 | 7128 | 3133 | 7096 |
| 2746 | 8518 | 2824 | 6104 | 2960 | 5418 | 3057 | 7129 | 3134 | 7097 |
| 2747 | 8519 | 2825 | 6105 | 2961 | 5419 | 3058 | 7130 | 3136 | 7099 |
| 2748 | 8520 | 2826 | 6106 | 2962 | 5421 | 3059 | 7131 | 3137 | 7100 |
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| 3247 | 8249 | 3335 | 5162 | 3433 | 3149 | 3578 | 3036 | 3679* | 4097 |
| 3248 | 8250 | 3336 | 5163 | 3434 | 3150 | 3579 | 5581 | 3680 | 4102 |
| 3249 | 8251 | 3337 | 5164 | 3435 | 3151 | 3585 | 5312 | 3681 | 4103 |
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| 3257 | 8259 | 3346 | 5231 | 3443 | 6162 | 3595 | 3374 | 3689 | 4111 |
| 3258 | 8260 | 3347* | 5183 | 3444 | 3163 | 3596 | 3375 | 3690 | 4112 |
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| 3723* | 4145 | 3793 | 5645 | 3883 | 5715 | 3958 | 5769 | 4098 | 6323 |
| 3724 | 4146 | 3794 | 5646 | 3884 | 5716 | 3959 | 5770 | 4099 | 6324 |
| 3725 | 4147 | 3795 | 5647 | 3887 | 5615 | 3960 | 5771 | 4100* | 6325 |
| 3726* | 4148 | 3796 | 5648 | 3888 | 5616 | 3961 | 5772 | 4101* | 6326 |
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| 3728 | 4150 | 3798* | 5666 | 3890 | 5618 | 3963 | 5774 | 4103* | 6328 |
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| 3733* | 4158 | 3804 | 5652 | 3895 | 5787 | 3968 | 5779 | 4108 | 6333 |
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| 3735 | 4160 | 3806 | 5654 | 3897 | 5789 | 3970 | 5781 | 4110 | 6335 |
| 3736 | 4161 | 3811 | 5588 | 3898 | 5790 | 3971 | 5782 | 4111 | 6336 |
| 3737 | 4162 | 3812 | 5589 | 3899 | 5791 | 4014 | 5857 | 4112 | 6337 |
| 3738* | 4163 | 3820* | 5590 | 3900 | 5792 | 4015 | 5858 | 4113 | 6338 |
| 3739 | 4164 | 3821* | 5594 | 3901 | 5793 | 4016 | 5859 | 4114 | 6339 |
| 3740 | 4165 | 3822* | 5596 | 3902 | 5794 | 4017 | 5860 | 4115 | 6340 |
| 3741 | 4166 | 3824* | 5600 | 3903 | 5795 | 4018 | 5861 | 4116 | 6341 |
| 3742 | 4167 | 3825* | 5601 | 3904 | 5796 | 4019 | 5862 | 4117 | 6342 |
| 3743 | 4168 | 3828 | 5602 | 3905 | 5797 | 4020 | 5863 | 4118* | 6343 |
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| 3746 | 4171 | 3836 | 5676 | 3908 | 5800 | 4023 | 5866 | 4121 | 6346 |
| 3747 | 4172 | 3837 | 5677 | 3909 | 5801 | 4048 | 4998 | 4122 | 6347 |
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| 3749 | 4174 | 3839 | 5680 | 3911 | 5803 | 4050 | 5000 | 4124 | 6349 |
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| 4220 | 6470 | 4289* | 3714 | 4385 | 7117 | 4468 | 7151 | 4557* | 3659 |
| 4221 | 6471 | 4290* | 3717 | 4386 | 7118 | 4469 | 7154 | 4558 | 3660 |
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| 4568 | 8802 | 4665 | 18 | 4757 | 116 | 4843 | 199 | 4927 | 283 |
| 4569 | 8803 | 4666 | 26 | 4758 | 118 | 4844 | 200 | 4930 | 284 |
| 4570 | 8804 | 4667 | 27 | 4763 | 127 | 4845 | 201 | 4931 | 285 |
| 4571 | 8805 | 4668 | 28 | 4764 | 128 | 4846 | 202 | 4932 | 286 |
| 4575 | 5288 | 4669 | 29 | 4765 | 129 | 4847 | 203 | 4933 | 287 |
| 4576* | 5289 | 4670 | 30 | 4766 | 130 | 4852 | 204 | 4934 | 288 |
| 4577 | 5290 | 4671 | 32 | 4767 | 131 | 4853 | 205 | 4935 | 289 |
| 4578 | 5291 | 4672 | 35 | 4768 | 132 | 4854* | 206 | 4936 | 290 |
| 4580 | 5292 | 4673 | 36 | 4769 | 133 | 4855 | 207 | 4937 | 291 |
| 4581 | 5293 | 4674 | 38 | 4770 | 134 | 4856 | 208 | 4938 | 292 |
| 4582 | 5294 | 4675 | 39 | 4771 | 135 | 4857 | 209 | 4939 | 293 |
| 4583 | 5295 | 4676 | 40 | 4772 | 136 | 4858 | 210 | 4940 | 294 |
| 4585* | 3670 | 4680 | 43 | 4773 | 137 | 4859 | 211 | 4941 | 295 |
| 4586* | 3671 | 4681 | 44 | 4774 | 138 | 4860 | 215 | 4942* | 296 |
| 4588 | 8741 | 4682 | 45 | 4775* | 139 | 4861 | 216 | 4943 | 297 |
| 4589 | 8742 | 4683* | 46 | 4776 | 140 | 4862 | 217 | 4944 | 298 |
| 4594 | 1319 | 4684 | 47 | 4777 | 141 | 4863 | 218 | 4949 | 299 |
| 4595 | 1320 | 4685 | 48 | 4778 | 142 | 4864 | 219 | 4950 | 300 |
| 4596 | 1321 | 4686 | 49 | 4783 | 143 | 4869 | 220 | 4951 | 301 |
| 4597 | 1322 | 4690 | 50 | 4784 | 144 | 4870 | 221 | 4952 | 302 |
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| 4601 | 1326 | 4697 | 54 | 4788 | 148 | 4874 | 225 | 4956 | 306 |
| 4602 | 1327 | 4698 | 55 | 4789 | 149 | 4875 | 226 | 4957 | 307 |
| 4603 | 1328 | 4699 | 56 | 4790 | 150 | 4876 | 227 | 4958 | 308 |
| 4604 | 1329 | 4700 | 57 | 4793 | 153 | 4877 | 228 | 4962 | 309 |
| 4605 | 1330 | 4701 | 58 | 4794 | 154 | 4878 | 233 | 4963 | 310 |
| 4606 | 1331 | 4702 | 59 | 4796 | 155 | 4879 | 234 | 4964 | 311 |
| 4607 | 1332 | 4703 | 60 | 4797 | 156 | 4880 | 235 | 4965 | 312 |
| 4608 | 1333 | 4704 | 16 | 4798 | 157 | 4881 | 236 | 4966 | 313 |
| 4609 | 1334 | 4709 | 61 | 4799 | 158 | 4882 | 237 | 4967 | 314 |
| 4610 | 1335 | 4710 | 62 | 4800 | 159 | 4883 | 238 | 4968 | 315 |
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| 4612 | 1337 | 4712 | 64 | 4802 | 161 | 4885 | 240 | 4970 | 319 |
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| 4614 | 1339 | 4714 | 66 | 4804 | 164 | 4886a | 242 | 4972 | 321 |
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| 4620 | 1341 | 4716 | 68 | 4806 | 166 | 4888 | 244 | 4978 | 323 |
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| 4626 | 1347 | 4722 | 75 | 4812 | 172 | 4894 | 250 | 4984 | 330 |
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| 4643 | 1369 | 4736 | 97 | 4831 | 186 | 4912 | 264 | 4998 | 344 |
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| 5009 | 356 | 5108 | 426 | 5196 | 514 | 5287 | 586 | 5369 | 666 |
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| 5013 | 360 | 5112 | 430 | 5200 | 518 | 5291 | 590 | 5373 | 670 |
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| 5019 | 362 | 5117 | 433 | 5202 | 520 | 5293 | 592 | 5375 | 672 |
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| 5023 | 366 | 5121 | 437 | 5206 | 524 | 5301 | 606 | 5379 | 676 |
| 5029 | 367 | 5122 | 438 | 5207 | 525 | 5302 | 607 | 5380 | 677 |
| 5030 | 368 | 5123 | 439 | 5208 | 526 | 5303 | 608 | 5381 | 678 |
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| 5036 | 372 | 5127 | 443 | 5216 | 531 | 5307 | 612 | 5392 | 682 |
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| 5046 | 380 | 5137 | 451 | 5224 | 539 | 5319 | 620 | 5400 | 691 |
| 5050 | 381 | 5138 | 452 | 5225 | 540 | 5320 | 621 | 5401 | 692 |
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| 5052 | 283 | 5140 | 454 | 5227 | 542 | 5322 | 623 | 5403 | 694 |
| 5053 | 384 | 5141 | 456 | 5228 | 543 | 5323 | 624 | 5404 | 695 |
| 5054 | 385 | 5142* | 457 | 5229 | 544 | 5324 | 625 | 5405 | 696 |
| 5055 | 386 | 5143 | 458 | 5230 | 545 | 5325 | 626 | 5406 | 697 |
| 5056 | 387 | 5148 | 459 | 5231 | 546 | 5326 | 627 | 5407 | 698 |
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| 5086 | 409 | 5174 | 483 | 5251 | 568 | 5352 | 649 | 5433 | 720 |
| 5087 | 410 | 5175 | 484 | 5252 | 569 | 5353 | 650 | 5434 | 721 |
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| 5479 | 764 | 5552 | 837 | 5638 | 922 | 5728 | 994 | 5815 | 1064 |
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| 5485 | 770 | 5562 | 843 | 5644 | 930 | 5739 | 1000 | 5821 | 1070 |
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| 5896 | 1128 | 5990 | 1210 | 6088 | 1285 | 6160 | 1408 | 6234 | 1478 |
| 5900* | 1129 | 5991 | 1211 | 6089 | 1286 | 6161 | 1409 | 6235 | 1479 |
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| 5913 | 1143 | 6004 | 1224 | 6102 | 1299 | 6174 | 1422 | 6251 | 1492 |
| 5914 | 1144 | 6008 | 1225 | 6103 | 1300 | 6175 | 1423 | 6252 | 1493 |
| 5915 | 1145 | 6009 | 1226 | 6104 | 1301 | 6176 | 1424 | 6253 | 1494 |
| 5916 | 1146 | 6010 | 1227 | 6105 | 1302 | 6177 | 1425 | 6254 | 1495 |
| 5917 | 1147 | 6011 | 1228 | 6106 | 1303 | 6178 | 1426 | 6255 | 1496 |
| 5918 | 1148 | 6012 | 1229 | 6107 | 1304 | 6179 | 1427 | 6256 | 1497 |
| 5919 | 1149 | 6013 | 1230 | 6108 | 1305 | 6180 | 1428 | 6257 | 1498 |
| 5920 | 1150 | 6017 | 1231 | 6109 | 1306 | 6181 | 1429 | 6258 | 1499 |
| 5921 | 1151 | 6018 | 1232 | 6110 | 1307 | 6182 | 1430 | 6259 | 1500 |
| 5922 | 1152 | 6019 | 1233 | 6111 | 1308 | 6183 | 1431 | 6260 | 1501 |
| 5923 | 1153 | 6020 | 1234 | 6112 | 1309 | 6184 | 1432 | 6261 | 1502 |
| 5925* | 1159 | 6021 | 1235 | 6113 | 1310 | 6185 | 1433 | 6262 | 1503 |
| 5926* | 1160 | 6022 | 1239 | 6114 | 1311 | 6186 | 1434 | 6263 | 1504 |
| 5927* | 1161 | 6023 | 1240 | 6115 | 1312 | 6187 | 1435 | 6264 | 1505 |
| 5930* | 1162 | 6024 | 1241 | 6116 | 1313 | 6188 | 1436 | 6265 | 1506 |
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| 5932 | 1164 | 6026 | 1243 | 6118 | 1315 | 6190 | 1438 | 6267 | 1508 |
| 5933 | 1165 | 6027 | 1244 | 6119 | 1316 | 6191 | 1439 | 6268 | 1509 |
| 5934 | 1166 | 6028 | 1245 | 6120 | 1317 | 6192 | 1440 | 6269 | 1510 |
| 5935 | 1167 | 6029 | 1246 | 6121 | 1318 | 6193 | 1441 | 6270 | 1511 |
| 5936 | 1168 | 6030 | 1248 | 6125 | 1372 | 6194 | 1442 | 6271 | 1512 |
| 5937 | 1169 | 6034 | 1249 | 6126 | 1373 | 6195 | 1443 | 6272 | 1513 |
| 5938 | 1170 | 6035 | 1250 | 6127 | 1374 | 6196 | 1444 | 6273 | 1514 |
| 5939 | 1171 | 6036 | 1251 | 6128 | 1375 | 6197 | 1445 | 6274 | 1515 |
| 5940 | 1172 | 6037 | 1252 | 6129 | 1376 | 6198 | 1446 | 6275 | 1516 |
| 5941* | 1173 | 6038 | 1253 | 6130 | 1377 | 6199 | 1447 | 6276 | 1517 |
| 5942 | 1174 | 6040 | 1254 | 6130a | 1378 | 6199a | 1448 | 6277 | 1518 |
| 5943 | 1175 | 6041 | 1255 | 6131 | 1379 | 6200 | 1449 | 6278 | 1519 |
| 5944 | 1176 | 6042 | 1256 | 6132 | 1380 | 6201 | 1450 | 6279 | 1520 |
| 5945 | 1177 | 6043 | 1257 | 6133 | 1381 | 6202 | 1451 | 6280 | 1521 |
| 5946* | 1178 | 6044 | 1258 | 6134 | 1382 | 6203 | 1452 | 6281 | 1522 |
| 5947 | 1179 | 6045 | 1259 | 6135 | 1383 | 6204 | 1453 | 6282 | 1523 |
| 5948 | 1180 | 6046 | 1260 | 6136 | 1384 | 6205 | 1454 | 6283 | 1524 |

BALLINGER CROSS-REFERENCES.

| Bal. Code | Herein | Bal. Code | Herein | Bal. Code | Herein | Bal. Code | Herein | Bal. Code | Herein |
|-----------|--------|-----------|--------|-----------|--------|-----------|--------|-----------|--------|
| 6284 | 1525 | 6363 | 1595 | 6440 | 1670 | 6532 | 1749 | 6615 | 1822 |
| 6285 | 1526 | 6364 | 1596 | 6441 | 1671 | 6533 | 1750 | 6619 | 1847 |
| 6286 | 1527 | 6365 | 1597 | 6442 | 1672 | 6534 | 1751 | 6620 | 1848 |
| 6287 | 1528 | 6366 | 1598 | 6443 | 1673 | 6535 | 1752 | 6621 | 1849 |
| 6288 | 1529 | 6367 | 1599 | 6447 | 1674 | 6536 | 1753 | 6622 | 1850 |
| 6289 | 1530 | 6368 | 1600 | 6448 | 1675 | 6537 | 1754 | 6623 | 1851 |
| 6290 | 1531 | 6369 | 1601 | 6449 | 1676 | 6542 | 1755 | 6624 | 1852 |
| 6291 | 1532 | 6370 | 1602 | 6450 | 1677 | 6543 | 1758 | 6625 | 1853 |
| 6292 | 1532 | 6371 | 1603 | 6451 | 1678 | 6544 | 1759 | 6626 | 1854 |
| 6296 | 1534 | 6372 | 1604 | 6452 | 1679 | 6545 | 1761 | 6627 | 1855 |
| 6297 | 1535 | 6373 | 1605 | 6453 | 1680 | 6546* | 1762 | 6628 | 1856 |
| 6298 | 1536 | 6374 | 1606 | 6454 | 1681 | 6547* | 1763 | 6631 | 1857 |
| 6299 | 1537 | 6375 | 1607 | 6455 | 1682 | 6548* | 1764 | 6632 | 1858 |
| 6300 | 1538 | 6376 | 1608 | 6460 | 1683 | 6549 | 1765 | 6633 | 1859 |
| 6301 | 1539 | 6377 | 1609 | 6461 | 1684 | 6550 | 1766 | 6634 | 1860 |
| 6302 | 1540 | 6381 | 1610 | 6462 | 1685 | 6551 | 1767 | 6635 | 1861 |
| 6303 | 1541 | 6382 | 1611 | 6463 | 1686 | 6552 | 1768 | 6636 | 1862 |
| 6304 | 1542 | 6383 | 1612 | 6464 | 1687 | 6553 | 1769 | 6637 | 1863 |
| 6308 | 1543 | 6384 | 1613 | 6465 | 1688 | 6554 | 1770 | 6640 | 1867 |
| 6309 | 1544 | 6385 | 1614 | 6466 | 1689 | 6555 | 1771 | 6641 | 1868 |
| 6310 | 1545 | 6386 | 1615 | 6467 | 1690 | 6556 | 1772 | 6642 | 1869 |
| 6311 | 1546 | 6387 | 1616 | 6468 | 1691 | 6557 | 1773 | 6643 | 1870 |
| 6312 | 1547 | 6388 | 1617 | 6469 | 1692 | 6558 | 1774 | 6644 | 1871 |
| 6313 | 1548 | 6389 | 1618 | 6474 | 1693 | 6559 | 1775 | 6645 | 1872 |
| 6314 | 1549 | 6390 | 1619 | 6475 | 1694 | 6560 | 1776 | 6646 | 1873 |
| 6315 | 1550 | 6391 | 1620 | 6476 | 1695 | 6561* | 1777 | 6647 | 1874 |
| 6316 | 1551 | 6395 | 1621 | 6480* | 1696 | 6565 | 1778 | 6648 | 1875 |
| 6317 | 1552 | 6396 | 1626 | 6481 | 1697 | 6566 | 1779 | 6649 | 1876 |
| 6318 | 1553 | 6397 | 1627 | 6482 | 1698 | 6567 | 1780 | 6650 | 1877 |
| 6319 | 1554 | 6398 | 1628 | 6483 | 1699 | 6568 | 1781 | 6651 | 1878 |
| 6320 | 1555 | 6399 | 1629 | 6487 | 1708 | 6569 | 1782 | 6652 | 1879 |
| 6321 | 1556 | 6400 | 1630 | 6488 | 1709 | 6570 | 1783 | 6653 | 1880 |
| 6322 | 1557 | 6401 | 1631 | 6489 | 1710 | 6571 | 1784 | 6654 | 1881 |
| 6323 | 1558 | 6402 | 1637 | 6490 | 1711 | 6572 | 1785 | 6655 | 1882 |
| 6324 | 1559 | 6403* | 1632 | 6491 | 1712 | 6573 | 1786 | 6656 | 1883 |
| 6325 | 1560 | 6404 | 1635 | 6492 | 1713 | 6574 | 1787 | 6657 | 1884 |
| 6326 | 1561 | 6405 | 1636 | 6493 | 1714 | 6575 | 1788 | 6658 | 1885 |
| 6327 | 1562 | 6405a | 1639 | 6494 | 1715 | 6576 | 1789 | 6659 | 1886 |
| 6328 | 1563 | 6405b | 1640 | 6500* | 1716 | 6580 | 1790 | 6660 | 1887 |
| 6329 | 1564 | 6406 | 1641 | 6501 | 1717 | 6581 | 1791 | 6661 | 1888 |
| 6330 | 1565 | 6407 | 1642 | 6502 | 1718 | 6582 | 1792 | 6662 | 1889 |
| 6331 | 1566 | 6408 | 1633 | 6503 | 1719 | 6583 | 1793 | 6664 | 1890 |
| 6332 | 1567 | 6409 | 1643 | 6504 | 1720 | 6584 | 1794 | 6666 | 1925 |
| 6333 | 1568 | 6410 | 1644 | 6505 | 1721 | 6585 | 1795 | 6667 | 1926 |
| 6334 | 1569 | 6411 | 1645 | 6506 | 1722 | 6588 | 1796 | 6668 | 1927 |
| 6335 | 1570 | 6412 | 1646 | 6507 | 1723 | 6589 | 1797 | 6669 | 1928 |
| 6336 | 1571 | 6413 | 1647 | 6508 | 1724 | 6590 | 1798 | 6670 | 1929 |
| 6337 | 1572 | 6414 | 1648 | 6509 | 1725 | 6591 | 1799 | 6671 | 1930 |
| 6338 | 1573 | 6415 | 1649 | 6510 | 1726 | 6592 | 1800 | 6672 | 1931 |
| 6339 | 1574 | 6416 | 1650 | 6511 | 1727 | 6593 | 1801 | 6673 | 1932 |
| 6340 | 1575 | 6417 | 1651 | 6512 | 1728 | 6594 | 1802 | 6674 | 1933 |
| 6341 | 1576 | 6418 | 1652 | 6513* | 1729 | 6595 | 1803 | 6675 | 1934 |
| 6342 | 1577 | 6419 | 1653 | 6514* | 1730 | 6596 | 1804 | 6678 | 1935 |
| 6343 | 1578 | 6420 | 1634 | 6515 | 1731 | 6597 | 1805 | 6680 | 1936 |
| 6347 | 1579 | 6424 | 1654 | 6516 | 1732 | 6598 | 1806 | 6681 | 1937 |
| 6348 | 1580 | 6425 | 1655 | 6517 | 1733 | 6600 | 1807 | 6682 | 1938 |
| 6349 | 1581 | 6426 | 1656 | 6518* | 1734 | 6601 | 1808 | 6683 | 1939 |
| 6350 | 1582 | 6427 | 1657 | 6519 | 1735 | 6602 | 1809 | 6684 | 1940 |
| 6351 | 1583 | 6428 | 1658 | 6520 | 1736 | 6603 | 1810 | 6685 | 1941 |
| 6352 | 1584 | 6429 | 1659 | 6521 | 1737 | 6604 | 1811 | 6686 | 1942 |
| 6353 | 1585 | 6430 | 1660 | 6522 | 1738 | 6605 | 1812 | 6687 | 1943 |
| 6354 | 1586 | 6431 | 1661 | 6523 | 1739 | 6606* | 1813 | 6688 | 1944 |
| 6355 | 1587 | 6432 | 1662 | 6524 | 1740 | 6607 | 1814 | 6689 | 1945 |
| 6356 | 1588 | 6433 | 1663 | 6525 | 1741 | 6608 | 1815 | 6690 | 1946 |
| 6357 | 1589 | 6434* | 1664 | 6526 | 1742 | 6609 | 1816 | 6691 | 1947 |
| 6358 | 1590 | 6435* | 1665 | 6527 | 1743 | 6610 | 1817 | 6692 | 1948 |
| 6359 | 1591 | 6436 | 1666 | 6528 | 1744 | 6611 | 1818 | 6695 | 1949 |
| 6360 | 1592 | 6437* | 1667 | 6529 | 1745 | 6612 | 1819 | 6696 | 1950 |
| 6361 | 1593 | 6438 | 1668 | 6530 | 1747 | 6613 | 1820 | 6697 | 1951 |
| 6362 | 1594 | 6439 | 1669 | 6531 | 1748 | 6614 | 1821 | 6698 | 1952 |

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| Bal. Code | Herein | Bal. Code | Herein | Bal. Code | Herein | Bal. Code | Herein | Bal. Code | Herein |
|-----------|--------|-----------|--------|-----------|--------|-----------|--------|-----------|--------|
| 6699 | 1953 | 6786 | 2011 | 6869 | 2081 | 6945 | 2157 | 7039 | 2730 |
| 6700 | 1954 | 6788 | 2012 | 6870 | 2082 | 6946 | 2158 | 7040 | 2731 |
| 6701 | 1955 | 6789 | 2013 | 6871 | 2083 | 6947 | 2159 | 7041 | 2732 |
| 6702 | 1956 | 6790 | 2014 | 6872 | 2084 | 6948 | 2160 | 7042 | 2733 |
| 6703 | 1957 | 6791 | 2015 | 6873 | 2085 | 6949 | 2161 | 7043 | 2734 |
| 6704 | 1958 | 6792 | 2016 | 6874 | 2086 | 6950 | 2162 | 7044 | 2735 |
| 6705 | 1959 | 6793 | 2017 | 6875 | 2087 | 6951 | 2163 | 7045 | 2736 |
| 6706 | 1960 | 6794 | 2018 | 6876 | 2088 | 6952 | 2164 | 7046 | 2737 |
| 6707 | 1961 | 6795 | 2019 | 6877 | 2089 | 6953 | 2165 | 7047 | 2738 |
| 6708 | 1962 | 6796 | 2020 | 6878 | 2090 | 6954 | 2166 | 7048 | 2739 |
| 6709 | 1963 | 6797 | 2021 | 6879 | 2091 | 6955 | 2167 | 7049* | 2740 |
| 6710 | 1964 | 6800 | 2022 | 6880 | 2092 | 6956 | 2168 | 7050 | 2741 |
| 6711 | 1965 | 6801 | 2023 | 6884 | 2093 | 6957 | 2169 | 7051 | 2742 |
| 6712 | 1966 | 6802* | 2024 | 6885 | 2094 | 6958 | 2170 | 7052 | 2743 |
| 6715 | 1891 | 6805 | 2025 | 6886 | 2095 | 6960 | 2171 | 7053 | 2744 |
| 6716 | 1892 | 6806 | 2026 | 6887 | 2096 | 6961 | 2172 | 7054 | 2745 |
| 6717 | 1893 | 6807 | 2027 | 6888 | 2097 | 6965 | 2181 | 7055 | 2746 |
| 6718 | 1894 | 6808 | 2028 | 6889 | 2098 | 6966 | 2182 | 7056 | 2747 |
| 6719 | 1895 | 6809 | 2029 | 6890 | 2099 | 6967 | 2183 | 7057 | 2748 |
| 6720 | 1896 | 6810 | 2030 | 6891 | 2100 | 6968 | 2184 | 7058 | 2749 |
| 6721 | 1897 | 6811 | 2031 | 6892 | 2101 | 6969 | 2185 | 7059 | 2750 |
| 6724 | 1967 | 6812 | 2032 | 6893 | 2102 | 6970 | 2186 | 7060 | 2751 |
| 6725 | 1968 | 6813 | 2033 | 6894 | 2103 | 6975 | 2187 | 7061 | 2752 |
| 6726 | 1969 | 6814 | 2034 | 6895 | 2104 | 6976 | 2188 | 7062 | 2753 |
| 6727 | 1970 | 6815 | 2035 | 6896 | 2105 | 6977 | 2189 | 7063 | 2754 |
| 6728 | 1971 | 6816 | 2036 | 6897 | 2106 | 6978 | 2190 | 7064 | 2755 |
| 6729 | 1972 | 6817 | 2037 | 6898 | 2107 | 6979 | 2196 | 7065 | 2756 |
| 6730 | 1973 | 6818 | 2038 | 6899 | 2108 | 6980 | 2197 | 7066* | 2757 |
| 6731 | 1974 | 6819 | 2039 | 6900 | 2109 | 6981 | 2198 | 7067 | 2758 |
| 6732 | 1975 | 6820 | 2040 | 6901 | 2110 | 6982 | 2199 | 7068 | 2759 |
| 6733 | 1976 | 6821 | 2041 | 6902 | 2111 | 6983 | 2200 | 7069 | 2760 |
| 6734 | 1977 | 6824 | 2042 | 6903 | 2112 | 6984 | 2201 | 7070 | 2761 |
| 6735 | 1978 | 6825 | 2043 | 6904 | 2113 | 6985 | 2202 | 7071 | 2762 |
| 6736 | 1979 | 6826 | 2044 | 6905 | 2114 | 6986 | 2203 | 7073 | 2763 |
| 6740 | 1898 | 6827 | 2045 | 6906 | 2115 | 6987 | 2204 | 7074 | 2764 |
| 6741 | 1899 | 6828 | 2046 | 6907 | 2116 | 6988 | 2205 | 7075 | 2765 |
| 6742 | 1900 | 6829 | 2047 | 6908 | 2117 | 6989 | 2206 | 7076 | 2766 |
| 6743 | 1901 | 6830 | 2048 | 6909 | 2118 | 6990 | 2207 | 7077 | 2767 |
| 6744 | 1902 | 6831 | 2049 | 6910 | 2119 | 6991 | 2208 | 7078 | 2768 |
| 6745 | 1903 | 6832 | 2050 | 6911 | 2120 | 6992 | 2209 | 7079 | 2769 |
| 6746 | 1904 | 6833 | 2051 | 6912 | 2121 | 6993* | 2210 | 7080 | 2770 |
| 6747 | 1905 | 6834 | 2052 | 6913 | 2122 | 6994 | 2212 | 7081 | 2771 |
| 6748 | 1906 | 6835 | 2053 | 6914 | 2123 | 6996 | 2222 | 7082 | 2772 |
| 6749 | 1907 | 6839 | 2054 | 6915 | 2124 | 6997 | 2223 | 7083 | 2773 |
| 6750 | 1908 | 6840 | 2055 | 6916 | 2125 | 6998 | 2224 | 7084 | 2774 |
| 6751 | 1909 | 6841 | 2056 | 6917 | 2126 | 7004 | 2231 | 7085 | 2775 |
| 6754* | 1910 | 6842 | 2057 | 6918 | 2127 | 7005 | 2232 | 7086 | 2776 |
| 6755 | 1911 | 6843 | 2058 | 6919 | 2128 | 7006 | 2233 | 7087 | 2777 |
| 6756 | 1912 | 6844 | 2059 | 6920 | 2129 | 7007 | 2234 | 7088 | 2778 |
| 6757 | 1913 | 6845 | 2060 | 6921 | 2130 | 7008 | 2235 | 7089 | 2779 |
| 6758 | 1914 | 6846 | 2061 | 6925 | 2131 | 7009 | 2236 | 7094 | 2784 |
| 6759 | 1915 | 6847 | 2062 | 6926 | 2132 | 7010 | 2237 | 7095 | 2785 |
| 6760 | 1916 | 6848 | 2063 | 6927 | 2133 | 7011 | 2238 | 7096 | 2786 |
| 6761 | 1917 | 6849 | 2064 | 6928 | 2134 | 7012 | 2239 | 7097 | 2787 |
| 6762 | 1918 | 6850 | 2065 | 6929 | 2135 | 7013 | 2240 | 7098 | 2788 |
| 6763 | 1919 | 6851 | 2066 | 6930 | 2137 | 7015 | 2241 | 7099 | 2789 |
| 6764 | 1920 | 6852 | 2067 | 6931 | 2138 | 7016 | 2242 | 7100 | 2790 |
| 6765 | 1921 | 6853 | 2068 | 6932 | 2139 | 7017 | 2243 | 7101 | 2791 |
| 6766 | 1922 | 6854 | 2069 | 6933 | 2140 | 7018 | 2244 | 7103* | 2792 |
| 6767 | 1923 | 6855 | 2070 | 6934 | 2141 | 7019 | 2245 | 7104 | 2794 |
| 6768 | 1924 | 6856 | 2071 | 6935 | 2142 | 7020 | 2246 | 7105 | 2795 |
| 6773 | 2722 | 6857 | 2072 | 6936 | 2143 | 7022 | 2247 | 7106 | 2796 |
| 6774 | 2723 | 6858 | 2073 | 6937 | 2144 | 7023 | 2248 | 7107 | 2797 |
| 6775 | 2724 | 6859 | 2074 | 6938 | 2145 | 7024 | 2249 | 7108 | 2798 |
| 6776 | 2725 | 6860 | 2075 | 6939 | 2146 | 7025 | 2250 | 7109* | 2799 |
| 6780 | 2005 | 6861 | 2076 | 6940 | 2147 | 7026 | 2251 | 7111 | 2800 |
| 6782 | 2007 | 6865 | 2077 | 6941 | 2148 | 7035 | 2726 | 7112 | 2802 |
| 6783 | 2008 | 6866 | 2078 | 6942 | 2151 | 7036 | 2727 | 7113 | 2803 |
| 6784 | 2009 | 6867 | 2079 | 6943 | 2152 | 7037 | 2728 | 7114 | 2804 |
| 6785 | 2010 | 6868 | 2080 | 6944 | 2156 | 7038* | 2729 | 7115 | 2805 |

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|-----------|--------|-----------|--------|-----------|--------|-----------|--------|-----------|--------|
| 7116 | 2806 | 7174 | 3340 | 7235 | 2898 | 7294 | 2950 | 7368 | 5386 |
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| 7118 | 2807 | 7176 | 2847 | 7237 | 2900 | 7296 | 2952 | 7370 | 5388 |
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| 7122 | 2811 | 7187 | 2853 | 7241 | 2906 | 7300 | 2955 | 7376 | 5383 |
| 7123 | 2812 | 7188 | 2854 | 7242 | 2907 | 7301 | 2956 | 7378 | 5208 |
| 7124 | 2813 | 7189 | 2855 | 7243 | 2908 | 7302 | 2719 | 7381 | 5195 |
| 7125 | 2814 | 7190 | 2856 | 7244 | 2909 | 7303 | 8293 | 7383 | 5197 |
| 7127 | 3257 | 7191 | 2857 | 7245 | 2910 | 7304 | 8294 | 7384 | 5198 |
| 7128 | 2816 | 7192 | 2858 | 7246 | 2911 | 7305 | 2957 | 7385 | 5199 |
| 7129 | 2817 | 7193 | 2859 | 7247 | 2912 | 7306 | 2958 | 7386 | 5200 |
| 7130 | 2818 | 7194 | 2860 | 7248 | 2913 | 7310 | 2960 | 7389 | 5201 |
| 7131 | 2819 | 7195 | 2861 | 7249 | 2914 | 7311 | 2961 | 7390 | 5202 |
| 7132 | 2820 | 7196 | 2862 | 7250 | 2915 | 7312 | 2962 | 7391 | 5203 |
| 7133 | 2702 | 7197 | 2863 | 7251 | 2916 | 7313 | 2963 | 7392 | 5204 |
| 7136 | 2821 | 7198 | 2864 | 7252 | 2918 | 7314 | 2964 | 7393 | 5205 |
| 7137 | 2822 | 7199 | 2865 | 7253 | 2919 | 7315 | 2965 | 7394 | 5206 |
| 7138 | 2823 | 7200 | 2866 | 7254 | 2920 | 7316 | 2966 | 7395 | 5207 |
| 7139 | 2824 | 7201 | 2867 | 7255 | 2921 | 7317 | 2967 | 7397* | 5188 |
| 7140 | 2825 | 7202 | 2868 | 7256 | 2922 | 7318 | 2715 | 7398* | 5189 |
| 7141 | 2826 | 7203 | 2869 | 7257 | 6284 | 7321 | 8385 | 7403 | 8717 |
| 7142 | 2827 | 7204 | 2870 | 7258 | 6285 | 7322 | 2969 | 7404 | 2982 |
| 7144 | 2828 | 7205 | 2871 | 7259 | 2923 | 7323* | 2970 | 7405 | 2983 |
| 7145 | 2830 | 7206 | 2872 | 7260 | 2924 | 7324 | 2971 | 7406 | 3284 |
| 7146 | 2703 | 7207 | 2873 | 7261 | 2925 | 7325 | 5342 | 7407 | 3285 |
| 7146a | 2831 | 7208 | 2874 | 7262 | 5315 | 7326 | 5343 | 7408 | 3286 |
| 7147 | 2832 | 7209 | 2875 | 7263 | 5316 | 7327 | 5344 | 7409 | 3287 |
| 7148 | 5144 | 7210 | 2876 | 7264 | 2926 | 7334 | 2972 | 7410 | 3288 |
| 7149 | 5145 | 7211 | 2877 | 7265 | 2927 | 7335 | 2973 | 7415 | 4958 |
| 7150 | 5146 | 7212 | 2878 | 7266 | 2928 | 7336 | 2974 | 7416 | 4959 |
| 7151 | 5147 | 7213 | 2879 | 7267 | 5317 | 7337 | 2975 | 7417 | 4960 |
| 7152 | 5148 | 7214 | 2880 | 7268 | 2929 | 7338 | 2976 | 7418 | 4961 |
| 7153 | 5149 | 7215 | 2881 | 7269 | 2930 | 7339 | 2977 | 7419 | 4962 |
| 7154 | 2833 | 7216 | 2882 | 7275 | 2936 | 7340 | 2978 | 7420* | 4963 |
| 7155 | 2834 | 7217 | 2883 | 7276 | 2937 | 7341 | 2979 | 7421 | 4964 |
| 7156 | 2835 | 7218 | 2884 | 7277 | 2938 | 7342 | 2980 | 7422 | 4965 |
| 7157 | 2704 | 7219 | 2885 | 7278 | 2939 | 7343 | 2981 | 7423 | 4966 |
| 7158 | 2708 | 7220 | 2886 | 7279 | 2940 | 7347* | 5354 | 7424 | 4967 |
| 7159 | 3289 | 7221 | 2887 | 7280 | 2941 | 7349 | 5353 | 7425 | 4968 |
| 7160 | 2836 | 7226 | 2889 | 7281 | 2942 | 7350 | 5352 | 7426 | 4969 |
| 7161 | 3265 | 7227 | 2890 | 7282 | 2943 | 7353* | 5356 | 7427 | 4970 |
| 7165 | 2843 | 7228 | 2891 | 7283 | 2944 | 7354 | 5358 | 7428 | 4971 |
| 7167 | 2844 | 7229 | 2892 | 7284 | 2945 | 7355 | 5357 | 7435 | 2984 |
| 7168 | 2845 | 7230 | 2893 | 7285 | 2946 | 7358* | 5372 | 7436 | 2985 |
| 7169 | 2711 | 7231 | 2894 | 7286 | 2947 | 7362 | 5358½ | 7437 | 2986 |
| 7170 | 2712 | 7232 | 2153 | 7287 | 6566 | 7364* | 5325 | 7438 | 2987 |
| 7171 | 2713 | | 2895 | 7288 | 2948 | 7366* | 5326 | 7439 | 2988 |
| 7172 | 2714 | 7233 | 2896 | 7293 | 2949 | 7367 | 5355 | 7440* | 2989 |
| 7173 | 3123 | 7234 | 2897 | | | | | | |

EARLIER LAWS NOT IN BALLINGER'S CODE.

SESSION LAWS.

| 1869. | | | 1875. | | | 1891. | | | 1895. | | |
|-------|------|--------|-------|------|--------|-------|------|--------|-------|------|--------|
| Page | Sec. | Herein | Page | Sec. | Herein | Page | Sec. | Herein | Page | Sec. | Herein |
| 408 | 2 | 5039 | 115 | 1 | 2252 | 165 | 1 | 463 | 48 | 3 | 5265 |
| | | | | | | | | | 72 | 12 | 5448g |
| | | | | | | | | | 73 | 15 | 5448l |
| 1873. | | | 1890. | | | 1893. | | | 1897. | | |
| Page | Sec. | Herein | Page | Sec. | Herein | Page | Sec. | Herein | Page | Sec. | Herein |
| 438 | 3 | 7054 | 98 | 3 | 455 | 175 | 1 | 3879 | 182 | 97 | 9255 |
| | | | | | | 222 | 2 | 4923 | | | |

CODE OF 1881.

| Sec. | Herein | Sec. | Herein | Sec. | Herein | Sec. | Herein |
|------|--------|------|--------|------|--------|------|--------|
| 323 | 462 | 502 | 271 | 3126 | 6907 | 3133 | 6914 |
| 342 | 529 | 503 | 271½ | 3127 | 6908 | 3134 | 6915 |
| 497 | 266 | 504 | 272 | 3128 | 6909 | 3135 | 6916 |
| 498 | 267 | 1068 | 2136 | 3129 | 6910 | 3136 | 6917 |
| 499 | 268 | 3047 | 5655 | 3130 | 6911 | 3137 | 6918 |
| 500 | 269 | 3065 | 3893 | 3131 | 6912 | 3138 | 6919 |
| 501 | 270 | 3125 | 6906 | 3132 | 6913 | 3139 | 6920 |

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SESSION LAWS OF 1899.

| Page | Sec. | Herein | Page | Sec. | Herein | Page | Sec. | Herein | Page | Sec. | Herein |
|------|------|--------|------|------|--------|------|------|--------|------|------|--------|
| 12 | 1 | 6655 | 66 | 28 | 5447c | 110 | 1 | 7870 | 157 | 4 | 7890 |
| 14 | 2 | 6659 | 66 | 29 | 5447d | 112 | 1 | 7490 | 157 | 5 | 7891 |
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| 23 | 1 | 5656 | 67 | 1 | 5057 | 114 | 3 | 7492 | 158 | 2 | 3661 |
| 23 | 1 | 8718 | 68 | 3 | 5059 | 115 | 2 | 7991 | 158 | 3 | 3662 |
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| 26 | 1 | 3797 | 69 | 1 | 7358 | 116 | 4 | 7993 | 159 | 5 | 3664 |
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| 40 | 3 | 6994 | 71 | 8 | 7365 | 120 | 1 | 6751 | 163 | 2 | 6573 |
| 41 | 4 | 6995 | 71 | 9 | 7366 | 120 | 2 | 6752 | 163 | 3 | 6574 |
| 41 | 1 | 7760 | 72 | 11 | 7368 | 120 | 3 | 6753 | 164 | 1 | 6500 |
| 41 | 2 | 7761 | 72 | 12 | 7369 | 122 | 1 | 2709 | 164 | 2 | 6501 |
| 42 | 3 | 7762 | 73 | 13 | 7370 | 122 | 2 | 2709 | 164 | 3 | 6502 |
| 42 | 4 | 7763 | 73 | 14 | 7371 | 126 | 1 | 7751 | 164 | 4 | 6503 |
| 42 | 5 | 7764 | 74 | 1 | 3038 | 127 | 2 | 7752 | 165 | 5 | 6504 |
| 42 | 6 | 7765 | 76 | 8 | 3044 | 127 | 3 | 7753 | 165 | 6 | 6505 |
| 43 | 1 | 9246 | 79 | 1 | 1734 | 128 | 4 | 7754 | 165 | 7 | 6506 |
| 43 | 2 | 9247 | 80 | 1 | 3045 | 128 | 1 | 6250 | 165 | 8 | 6507 |
| 44 | 3 | 9248 | 80 | 2 | 3046 | 128 | 2 | 6251 | 166 | 9 | 6508 |
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| 45 | 2 | 3644 | 81 | 4 | 3048 | 129 | 4 | 6253 | 167 | 11 | 6510 |
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| 46 | 4 | 3646 | 82 | 6 | 3050 | 129 | 6 | 457 | 168 | 13 | 6512 |
| 46 | 5 | 3647 | 83 | 7 | 3051 | 129 | 7 | 6255 | 168 | 1 | 7732 |
| 47 | 1 | 6824 | 82 | 8 | 3052 | 130 | 8 | 6256 | 169 | 1 | 5737 |
| 47 | 7 | 3651 | 83 | 9 | 3053 | 132 | 1 | 4346 | 170 | 2 | 5738 |
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| 49 | 2 | 8683 | 85 | 1 | 1121 | 135 | 2 | 7520 | 174 | 1 | 3704 |
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| 52 | 1 | 3175 | 87 | 5 | 584 | 136 | 5 | 7523 | 176 | 1 | 8930 |
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| 57 | 3 | 5446d | 89 | 8 | 595 | 136 | 9 | 7527 | 186 | 2 | 2706 |
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| 59 | 5 | 5446f | 90 | 10 | 597 | 138 | 1 | 6761 | 187 | 1 | 4095 |
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| 61 | 11 | 5448f | 92 | 13 | 600 | 141 | 2 | 9528 | 204 | 11 | 5216 |
| 61 | 12 | 5448h | 93 | 14 | 601 | 141 | 3 | 9529 | 204 | 12 | 5217 |
| 62 | 14 | 5445b | 93 | 15 | 602 | 143 | 1 | 1173 | 205 | 13 | 5218 |
| 62 | 15 | 5448k | 94 | 16 | 603 | 144 | 1 | 188 | 205 | 14 | 5220 |
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| 62 | 18 | 5444c | 100 | 1 | 3723 | 146 | 2 | 636 | 205 | 16 | 5222 |
| 63 | 19 | 5444d | 101 | 2 | 3724 | 147 | 2 | 9083 | 205 | 17 | 5223 |
| 63 | 21 | 5448m | 102 | 1 | 7483 | 148 | 1 | 3771 | 205 | 18 | 5224 |
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| 63 | 23 | 5446b | 105 | 1 | 6650 | 148 | 1 | 3789 | 206 | 20 | 5226 |
| 64 | 24 | 5446g | 106 | 1 | 8341 | 155 | 1 | 8780 | 216 | 1 | 8445 |
| 65 | 25 | 5447 | 107 | 2 | 8342 | 156 | 1 | 7887 | 216 | 2 | 8446 |
| 65 | 26 | 5447a | 109 | 1 | 151 | 156 | 2 | 7888 | 217 | 3 | 8447 |
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| 263 | 7 | 6360 | 341 | 6 | 3397 | 354 | 76 | 3467 | 366 | 146 | 3536 |
| 263 | 8 | 6343 | 342 | 7 | 3398 | 354 | 77 | 3468 | 366 | 147 | 3537 |
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| 272 | 1 | 6808 | 343 | 13 | 3404 | 355 | 83 | 3474 | 367 | 153 | 3543 |
| 273 | 2 | 6809 | 343 | 14 | 3405 | 355 | 84 | 3475 | 367 | 154 | 3544 |
| 273 | 3 | 6810 | 343 | 15 | 3406 | 355 | 85 | 3475½ | 367 | 155 | 3545 |
| 273 | 4 | 6811 | 344 | 16 | 3407 | 356 | 86 | 3476 | 368 | 156 | 3546 |
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| 292 | 9 | 9228 | 347 | 33 | 3424 | 358 | 103 | 3493 | 370 | 173 | 3563 |
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| 295 | 12 | 9236 | 347 | 36 | 3427 | 358 | 106 | 3496 | 370 | 176 | 3566 |
| 298 | 17 | 9259 | 348 | 37 | 3428 | 359 | 107 | 3497 | 370 | 177 | 3567 |
| 302 | 20 | 9262 | 348 | 38 | 3429 | 359 | 108 | 3498 | 370 | 178 | 3568 |
| 303 | 22 | 9265 | 348 | 39 | 3430 | 359 | 109 | 3499 | 371 | 179 | 3569 |
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| 13 | 1 | 8334 | 107 | 8 | 4233 | 184 | 5 | 3855 | 254 | 8 | 8938 |
| 16 | 1 | 2888 | 108 | 9 | 4234 | 185 | 6 | 3856 | 254 | 10 | 8940 |
| 19 | 1 | 3135 | 108 | 10 | 4235 | 185 | 7 | 3857 | 256 | 12 | 8943 |
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| 20 | 5 | 3139 | 109 | 14 | 4239 | 190 | 3 | 5668 | 258 | 1 | 7348 |
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| 23 | 1 | 1236 | 110 | 18 | 4243 | 191 | 7 | 5672 | 260 | 2 | 6405 |
| 23 | 2 | 1237 | 110 | 19 | 4244 | 192 | 1 | 6854½ | 260 | 3 | 6406 |
| 24 | 3 | 1238 | 111 | 22 | 4247 | 192 | 1 | 5609 | 260 | 4 | 6407 |
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| 25 | 2 | 2717 | 112 | 24 | 4249 | 197 | 7 | 5445 | 262 | 2 | 2701 |
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| 27 | 2 | 6395 | 113 | 27 | 4257 | 201 | 2 | 5627 | 263 | 2 | 7102 |
| 28 | 1 | 1716 | 113 | 28 | 4258 | 201 | 3 | 5628 | 263 | 3 | 7103 |
| 29 | 2 | 1729 | 113 | 29 | 4259 | 202 | 4 | 5629 | 263 | 4 | 7104 |
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| 33 | 1 | 6392 | 114 | 31 | 4261 | 203 | 6 | 5631 | 265 | 1 | 9114 |
| 33 | 2 | 6393 | 114 | 32 | 4262 | 215 | 1 | 9071 | 265 | 2 | 9115 |
| 34 | 1 | 2793 | 114 | 33 | 4263 | 215 | 2 | 9072 | 265 | 3 | 9116 |
| 35 | 1 | 6396 | 114 | 34 | 4264 | 215 | 3 | 9073 | 271 | 2 | 5159 |
| 36 | 2 | 6397 | 114 | 35 | 4265 | 218 | 1 | 6791 | 272 | 1 | 4015 |
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| 72 | 11 | 9191 | 134 | 4 | 6555 | 222 | 1 | 5296 | 287 | 5 | 4766 |
| 74 | 16 | 9196 | 134 | 5 | 6556 | 223 | 2 | 5297 | 287 | 6 | 4902 |
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| 77 | 2 | 42 | 135 | 7 | 6558 | 224 | 4 | 5299 | 288 | 8 | 4919 |
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| 92 | 3 | 6886 | 136 | 1 | 1184 | 226 | 1 | 4107 | 292 | 1 | 7367 |
| 93 | 4 | 6887 | 137 | 2 | 1185 | 228 | 2 | 3203 | 294 | 1 | 6765 |
| 93 | 5 | 6888 | 137 | 3 | 1186 | 229 | 3 | 3208 | 298 | 1 | 4963 |
| 93 | 6 | 6889 | 146 | 21 | 3240 | 236 | 1 | 5406 | 299 | 1 | 9506 |
| 93 | 7 | 6890 | 147 | 22 | 3241 | 237 | 2 | 5407 | 299 | 2 | 9507 |
| 96 | 5 | 5555 | 150 | 1 | 7574 | 238 | 3 | 5420 | 300 | 3 | 9508 |
| 96 | 6 | 5556 | 151 | 2 | 7575 | 238 | 1 | 8029 | 300 | 1 | 7084 |
| 96 | 7 | 5557 | 152 | 3 | 7576 | 239 | 2 | 8030 | 301 | 1 | 2829 |
| 98 | 1 | 6616 | 155 | 4 | 7577 | 239 | 3 | 8031 | 302 | 1 | 3266 |
| 98 | 2 | 6617 | 156 | 5 | 7578 | 240 | 1 | 7531 | 302 | 2 | 3267 |
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| 99 | 5 | 6620 | 172 | 4 | 5048 | 242 | 2 | 7550 | 303 | 5 | 3270 |
| 99 | 6 | 6621 | 173 | 1 | 7062 | 242 | 2 | 7551 | 304 | 6 | 3271 |
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| 105 | 1 | 1756 | 174 | 3 | 7064 | 243 | 3 | 7533 | 304 | 8 | 3273 |
| 105 | 2 | 1757 | 175 | 1 | 7840 | 243 | 4 | 7553 | 304 | 9 | 3274 |
| 106 | 1 | 4226 | 176 | 2 | 7841 | 244 | 5 | 7554 | 304 | 10 | 3275 |
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| 307 | 1 | 3640 ¹ / ₂ | 321 | 1 | 2990 | 349 | 5 | 7010 | 362 | 11 | 6176 |
| 308 | 2 | 3641 | 324 | 1 | 5384 | 350 | 6 | 7011 | 362 | 12 | 6177 |
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| 37 | 1 | 6628 | 66 | 2 | 3008 | 92 | 2 | 8928 | 119 | 4 | 3736 |
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| 38 | 2 | 7057 | 68 | 1 | 2917 | 99 | 2 | 7003 | 122 | 2 | 7572 |

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| 73 | 4 | 5046 | 179 | 2 | 4121 | 244 | 1 | 3344 | 327 | 11 | 5286 |
| 76 | 1 | 8530 | 180 | 1 | 6408 | 245 | 2 | 3345 | 327 | 12 | 5287 |
| 77 | 1 | 8531 | 180 | 2 | 6409 | 247 | 1 | 5330 | 330 | 1 | 9066 |
| 77 | 1 | 6669 | 180 | 3 | 6410 | 247 | 2 | 5331 | 330 | 2 | 9067 |
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| 78 | 2 | 6029 | 182 | 5 | 6412 | 248 | 4 | 5333 | 331 | 4 | 9069 |
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| 27 | 1 | 5081 | 79 | 2 | 9162 | 132 | 1 | 9141 | 169 | 1 | 8730 |
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| 31 | 1 | 3363 | 80 | 5 | 9165 | 134 | 4 | 9144 | 170 | 1 | 7511 |
| 32 | 1 | 9249 | 81 | 6 | 9166 | 134 | 5 | 9145 | 170 | 2 | 7512 |
| 32 | 2 | 9250 | 81 | 7 | 9167 | 136 | 6 | 9146 | 171 | 1 | 4250 |
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| 33 | 2 | 2174 | | | 497 | 137 | 8 | 9148 | 173 | 1 | 8575 |
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| 365 | 4 | 4717 | 391 | 4 | 6863 | 436 | 6 | 7173 | 473 74 (art. 2) | | 7243 |
| 366 | 5 | 4718 | 392 | 1 | 7443 | 437 | 7 | 7174 | 473 74 (art. 3) | | 7244 |
| 367 | 6 | 4719 | 393 | 1 | 7021 | 437 | 8 | 7175 | 473 74 (art. 4) | | 7245 |
| 367 | 7 | 4720 | 394 | 1 | 5239 | 438 | 9 | 7176 | 473 74 (art. 5) | | 7246 |
| 367 | 8 | 4721 | 394 | 2 | 5240 | 438 | 10 | 7177 | 474 74 (art. 6) | | 7247 |
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| 474 | 74 | (art. 10) 7251 | 489 | 84 | 7321 | 514 | 54 | 3122 | 544 | 14 | 6136 |
| 474 | 74 | (art. 11) 7252 | 489 | 85 | 7322 | 515 | 55 | 3124 | 544 | 15 | 6137 |
| 474 | 74 | (art. 12) 7253 | 490 | 86 | 7323 | 515 | 56 | 3125 | 545 | 16 | 6138 |
| 474 | 74 | (art. 13) 7254 | 490 | 87 | 7324 | 515 | 57 | 3126 | 545 | 17 | 6139 |
| 475 | 74 | (art. 14) 7255 | 491 | 88 | 7325 | 515 | 58 | 3127 | 545 | 18 | 6140 |
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| 476 | 74 | (art. 21) 7262 | 493 | 95 | 7332 | 518 | 65 | 3134 | 551 | 24 | 6146 |
| 476 | 74 | (art. 22) 7263 | 493 | 96 | 7333 | 518 | 1 | 7859 | 551 | 25 | 6147 |
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| 477 | 74 | (art. 27) 7268 | 495 | 1 | 3069 | 521 | 5 | 5984 | 553 | 30 | 6152 |
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| 477 | 74 | (art. 32) 7273 | 496 | 6 | 3074 | 522 | 10 | 5989 | 555 | 35 | 6157 |
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| 1015 | 403 | 2655 | 1022 | 415 | 2667 | 1025 | 427 | 2679 | 1029 | 440 | 2692 |
| 1016 | 404 | 2656 | 1022 | 416 | 2668 | 1025 | 428 | 2680 | 1029 | 441 | 2693 |
| 1018 | 405 | 2657 | 1023 | 417 | 2669 | 1026 | 429 | 2681 | 1030 | 442 | 2694 |
| 1018 | 406 | 2658 | 1023 | 418 | 2670 | 1026 | 430 | 2682 | 1030 | 443 | 2695 |
| 1019 | 407 | 2659 | 1023 | 419 | 2671 | 1027 | 431 | 2683. | 1030 | 444 | 2696 |

EXTRA SESSION LAWS OF 1909.

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|------|------|--------|------|------|--------|------|------|--------|------|------|--------|
| 8 | 1 | 8166 | 25 | 25 | 8190 | 37 | 1 | 5079 | 54 | 4 | 7165 |
| 9 | 2 | 8167 | 25 | 26 | 8191 | 39 | 1 | 5908 | 55 | 1 | 5603 |
| 9 | 3 | 8168 | 26 | 27 | 8192 | 39 | 2 | 5912 | 56 | 1 | 8354 |
| 11 | 4 | 8169 | 27 | 28 | 8193 | 40 | 3 | 5914 | 57 | 1 | 3715a |
| 13 | 5 | 8170 | 27 | 29 | 8194 | 42 | 1 | 5360 | 57 | 2 | 3715b |
| 14 | 6 | 8171 | 28 | 30 | 8195 | 42 | 2 | 5361 | 57 | 3 | 3715c |
| 14 | 7 | 8172 | 30 | 31 | 8196 | 43 | 3 | 5362 | 57 | 4 | 3715d |
| 16 | 8 | 8173 | 30 | 32 | 8197 | 44 | 4 | 5363 | 58 | 5 | 3715e |
| 17 | 9 | 8174 | 31 | 33 | 8198 | 45 | 5 | 5364 | 58 | 1 | 6704 |
| 19 | 10 | 8175 | 31 | 34 | 8199 | 45 | 6 | 5365 | 60 | 1 | 9004 |
| 20 | 11 | 8176 | 32 | 35 | 8200 | 46 | 7 | 5366 | 61 | 1 | 2721½ |
| 20 | 12 | 8177 | 32 | 36 | 8201 | 46 | 8 | 5367 | 62 | 1 | 3676a |
| 21 | 13 | 8178 | 32 | 37 | 8202 | 46 | 9 | 5368 | 62 | 2 | 3676b |
| 21 | 14 | 8179 | 32 | 38 | 8203 | 46 | 10 | 5369 | 63 | 3 | 3676c |
| 21 | 15 | 8180 | 33 | 39 | 8204 | 47 | 1 | 4158 | 64 | 4 | 3676d |
| 22 | 16 | 8181 | 33 | 40 | 8205 | 49 | 1 | 7579 | 65 | 1-5 | 6883 |
| 22 | 17 | 8182 | 33 | 41 | 8206 | 49 | 2 | 7580 | 65 | | 6885 |
| 22 | 18 | 8183 | 34 | 42 | 8207 | 50 | 3 | 7581 | 66 | 1 | 2445 |
| 22 | 19 | 8184 | 34 | 43 | 8208 | 51 | 4 | 7582 | 67 | 2 | 2689 |
| 23 | 20 | 8185 | 34 | 44 | 8209 | 51 | 5 | 7583 | 68 | 1 | 8921 |
| 23 | 21 | 8186 | 34 | 45 | 8210 | 52 | 1 | 4579 | 68 | 2 | 8922 |
| 24 | 22 | 8187 | 34 | 46 | 8211 | 53 | 1 | 7152 | 69 | 3 | 8923 |
| 24 | 23 | 8188 | 35 | 47 | 8212 | 53 | 2 | 7153 | 69 | 4 | 8924 |
| 25 | 24 | 8189 | 36 | 1 | 5049 | 53 | 3 | 7164 | | | |

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| Pierce | Herein | Pierce | Herein | Pierce | Herein | Pierce | Herein | Pierce | Herein |
|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|
| 249 | 143 | 328 | 222 | 404 | 288 | 487 | 722 | 556 | 694 |
| 250 | 153 | 329 | 223 | 405 | 289 | 488 | 723 | 557 | 695 |
| 251 | 154 | 330 | 224 | 406 | 1260½ | 489 | 724 | 558 | 696 |
| 252 | 179 | 331 | 225 | 407 | 290 | 490 | 725 | 559 | 697 |
| 253 | 180 | 332 | 226 | 408 | 291 | 491 | 726 | 560 | 698 |
| 254 | 181 | 333 | | 409 | 292 | 492 | 727 | 561 | 699 |
| 255 | 182 | 334 | | 410 | 293 | 493 | 728 | 562 | 700 |
| 257 | 184 | 335 | 227 | 411 | 295 | 494 | 729 | 563 | 701 |
| 258 | 185 | 336 | 228 | 413 | 297 | 495 | 730 | 564 | 702 |
| 259 | 186 | 337 | 233 | 414 | 298 | 496 | 731 | 565 | 6765 |
| 260 | 187 | 338 | 234 | 420 | 299 | 497 | 732 | 566 | 704 |
| 261 | 188 | 339 | 235 | 421 | 300 | 498 | 733 | 567 | 705 |
| 262 | 189 | 340 | 236 | 422 | 301 | 499 | 734 | 568 | 706 |
| 263 | 190 | 341 | 237 | 423 | 302 | 500 | 735 | 574 | 740 |
| 264 | 191 | 342 | 238 | 424 | 303 | 501 | 736 | 575 | 741 |
| 265 | 192 | 343 | 241 | 425 | 304 | 502 | 737 | 576 | 742 |
| 266 | 193 | 344 | 243 | 426 | 305 | 503 | 738 | 577 | 745 |
| 268 | 195 | 345 | 244 | 427 | 306 | 504 | 739 | 578 | 746 |
| 269 | 196 | 346 | 245 | 428 | 307 | 510 | 647 | 579 | 747 |
| 270 | 197 | 347 | 246 | 429 | 308 | 511 | 648 | 580 | 748 |
| 271 | 198 | 348 | 247 | 435 | 748 | 512 | 649 | 581 | 749 |
| 272 | 202 | 349 | 248 | 436 | 749 | 513 | 650 | 582 | 744 |
| 273 | 203 | 350 | 249 | 437 | 750 | 514 | 651 | 583 | 199 |
| 279 | 155 | 351 | 250 | 438 | 751 | 516 | 653 | 584 | 200 |
| 280 | 156 | 352 | 251 | 439 | 752 | 517 | 654 | 590 | 201 |
| 281 | 157 | 353 | 252 | 440 | 753 | 518 | 655 | 591 | 318 |
| 282 | 459 | 354 | 253 | 441 | 754 | 519 | 656 | 592 | 322 |
| 283 | 460 | 355 | 309 | 442 | 756 | 520 | 657 | 593 | 323 |
| 284 | 461 | 356 | 310 | 443 | 757 | 521 | 658 | 594 | 324 |
| 285 | 159 | 357 | 311 | 444 | 758 | 522 | 659 | 595 | 325 |
| 286 | 160 | 358 | 312 | 445 | 759 | 523 | 660 | 596 | 326 |
| 287 | 161 | 359 | 313 | 446 | 755 | 524 | 661 | 597 | 327 |
| 288 | 163 | 360 | 314 | 447 | 760 | 525 | 662 | 598 | 329 |
| 289 | 164 | 361 | 315 | 448 | 761 | 526 | 663 | 599 | 330 |
| 289a | 165 | 362 | 319 | 449 | 762 | 527 | 664 | 600 | 331 |
| 290 | 166 | 363 | 242 | 450 | 763 | 528 | 665 | 601 | 332 |
| 292 | 168 | 364 | 320 | 451 | 764 | 529 | 666 | 602 | 333 |
| 293 | 169 | 370 | 321 | 452 | 765 | 530 | 667 | 603 | 334 |
| 294 | 170 | 371 | 255 | 453 | 766 | 531 | 668 | 604 | 335 |
| 295 | 171 | 372 | 256 | 454 | 767 | 532 | 669 | 605 | 336 |
| 296 | 172 | 373 | 257 | 455 | 768 | 533 | 670 | 606 | 337 |
| 297 | 173 | 374 | 258 | 456 | 769 | 534 | 671 | 608 | 338 |
| 298 | 174 | 375 | 259 | 457 | 770 | 535 | 672 | 609 | 340 |
| 299 | 175 | 376 | 260 | 458 | 771 | 536 | 673 | 610 | 341 |
| 300 | 176 | 377 | 261 | 459 | 772 | 537 | 674 | 611 | 342 |
| 301 | 177 | 378 | 262 | 460 | 773 | 538 | 675 | 612 | 343 |
| 302 | 178 | 379 | 263 | 461 | 774 | 539 | 676 | 613 | 344 |
| 308 | 204 | 380 | 264 | 467 | 707 | 540 | 677 | 614 | 345 |
| 309 | 205 | | 265 | 468 | 708 | 541 | 678 | 615 | 347 |
| 310 | 206 | | 273 | 469 | 709 | 542 | 679 | 616 | 348 |
| 312 | 207 | 381 | 274 | 470 | 710 | 543 | 680 | 617 | 349 |
| | 208 | 382 | 275 | 471 | 711 | 544 | 681 | 618 | 350 |
| | 209 | 383 | 277 | 472 | 712 | 545 | 682 | 619 | 351 |
| 313 | 210 | 384 | 278 | 473 | 713 | 546 | 683 | 620 | 352 |
| 314 | 211 | 385 | 279 | 474 | 714 | 547 | 684 | 621 | 353 |
| 315 | 215 | 386 | 280 | 475 | 715 | 548 | 685 | 622 | 354 |
| 316 | 216 | 387 | 281 | 476 | 716 | 551 | 688 | 623 | 355 |
| 317 | 217 | 393 | 282 | 477 | 717 | 551a | 689 | 624 | 356 |
| 318 | 218 | 394 | 284 | 483 | 718 | 552 | 690 | 625 | 357 |
| 319 | 219 | 400 | 285 | 484 | 719 | 553 | 691 | 626 | 360 |
| 320 | 220 | 401 | 286 | 485 | 720 | 554 | 692 | 627 | 361 |
| 326 | 221 | 402 | 287 | 486 | 721 | 555 | 693 | 628 | 358 |
| 327 | | 403 | | | | | | | 359 |

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| Pierce | Herein | Pierce | Herein | Pierce | Herein | Pierce | Herein | Pierce | Herein |
|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|
| 634 | 362 | 762 | 431 | 870 | 589 | 956 | 1219 | 1058 | 1726 |
| 635 | 363 | 764 | 433 | 871 | 590 | 957 | 1220 | 1059 | 1727 |
| 636 | 364 | 765 | 434 | 872 | 592 | 958 | 1220 | 1060 | 1728 |
| 637 | 365 | 766 | 435 | 873 | 593 | 959 | 1221 | 1061 | 1729 |
| 638 | 366 | 767 | 442 | 874 | 1121 | 960 | 1222 | 1062 | 1730 |
| 645 | 367 | 768 | 443 | 875 | 1122 | 961 | 1223 | 1063 | 1731 |
| 646 | 368 | 769 | 444 | 876 | 582 | 962 | 1224 | 1064 | 1732 |
| 652 | 82 | 770 | 448 | 877 | 583 | 968 | 1225 | 1065 | 1733 |
| 653 | 369 | 771 | 449 | 878 | 584 | 969 | 1226 | 1066 | 1734 |
| 654 | 370 | 772 | 436 | 879 | 591 | 970 | 1227 | 1067 | 1735 |
| 655 | 371 | 773 | 437 | 880 | 594 | 971 | 1228 | 1068 | 1736 |
| 656 | 372 | 774 | 438 | 881 | 595 | 972 | 1229 | 1069 | 1737 |
| 657 | 373 | 775 | 439 | 882 | 596 | 973 | 1230 | 1070 | 1738 |
| 658 | 374 | 776 | 440 | 883 | 597 | 979 | 1231 | 1071 | 1739 |
| 659 | 375 | 777 | 441 | 884 | 598 | 980 | 1232 | 1072 | 1740 |
| 660 | 376 | 783 | 445 | 885 | 599 | 981 | 1239 | 1073 | 1741 |
| 661 | 377 | 784 | 450 | 886 | 600 | 982 | 1244 | 1074 | 1742 |
| 667 | 381 | 785 | 451 | 887 | 601 | 984 | 1246 | 1075 | 1743 |
| 668 | 382 | 786 | 452 | 888 | 602 | 985 | 1233 | 1076 | 1744 |
| 669 | 383 | 787 | 453 | 889 | 603 | 986 | 1234 | 1077 | 1745 |
| 670 | 384 | 788 | 446 | 890 | 604 | 987 | 1235 | 1078 | 1747 |
| 671 | 385 | 789 | 454 | 891 | 8763 | 988 | 1240 | 1079 | 1748 |
| 672 | 386 | 790 | 456 | 897 | 613 | 989 | 1241 | 1080 | 1749 |
| 673 | 387 | 791 | 455 | 898 | 614 | 990 | 1242 | 1082 | 1751 |
| 674 | 388 | 792 | 447 | 899 | 615 | 991 | 1243 | 1083 | 1752 |
| 675 | 389 | 793 | 458 | 900 | 616 | 992 | 1245 | 1084 | 1753 |
| 676 | 390 | 799 | 462 | 901 | 617 | 993 | 1248 | 1085 | 1754 |
| 677 | 391 | 800 | 463 | 902 | 618 | 994 | 1236 | 1091 | 266 |
| 678 | 392 | 806 | 510 | 903 | 619 | 995 | 1237 | 1092 | 267 |
| 679 | 393 | 807 | 514 | 904 | 620 | 996 | 1238 | 1093 | 268 |
| 680 | 394 | 808 | 512 | 905 | 621 | 1001 | 1249 | 1094 | 269 |
| 681 | 395 | 809 | 511 | 906 | 622 | 1002 | 1250 | 1095 | 270 |
| 682 | 396 | 810 | 513 | 907 | 623 | 1003 | 1251 | 1096 | 271 |
| 683 | 397 | 811 | 515 | 908 | 624 | 1004 | 1252 | 1097 | 271½ |
| 684 | | 812 | 516 | 909 | 625 | 1005 | 1253 | 1098 | 272 |
| 690 | 420 | 813 | 517 | 910 | 626 | 1011 | 1262 | 1103 | 474 |
| 691 | 421 | 814 | 518 | 911 | 627 | 1012 | 1263 | 1104 | 476 |
| 692 | 422 | 815 | 520 | 912 | 628 | 1013 | 1254 | 1105 | 477 |
| 693 | 423 | 816 | 521 | 913 | 629 | 1014 | 1260 | 1106 | 478 |
| 694 | 424 | 817 | | 914 | 630 | 1015 | 1257 | 1107 | 479 |
| 695 | 425 | 818 | 519 | 915 | 631 | 1018 | 1258 | 1108 | 480 |
| 696 | 426 | 824 | 522 | 916 | 632 | 1019 | 1259 | 1109 | 481 |
| 697 | 427 | 825 | 523 | 917 | 633 | 1020 | 1270 | 1111 | 483 |
| 698 | 428 | 826 | 524 | 918 | 634 | 1021 | 1271 | 1112 | 484 |
| 699 | 429 | 827 | 525 | 919 | 635 | 1022 | 1272 | 1113 | 485 |
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| 706 | 398 | 829 | 527 | 921 | 637 | 1024 | 1274 | 1115 | 487 |
| 709 | 401 | 835 | 570 | 922 | 638 | 1025 | 1275 | 1116 | 488 |
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| 711 | 402 | 840 | 562 | 924 | 640 | 1027 | 1277 | 1118 | 490 |
| 712 | 403 | 841 | 563 | 925 | 641 | 1033 | 464 | 1119 | 491 |
| 718 | 405 | 842 | 564 | 926 | 642 | 1034 | 465 | 1120 | 492 |
| 719 | 404 | 843 | 565 | 927 | 643 | 1035 | 466 | 1121 | 493 |
| 720 | 406 | 844 | 568 | 928 | 644 | 1036 | 467 | 1122 | 494 |
| 721 | 407 | 845 | 569 | 929 | 645 | 1037 | 468 | 1123 | 495 |
| 727 | 408 | 846 | 566 | 930 | 646 | 1038 | 472 | 1129 | 605 |
| 728 | 409 | 846a | 567 | 937 | 1211 | 1039 | 473 | 1130 | 606 |
| 729 | 410 | 847 | 571 | 938 | 1212 | 1040 | 469 | 1131 | 607 |
| 735 | 411 | 848 | 572 | 939 | 1213 | 1041 | 470 | 1132 | 608 |
| 736 | 412 | 854 | 573 | 940 | 1214 | 1042 | 471 | 1133 | 609 |
| 742 | 413 | 855 | 574 | 941 | 1264 | 1048 | 1716 | 1134 | 610 |
| 743 | 414 | 856 | 575 | 942 | 1265 | 1049 | 1717 | 1135 | 611 |
| 744 | 415 | 857 | 576 | 943 | 1266 | 1050 | 1718 | 1136 | 612 |
| 745 | 416 | 858 | 577 | 944 | 1267 | 1051 | 1719 | 1142 | 785 |
| 746 | 417 | 864 | 578 | 945 | 1268 | 1052 | 1720 | 1143 | 792 |
| 747 | 418 | 865 | 581 | 946 | 1269 | 1053 | 1721 | 1144 | 793 |
| 748 | 419 | 866 | 585 | 952 | 1215 | 1054 | 1722 | 1145 | 794 |
| 754 | 378 | 867 | 586 | 953 | 1216 | 1055 | 1723 | 1146 | 795 |
| 755 | 379 | 868 | 587 | 954 | 1217 | 1056 | 1724 | 1147 | 796 |
| 756 | 380 | 869 | 588 | 955 | 1218 | 1057 | 1725 | 1148 | 800 |

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| Pierce | Herein | Pierce | Herein | Pierce | Herein | Pierce | Herein | Pierce | Herein |
|--------|--------|--------|--------|--------|--------|--------|---------|--------|--------|
| 1149 | 801 | 1225 | 861 | 1330 | 976 | 1421 | 1026 | 1519m | 797 |
| 1150 | 802 | 1226 | 862 | 1331 | 977 | 1422 | 1027 | 1519n | 798 |
| 1151 | 803 | 1227 | 863 | 1332 | 978 | 1423 | 1028 | 1519o | 799 |
| 1152 | 804 | 1228 | 864 | 1333 | 979 | 1424 | 1029 | 1524 | 2024 |
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| | { 809 | 1232 | 868 | 1342 | 959 | 1428 | 1033 | 1528 | 2117 |
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| 1159 | 787 | 1235 | 871 | 1345 | 962 | 1436 | 1036 | 1531 | 2120 |
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| 1163 | 791 | 1239 | 875 | 1349 | 966 | 1440 | 1040 | 1535 | 2124 |
| 1164 | 158 | 1240 | 876 | 1355 | 950 | 1441 | 1041 | 1536 | 2125 |
| 1165 | 1693 | 1241 | 877 | 1356 | 951 | 1442 | 1042 | 1537 | 2078 |
| 1166 | 1694 | 1242 | 878 | 1357 | 952 | 1443 | 1043 | 1538 | 2005 |
| 1167 | 1695 | 1243 | 879 | 1358 | 953 | 1444 | 1044 | 1544 | 2722 |
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| 1169 | 811 | 1245 | 881 | 1365 | 1063 | 1446 | 1046 | 1546 | 2724 |
| 1170 | 812 | 1246 | 882 | 1366 | 1065 | 1447 | 1047 | 1547 | 2725 |
| 1171 | 813 | 1247 | 883 | 1367 | 1066 | 1448 | 1048 | 1548 | 2984 |
| 1172 | 814 | 1248 | 884 | 1368 | 1067 | 1455 | 967 | 1554 | 2726 |
| 1173 | 815 | 1249 | 885 | 1369 | 1068 | 1456 | 968 | 1555 | 2727 |
| 1174 | 816 | 1255 | 937 | 1370 | 1069 | 1457 | 969 | 1556 | 2728 |
| 1175 | 817 | 1256 | 938 | 1371 | 1070 | 1458 | 970 | 1557 | 2729 |
| 1176 | 818 | 1257 | 939 | 1372 | 1071 | 1459 | 971 | 1558 | 2730 |
| 1177 | 819 | 1258 | 940 | 1373 | 1072 | 1460 | 972 | 1559 | 2731 |
| 1178 | 820 | 1259 | 941 | 1374 | 1073 | 1461 | 973 | 1560 | 2733 |
| 1179 | 821 | 1265 | 943 | 1375 | 1074 | 1467 | 1049 | 1561 | 2734 |
| 1180 | 822 | 1266 | 944 | 1376 | 1075 | 1468 | 1050 | 1562 | 2735 |
| 1181 | 823 | 1267 | 945 | 1377 | 1076 | 1469 | 1051 | 1563 | 2736 |
| 1182 | 824 | 1268 | 946 | 1378 | 1077 | 1470 | 1052 | 1564 | 2732 |
| 1183 | 825 | 1274 | 1116 | 1379 | 1078 | 1471 | 1053 | 1565 | 2737 |
| 1184 | 826 | 1275 | 1117 | 1380 | 1079 | 1472 | 1054 | 1566 | 2743 |
| 1185 | 827 | 1276 | 1118 | 1381 | 1080 | 1473 | 1055 | 1567 | 2744 |
| 1186 | 828 | 1277 | 1119 | 1382 | 1081 | 1474 | 1056 | 1568 | 2751 |
| 1187 | 829 | 1278 | 1121 | 1383 | 1082 | 1475 | 1057 | 1569 | 2752 |
| 1188 | 830 | 1279 | 1125 | 1384 | 1083 | 1476 | 1058 | 1570 | 2738 |
| 1189 | 831 | 1280 | 1126 | 1385 | 1084 | 1477 | 1059 | 1571 | 2739 |
| 1190 | 832 | 1281 | 1127 | 1386 | 1085 | 1478 | 1060 | 1572 | 2746 |
| 1191 | 833 | 1282 | 1128 | 1387 | 1064 | 1479 | 1061 | 1573 | 2747 |
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| 1203 | 839 | 1293 | 1611 | 1398 | 1004 | 1495 | 4001 | 1579 | 2988 |
| 1204 | 840 | 1294 | 1612 | 1399 | 1005 | 1497 | 294 | 1580 | 2753 |
| 1205 | 841 | 1295 | 1613 | 1400 | 1006 | 1498 | 775 | 1581 | 2753 |
| 1206 | 842 | 1296 | 1616 | 1401 | 1007 | 1499 | 777 | 1582 | 2755 |
| 1207 | 843 | 1297 | 1614 | 1402 | 1008 | 1500 | 776 | 1583 | 2754 |
| 1208 | 844 | 1298 | 1615 | 1403 | 1009 | 1501 | 579 | 1586 | 2740 |
| 1209 | 845 | 1299 | 1617 | 1404 | 1010 | 1502 | 580 | 1587 | 2741 |
| 1210 | 846 | 1300 | 1618 | 1405 | 1011 | 1503 | 240 | 1588 | 2742 |
| 1211 | 847 | 1301 | 1619 | 1406 | 1012 | 1510 | 147 | 1589 | 2758 |
| 1212 | 848 | 1302 | 1620 | 1407 | 1013 | 1517 | 144-146 | 1590 | 2759 |
| 1213 | 849 | 1308 | 998 | 1408 | 1014 | 1519 | 167 | 1591 | 2776 |
| 1214 | 850 | 1314 | 778 | 1410 | 1015 | 1519a | 229 | 1597 | 2784 |
| 1215 | 851 | 1315 | 779 | 1411 | 1016 | 1519b | 230 | 1598 | 2785 |
| 1216 | 852 | 1316 | | 1412 | 1017 | 1519c | 231 | 1599 | 2786 |
| 1217 | 853 | 1317 | 780 | 1413 | 1018 | 1519d | 232 | 1600 | 2787 |
| 1218 | 854 | 1318 | | 1414 | 1019 | 1519e | 652 | 1601 | 2788 |
| 1219 | 855 | 1319 | 775 | 1415 | 1020 | 1519f | 686 | 1602 | 2789 |
| 1220 | 856 | 1320 | 782 | 1416 | 1021 | 1519g | 687 | 1603 | 2790 |
| 1221 | 857 | 1321 | 783 | 1417 | 1022 | 1519h | 317 | 1604 | 2791 |
| 1222 | 858 | 1322 | 784 | 1418 | 1023 | 1519i | 3908 | 1605 | 5147 |
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| Pierce | Herein | Pierce | Herein | Pierce | Herein | Pierce | Herein | Pierce | Herein |
|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|
| 1608 | 2796 | 1685 | 3200 | 1777 | 2941 | 1878 | 5317 | 1948 | 2947 |
| 1609 | 2797 | 1686 | 3201 | 1778 | 2963 | 1879 | 5315 | 1949 | 2845 |
| 1610 | 2792 | 1695 | 2851 | 1779 | 2965 | 1880 | 5316 | 1950 | 2844 |
| 1611 | 2793 | 1696 | 2852 | 1780 | 2964 | 1881 | 2926 | 1951 | 2908 |
| 1613 | 2799 | 1697 | 2853 | 1781 | 2966 | 1882 | 2927 | 1952 | 2909 |
| 1614 | 2800 | 1698 | 2854 | 1787 | 2898 | 1883 | 2928 | 1953 | 2910 |
| 1615 | 2803 | 1699 | 2855 | 1789 | 2899 | 1884 | 2864 | 1954 | 8293 |
| 1616 | 2804 | 1700 | 2856 | 1790 | 2901 | 1885 | 2929 | 1955 | |
| 1617 | 2805 | 1701 | 2857 | 1791 | 7151 | 1886 | 2915 | 1956 | 5342 |
| 1618 | 2808 | 1702 | 2858 | 1792 | 2913 | 1887 | 2916 | 1957 | 5343 |
| 1619 | 2818 | 1703 | 2859 | 1793 | 2914 | 1888 | 2918 | 1958 | 5344 |
| 1620 | 2807 | 1704 | 2860 | 1794 | 2889 | 1889 | 1967 | 1959 | 3265 |
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| 1624 | 2814 | 1708 | 2888 | 1798 | 2893 | 1893 | 1971 | 1964 | 2932 |
| 1625 | 3288 | 1714 | 2867 | 1799 | 2894 | 1894 | 1972 | 1965 | 2933 |
| 1627 | 2833 | 1715 | 2868 | 1800 | 2895 | 1895 | 1973 | 1966 | 2934 |
| 1628 | 2834 | 1716 | 2869 | 1801 | 2896 | 1896 | 1974 | 1967 | 2775 |
| 1629 | 2840 | 1717 | 2870 | 1802 | 2897 | 1897 | 1975 | 1968 | 2919 |
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| 1631 | 2956 | 1719 | 2872 | 1804 | 2912 | 1899 | | 1970 | 2921 |
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| 1636 | 2951 | 1724 | 2877 | 1821 | 5229 | 1904 | 9524 | 1976 | 4087 |
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| Pierce | Herein | Pierce | Herein | Pierce | Herein | Pierce | Herein | Pierce | Herein |
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| Pierce | Herein | Pierce | Herein | Pierce | Herein | Pierce | Herein | Pierce | Herein |
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| 3009 | 1799 | 3107 | 1948 | 3211a | 5563 | 3275 | 8336 | 3392 | 7487 |
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PIERCE'S CODE CROSS-REFERENCES.

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PIERCE'S CODE CROSS-REFERENCES.

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| 3817r | 6867 | 3936 | 3809 | 4045 | 4077 | 4124 | 3869 | 4192 | 3969 |
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PIERCE'S CODE CROSS-REFERENCES.

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PIERCE'S CODE CROSS-REFERENCES.

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PIERCE'S CODE CROSS-REFERENCES.

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